

CANDIDATE : JUDGE MOROAMPHOLO PHILEMON TSOKA

APPLICANT: JUDGE MOROAMPHOLO PHILEMON TSOKA

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 (University of the North); and

1.1.2 LLB (University of the Witwatersrand).

1.2 The candidate is appropriately qualified.

2 Whether the candidate is a fit and proper person

2.1 There is nothing in the application or judgments considered by the reviewers that suggests that the candidate is not a fit and proper person.

2.2 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 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 appears to be broad and well-founded. The candidate's judgments which have been considered demonstrate a broad and well-founded knowledge of the law, and show careful consideration of the issues.

4.2 The candidate has dealt with constitutional law in a number of judgments and appears to have a fluent mastery of constitutional concepts. His judgments involving constitutional law indicate a keen sense of justice and fairness.

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

5.1 The candidate's extra-curial activities reflect a commitment to the values of the Constitution, as well as the development of the legal profession.

- 5.2 The decision in *Bosasa Operations (Pty) Limited v Basson & Another* 2013 (2) SA 570 (GSJ), illustrates this fact. This matter, although dealing with two interlocutory applications relating to discovery is, in essence, a judgment concerning the freedom of the press and the right of journalists and newspapers not to have to disclose the identity of their sources.
- 5.3 In this matter a company, being the Plaintiff, had received a tender from the Department of Prisons and, at least according to the newspaper and numerous other reports, there were substantial elements of corruption in the tender process.
- 5.4 The Plaintiff, suing for defamation, sought discovery of documentation and a skirmish ensued between the parties in relation to this issue. Ultimately the individual journalist, Basson, and the newspaper, the Mail and Guardian made discovery but redacted the names of their sources. The candidate, having dealt with the various procedural issues states that the crisp issue in the two applications is whether the Defendants have a valid objection to revealing the identity of their sources.
- 5.5 There is then an extensive analysis of both local and international authority on the point. The learned Judge also deals with constitutional issues such as those arising from section 16 of the Constitution dealing with the freedom of the press as well as the Court's obligation to consider international jurisprudence.
- 5.6 The candidate comes to the conclusion that journalists, subject to certain limitations, are not expected to reveal the identity of their

sources. He further finds that the freedom of the press is fundamental and a *sine qua non* for democracy. The judgment is a powerful statement in favour of freedom of the press and freedom of expression generally.

6 Whether any judgments have been overturned on appeal

6.1 The following judgments of the appellant have been overturned on appeal:

6.2 *Mazibuko and others v City of Johannesburg and Others (Centre of Housing Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 (W)

This matter has to do with the fundamental right to have access to sufficient water, and the right to human dignity. The Applicant challenged the third Respondent's regulations relating to compulsory National Standards and Measures to conserve water, and the Respondent's disconnection of unlimited water supply and the installation of pre-payment meters. They also challenged the adequacy of 25 litres of water per person per month or 6 kilolitres per household per month.

The candidate found that the restrictions on the supply of water imposed severe restrictions on the Applicants' daily lives. The matter went on appeal first to the SCA in *City of Johannesburg and Others v Mazibuko and Others* 2009 (3) SA 592 (SCA) and then to the Constitutional Court in *Mazibuko and Others v City Of Johannesburg and Others* 2010(4) SA 1 (CC). One difference between the decision of the candidate in the court *a quo* and the

decision of the SCA is the amount of water that ought to be provided, 50 litres in terms of the candidate's decision and 42 litres per person in terms of the SCA decision. Unlike the court *a quo*, the Supreme Court of Appeal granted an interim order and referred the matter back to the City of Johannesburg for further consideration.

The Constitutional Court took a different approach to both the High Court decision of the candidate and the decision of the Supreme Court of Appeal. The Constitutional Court set aside the order of the Supreme Court of Appeal and the order of the High Court, effectively vindicating the conduct of the City of Johannesburg.

6.3 *Walker & another v Mosdell & another* (53147/2009) [2012] ZAGPHC 171

This was an appeal to the full bench of the South Gauteng High Court, Johannesburg, against a judgment by the candidate in which he dismissed an application for the review and setting aside of an arbitration award in terms of section 33 of the Arbitration Act 42 of 1965 ("the Arbitration Act"). Leave to appeal was granted by the candidate on limited issues.

The dispute before the arbitrator arose from the sale of a restaurant that the appellants had purchased from the second respondent. The appellants alleged that the purchase price of the restaurant had been altered prior to signature of the agreement to include VAT. The appellants therefore refused to pay the VAT portion of the purchase price. Following the unsuccessful resolution of the dispute, the second respondent commenced arbitration proceedings. The

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appellants sought rectification of the agreement in the arbitration.

The Arbitrator heard extensive evidence on both rectification and a statement and debatement of the accounts of the restaurant. The Arbitrator issued an award, without reasons.

The primary ground of review before the candidate was that the Arbitrator had failed to determine the appellant's counter-claims. The candidate dismissed the application for review by holding that (i) the Arbitrator had, by implication, dismissed the counter-claim for rectification; and (ii) the effect of the award is that the counter-claim had no merit and to conclude otherwise would be illogical.

The appeal court found that the candidate erred in considering the merits of the dispute before him in that it was inappropriate for a court in an application for review under section 33(1) of the Arbitration Act to have regard to the evidence on the merits of the dispute before an arbitrator. The appeal court found that it was not the function of the candidate as the review court to determine whether the award was right or wrong on the merits. In doing so, the candidate erred by treating the review before him as an appeal. The appeal was upheld.

6.4 *Cochrane v City of Johannesburg* 2011 (1) SA 553 (GSJ)

This is an appeal judgment of the Full Bench from a decision of the candidate. We have been unable to locate the candidate's judgment. The question on appeal was whether the candidate was correct in setting aside a summons, under Uniform Rule 30, in circumstances where the plaintiff had failed to serve a notice within the six-month

period as required under s 3 of the Legal Proceedings against certain Organs of State Act, 2002. The Full Bench correctly held, in our view, that the Uniform Rule 30 related only to an irregular step taken by a party in respect of the Uniform Rules, and applying the procedure in respect of irregularities outside of the Uniform Rules would be casting the net too wide. Moreover, the Full Bench found that in terms of the Act, as held by the SCA (in *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA) after the candidate's judgment), that a claimant may at any time, even after the institution of the action, seek condonation for the failure to serve the notice within six months. In the result, the candidate's judgment was reversed on appeal.

6.5 *New Reclamation Group (Pty) Ltd v Davies* 2014 JDR 0773 (GSJ)

This case dealt with the enforcement of a restraint of trade agreement. The candidate, after examining the applicable legal principles, found that the applicant did not have trade secrets or business connections deserving of protection. The judgment was overturned on appeal to the full bench in *New Reclamation Group (Pty) Ltd v Davies* 2015 JDR 0220 (GJ). The matter turned on the factual question whether the applicant had an interest worthy of protection. The candidate found that it did not, whilst the full bench found that it did. Both the full bench and the court *a quo* had the unenviable job of balancing the various criteria associated with restraint of trade matters in what can only be regarded as a difficult matter which could have easily had another outcome.

- 6.6 *Buthelezi v MEC for Health Gauteng Province* 2014 JDR 2666 (GJ) overturned on appeal in *Mbhele v MEC for Health Gauteng Province* (355/2015) [2016] ZA SCA 166

On appeal of the candidate's judgment in *Buthelezi v MEC for Health Gauteng Province* 2014 JDR 2666 (GJ), the SCA was called upon to decide whether a claim for damages for emotional shock had been proved in the court *a quo*; and whether our law recognises a claim for constitutional damages for the loss of the right to rear a child.

The court held that the conduct of the medical staff at Baragwanath was negligent and that such negligence caused the baby to be stillborn. The court held that, on the alleged constitutional right to rear a child, this issue was not properly pleaded or even argued properly in the high court. The issue had been raised for the first time in the heads of argument without having laid a proper foundation in its papers. The court held that the appellant had failed to make out a case in recognition of that right.

The SCA held that the second plaintiff had made out a case for emotional shock and that the candidate had erred in finding that the claim for emotional shock had been abandoned. The court held that general damages in the amount of R100 000.00 must be paid to the appellant.

- 6.7 *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd* 2015 (2) SA 526 (SCA)

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This is a SCA judgment, where the judgment of the candidate in the Court *a quo* was overturned. We have been unable to locate the Candidate's judgment.

The issue related to whether there was proper compliance with section 346(4A)(a) of the Companies Act 61 of 1973; and whether the applicant had "*furnished*" a copy of the winding up application to the employees of the respondent. The SCA found that the candidate should not have been satisfied that there had been compliance with section 346(4A)(a)(ii) because of the application papers' silence as to whether there were employees; the respondent companies operating at several locations in South Africa; and the sheriff's failure to indicate in his return of service that he had made enquiries as to the existence of employees or their places of work.

The SCA consequently held that the candidate should not have granted a final winding-up order but should have issued a provisional winding-up order and given directions for the employees to be identified and for the application papers to be furnished to them.

6.8 *Rand Water Board v Big Cedar Trading 22 (Pty) Ltd* 2016 JDR 2215 (SCA)

The matter has its origins in an action instituted by the respondent against the appellant. Two claims were brought arising from the construction, installation and use of pipelines by the appellant through property owned, *inter alia*, by the respondent. The respondent alleged that the appellant had conducted itself without

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consent, permission or any servitude or limited right being registered or endorsed against the property.

In the court *a quo*, the candidate upheld the first claim and dismissed the second. He further ordered the appellant to register a servitude over the property at its own expense; to pay the respondent compensation for the servitude, and to pay the costs of the action on an attorney-client scale. The appeal was with the candidate's leave. The respondent cross-appealed against the candidate's refusal to order the removal of the pipelines and his rejection of the claim for constitutional damages.

Although the appeal court accepted that the evidence before the candidate did not establish that the appellant complied with certain requirements before laying its pipelines, it overturned the candidate's finding that the appellant had acted unlawfully on one procedural and one substantive ground. This put paid to the claim for the removal of the pipelines and disposed of the cross-appeal.

The appeal court was critical of the candidate's interpretation of the relevant statute when ordering that a servitude be registered by the appellant. Further, it found the argument that the candidate's order regarding the registration of a servitude amounted to making of a contract for the parties that they have not made themselves, to be a compelling one.

The appeal court found that the trial court's order insofar as compensation was concerned to insupportable on any basis.

Finally, the appeal court found that the strictures expressed by the candidate regarding the appellant's conduct in relation to the issue of costs to be "*entirely unjustified*" as was his attack on the *bona fides* of the appellant. The appeal court concluded that "[s]uch findings are never to be made lightly and they should not have been made in this case."

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

7.1 The candidate has extensive experience as an attorney, having practiced for a period of approximately 23 years (including articles of clerkship) before being elevated to the bench.

7.2 The candidate has furthermore served on the High Court bench for approximately 14 years. The candidate acted as Deputy Judge President of the High Court, Johannesburg for a period of approximately five months.

7.3 In addition, the candidate has served several periods as an acting judge of the Supreme Court of Appeal.

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

8.1 From a reading of his judgments, the candidate demonstrates a high standard of communication skills in English. His judgments are well-written and well-reasoned.

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

9.1 No adverse comments have been received.

10 The candidate's fairness and impartiality

10.1 The candidate's judgments indicate a well-balanced, fair and impartial approach to the issues and parties before him.

10.2 No information has been brought to the attention of the reviewers which casts doubt on the candidate's fairness and impartiality.

11 The candidate's independent mindedness

11.1 No adverse comments have been received.

11.2 The decision in *Hlophe v The Judicial Service Commission* 2009 JDR 0524 (GSJ) is illustrative of the candidate's independent mindedness. In this matter, the applicant sought an order declaring the entire proceedings of the JSC unlawful and void *ab initio*. He further sought an interim interdict against the proceedings pending the final determination of the applicant's application to the Constitutional Court to appeal the judgment of the Supreme Court of Appeal in the case of *Langa and others v Hlophe*.

11.3 The JSC proceedings sought to be declared invalid or interdicted pertained to a complaint by several Constitutional Court justices that the applicant had sought to influence a pending judgment of the Constitutional Court. The applicant had filed a counter-complaint against the Constitutional Court justices alleging a violation of certain of his rights.

11.4 The hearings into the complaint and counter-complaint were scheduled to begin on 1 April 2009. On the date of the hearing, the applicant's counsel sought a postponement on account of the

applicant's ill-health. The matter was postponed and then further postponed following the appointment of new counsel for the applicant.

11.5 Yet a further postponement was sought on the grounds of the applicant's ill-health. This application was denied by the majority of the members of the JSC. The applicant's counsel thereafter withdrew from the matter and the matter continued in his and the applicant's absence with the hearing of evidence of the Constitutional Court justices.

11.6 At the conclusion of the proceedings, the Chairperson decided that the record of proceedings should be prepared and furnished to the applicant, who would then be invited to make submissions thereon.

11.7 In this application, the applicant claimed *inter alia* that the (i) the JSC wrongfully and unfairly refused the application for a further postponement; (ii) the procedures adopted by the JSC were wrongful and unfair; and (iii) the JSC had failed to determine if there was a *prima facie* case to justify the hearing.

11.8 The candidate found that the refusal of the postponement and the willingness to proceed with the hearing in the absence of the applicant was prejudicial to the applicant and unhelpful to the process given the dispute of fact.

11.9 The candidate found however that the numerous additional complaints by the applicant regarding the procedure adopted by the JSC, bias, improper composition of the JSC, etc. ought to be separated from the complaint that the JSC unfairly and unreasonably

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refused his request for postponement. This is because it would amount a piecemeal review of the JSC's conduct in the absence of exceptional circumstances.

11.10 The candidate therefore ordered that the JSC proceedings that took place in the applicant's absence be set aside and a hearing *de novo* be convened.

12 The candidate's ability to conduct court proceedings

12.1 No adverse comments have been received. Both senior and junior counsel who have appeared before the candidate have remarked that he is both firm and fair in conducting court proceedings.

13 The candidate's administrative ability

13.1 No adverse comments have been received.

13.2 In the course of his tenure as Counselor of the Law Society of the Northern Province, Member of the Disciplinary Committee of the Law Society of the Northern Province, Examiner of the Attorneys Admission Examinations, Chairman of the Conveyancing Committee of the Law Society of the Northern Provinces, Trustee of a children's feeding scheme, and permanent judge, it is assumed that the candidate has considerable administrative and management skills.

14 The candidate's reputation for integrity and ethical behaviour

14.1 No adverse comments have been received.

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14.2 Two senior members of the Bar have indicated they know and can attest to the candidate's "*integrity and respect for his fellow human beings*".

15 **The candidate's judicial temperament**

15.1 No adverse comments have been received.

15.2 Nor is there anything in the judgment's reviewed to suggest that the candidate does not have the appropriate 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's application indicates that he has been involved in a number of community-based organisations, particularly children's feeding schemes.

16.2 The candidate's *curriculum vitae* indicates a clear commitment to transformation and to the development of the bench. He appears to have actively participated in the mentoring and training of aspirant judges.

16.3 The candidate has also provided leadership to the Law Society whilst an attorney.

16.4 The candidate has also been a member of the Black Lawyers Association.

17 The candidate's potential

17.1 The candidate has demonstrated during his many years as a judge and legal practitioner that he is committed to the development of the judiciary and the legal profession.

17.2 The reviewers are of the view that the candidate is a strong contender for appointment. He has a wealth of experience, both as an attorney and as a judge.

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

18.1 We refer to the comments of Vincent Maleka SC and TJB Bokaba SC:

“His appointment to the Supreme Court of Appeal will, in our humble opinion, enrich the bench of that Court.”

18.2 It would also be a message about the value and rewards of long years studying, building a career, and serving the community through the dispensing of justice.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd 2015 (2) SA 526 (SCA)

Cochrane v City of Johannesburg 2011 (1) SA 553 (GSJ)

Odinfin v Reynecke 2018 (1) SA 153 (SCA)

AB v JB 2016 (5) SA 211 (SCA)

*South African Human Rights Commission and others v Minister of Home Affairs:
Naledi Pandor and Others* [2014] 4 All SA 482 (GJ)

Bosasa Operations (pty) Limited v Basson & Another 2013 (2) SA 570 (GSJ)

Haitas and others v Port Wild Props 12 (Pty) Ltd 2011 (5) SA 562 (GSJ)

*Mazibuko and Others v City of Johannesburg and Others (Centre of Housing
Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 (W)

Mpho v Siphon NO and others [2006] 4 All SA 468 (W)

Unreported decisions

Rand Water Board v Big Cedar Trading 22 (Pty) Ltd 2016 JDR 2215 (SCA)

Walker & another v Mosdel & another (53147/2009) [2012] ZAGPHC 171

Buthelezi v MEC for Health Gauteng Province 2014 JDR 2666 (GJ)

S v Carneiro 2017 JDR 1886 (SCA)

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Mutual & Federal Insurance Company Limited v KNS Construction (Pty) Ltd
2016 JDR 1489 (SCA)

Geldenhuyys NO v Daniels 2016 JDR 1490 (SCA)

New Reclamation Group (Pty) Ltd v Davies 2014 JDR 0773 (GSJ)

Modibane v South African Revenue Service 2011 JDR 1460 (GSJ)

Genaco Systems (Pty) Ltd v Aircraft Fractional Ownership Services (Pty) Ltd
2011 JDR 1491 (GSJ)

Philken Buiding Construction (Pty) Ltd v Thesner Elzaan 2011 JDR 1492 (GSJ)

Hlophe v The Judicial Service Commission 2009 JDR 0524 (GSJ)

Mpofu v South African Broadcasting Corporation Ltd and Others (13815/2008)
[2008] ZAGPHC 144 (19 May 2008)

S v Else 2007 JDR 0265 (W)

PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd 2005 JDR 1067 (W)

Judgments upheld on appeal

Hannover Reinsurance Group Africa (Pty) Ltd & Another v Gungudoo & Another
2012 (1) SA 125 (GSJ)

Judgments overturned on appeal

Mazibuko and others v City of Johannesburg and Others (Centre of Housing Rights and Evictions as amicus curiae) [2008] 4 All SA 471 (W)

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Walker & another v Mosdell & another (53147/2009) [2012] ZAGPHC 171

Cochrane v City of Johannesburg 2011 (1) SA 553 (GSJ)

New Reclamation Group (Pty) Ltd v Davies 2014 JDR 0773 (GSJ)

Buthelezi v MEC for Health Gauteng Province 2014 JDR 2666 (GJ)

EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd 2015 (2) SA 526 (SCA)

Rand Water Board v Big Cedar Trading 22 (Pty) Ltd 2016 JDR 2215 (SCA)

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