

*CANDIDATE : ADV MOKHINE JONAS MOSOPA*

**APPLICANT: ADVOCATE MOKHINE JONAS MOSOPA**

**COURT FOR WHICH APPLICANT APPLIES: GAUTENG  
DIVISION OF THE HIGH COURT**

**1 The candidate's appropriate qualifications**

1.1 The candidate has the following academic qualifications:

1.1.1 Bachelor of Laws (B Juris) (University of Limpopo);  
and

1.1.2 LLB (University of Limpopo).

1.2 The candidate is appropriately qualified.

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

2.1 The candidate has been a practising advocate of the High Court of South Africa since June 1997 when he completed pupillage, to date. He has been a member of the Bar Council of the Church Square Association of Advocates on numerous occasions since 2012, and is currently a member.

2.2 The candidate has recorded in his application that he has never been subjected to a disciplinary hearing by the Bar, nor has he been convicted of any misconduct in his practice as an advocate. The Chairman of the Bar Church Square Association of Advocates has issued a Certificate of Good Standing, indicating that the candidate has been a member of the Association since August 2001, without any complaint

pertaining to his demeanour in court, and confirming that there have never been any disciplinary proceedings against the candidate. There is nothing in the candidate's application or the judgments considered in this review that would suggest that the candidate is not a fit and proper person.

2.3 We are not aware of any complaints of any type that have been lodged with the JSC in respect of this candidate and concerning his terms as an acting judge.

2.4 On that basis, the candidate may be considered a fit and proper person for the position.

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

3.1 The candidate is a forty-seven year old black man.

3.2 The appointment of the candidate would contribute towards greater racial diversity on the Bench, but not contribute towards gender diversity.

3.3 Moreover, the candidate has been nominated to the position sought by the Church Square Association of Advocates, Legal Aid Pretoria Justice Centre, and the Director of Public Prosecutions (Gauteng Local Division). These endorsements may contribute, in the eyes of the public, to the candidate's suitability in reflecting the racial composition which is sought to be achieved in the judiciary.

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

4.1 The candidate was admitted as an advocate of the High Court in October 1996, and completed pupillage in June 1997. The candidate joined the Criminal Law Bar where he practiced as an advocate, with the primary focus on criminal law. He became a member of the Church Square Association of Advocates in August 2001, where he has been practicing as a member for seventeen years, and twenty years as an advocate overall. His career has been exclusively in law, which has encompassed practicing as an advocate and, in various periods during 2016 to 2018, the candidate acted for six terms (10 October 2016 to 15 December 2016; 17 April 2017 to 30 June 2017; 31 July 2017 to 22 September 2017; October 2017 to 15 December 2017; 29 January 2018 to 29 March 2018; 16 April 2018 to 29 June 2018) as a judge in the High Court of South Africa, in the Gauteng Division. The candidate has also been a member of the Bar Council of the Church Square Association of Advocates on numerous occasions since 2012, where he is currently still a member of such Bar Council. The candidate has also served as a presiding officer in disciplinary hearings at the Private Security Industry Regulatory Authority (PSIRA) regarding contraventions of the PSIRA Act by private security companies.

4.2 A number of the candidate's judgments were reviewed. The candidate appended a selection of eight judgments to his application. All appear to be unreported. Of the eight:

- 4.2.1 One was a claim for whether certain heads of damages by the applicant are covered by Rule 34A;
- 4.2.2 Two were for damages against the Road Accident Fund arising out of motor vehicle accidents;
- 4.2.3 One related to an application for Summary Judgment;
- 4.2.4 One was for the Rescission of a Default Judgment; and;
- 4.2.5 One was an appeal against the conviction of murder;
- 4.2.6 One was for an application brought by the mother of a minor child to forgo the father's consent regarding passports and visas in order to travel with the minor child to the DRC where she relocated for work purposes; and
- 4.2.7 The eighth was an appeal against the conviction and sentence for the rape of a minor where the appellant was aware he was HIV positive.
- 4.3 The abovementioned cases were relatively straightforward and did not require the candidate to grapple with complex factual matters and to undertake substantial case law research in preparing his judgments. The candidate's knowledge of the law is evident from those written judgments, which are summarised in the annexure hereto. The candidate did not deal with constitutional issues in the course of these judgments.
- 4.4 We also reviewed an additional five judgments, which the candidate did not append to his application. Of the five:

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- 4.4.1 Three were against the Road Accident Fund;
- 4.4.2 One was an application in terms of Rule 43 of the Uniform Rules of Court; and;
- 4.4.3 The fifth was an automatic appeal against the conviction and life sentence imposed for the rape of an eleven year old girl;
- 4.5 The above judgments also appear to be unreported. All but one of the five additional judgments are contentious. The fifth, in which the candidate upheld the appellant's appeal against his conviction and life sentence for the rape of an eleven year old girl who was living in the same house as the appellant at the time; in the face of her testimony, that of her aunt and the corroborating evidence of a forensic nurse; raised concern.
- 4.6 Overall, it appears that the candidate has written thirteen judgments in his capacity as an acting judge from 2016. They are limited in nature and scope and do not pertain to complex matters, and it has not been possible to gauge his knowledge of constitutional law from those.
- 4.7 The candidate has not had any publications in the legal field.
- 4.8 The candidate himself does not profess to have particular experience or expertise in constitutional law as he has indicated on his application form that constitutional law makes up only 10% of his litigation work, stating that criminal and labour law litigation account for the majority of his litigation work. As indicated, it is not possible to determine

how familiar he is with constitutional court jurisprudence, as gleaned from the review of the judgments he wrote or with which he concurred.

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

5.1 It has not been possible to determine whether the candidate demonstrated a firm commitment to the values of the constitution and the rule of law. There were perhaps two missed opportunities in the two sexual assault cases he passed judgment on, both of which have been reviewed in the annexure.

5.2 Notably, the judgment in *Munkhambe v The State* (A676/2015) [2017] ZAGPPHC 1274 (12 December 2017) concerned the conviction and sentencing to life imprisonment of the Appellant for raping an 11 year old girl. The Appellant's appeal to the High Court against his conviction and sentence were automatic given the sentence of life imprisonment imposed by the Regional Court.

5.3 The candidate upheld the appeal both on conviction and sentence, setting aside both. The candidate stated that the magistrate had erred in convicting the Appellant as it had not applied the cautionary rule, and said furthermore that the complainant was not a credible witness. He said the cautionary rule ought to have been applied because the complainant was a child and was the only witness to the sexual assault. He said she was not credible because the complainant had apparently failed to mention in her evidence what she had informed the

forensic nurse (who testified for the state) on the day she was examined – that her legs were tied behind her and her mouth was closed with Sellotape. The candidate said the complainant contradicted herself by saying that the Appellant had spread her legs when penetrating her and by testifying that the Appellant covered her mouth with his hand so that she could not scream.

- 5.4 It is noted from the judgement that:
- 5.4.1 the forensic nurse that examined the complainant confirmed that the complainant's ruptured hymen and bleeding were consistent with forced penetration,
  - 5.4.2 the complainant's aunt testified that the complainant had informed her of the rape
  - 5.4.3 another witness testified that the complainant was acting out of character "like she is not in her mind and at night she will behave as if she is seeing something".
- 5.5 The complainant was 11 years old when the alleged rape occurred and 13 when she testified in court. The Appellant testified on his own behalf, denying that he ever raped or fondled the complainant. The Appellant also called the complainant's grandmother to testify on his behalf, being the owner of the place where the Appellant was renting a room. She testified that the complainant was staying with her at the time of the alleged rape and that when she confronted the complainant about the alleged rape, she denied it happened and allegedly also said that her aunt had told her to agree that

the Appellant raped her. The complainant said she had been afraid to tell her that she had been raped.

5.6 The candidate accordingly held that it could not be said beyond reasonable doubt that the Appellant was guilty.

5.7 Some concern has been noted with the judgment:

5.7.1 At paragraph 21, the candidate states that in evidence in chief, the complainant never mentioned that her mouth was covered with Sellotape, her legs were bound by a rope and that the appellant gave her R50 after raping her, which appears to have been sufficient to satisfy the candidate that the complainant provided a contradictory version of events via an omission during cross-examination. The concern is that if the candidate accepts that the victim's evidence is, in fact, a contradiction by omission, there is possibly a lack of appreciation for the fact that contradictions per se do not necessarily negate the evidence of a witness. Not every error made by a witness affects their credibility and a court is required to make an evaluation, taking into account the contradictions, their number and importance, as well as their bearing on other parts of the witness's evidence. (*Nomandela v S* [2007] 1 All SA 506 (E) per Leach J and Naudè AJ concurred.) Procedural factors which contribute to the trauma of participation in a rape trial include the adversarial nature of the court process; the fact that proceedings usually take place in open court; that the complainant is

a witness to the proceedings, rather than a party; and that the accused may cross-examine the complainant as witness (South African Law Commission Discussion Paper 102 336 454.)

5.7.2 While the defence may succeed with an argument that a negative inference should be drawn about the credibility of a complainant (*R v M* 1959 1 SA 352, recent research on “Sexual Assault Trauma Syndrome” (more commonly known as “Rape Trauma Syndrome”), has drawn attention to a range of psychological and social factors that may inhibit a complainant from reporting a rape at the earliest opportunity or not conveying the same statement as initially made (Schwikkard et al Principles of Evidence 201 fn 17, Hanson (1993) 16 Agenda 10). These factors were recently recognised in *Holtzhauzen v Roodt* 1997 (4) SA 766 (W). New sexual offences legislation reflects an awareness of these factors by determining that a court may not draw an inference solely on the fact that previous consistent statements have not been made, or on the basis of a delay between the alleged commission of the offence and the reporting thereof (Clause 16 of the Criminal Law (Sexual Amendment Bill).)

5.7.3 At paragraph 22, the candidate states that the complainant’s explanation as to how she was raped is improbable. The candidate focuses on how, rather than

whether, the complainant was raped. The forensic nurse's report corroborates that the victim was raped.

5.7.4 At paragraph 27, the candidate considers a family feud that the Magistrate in the court a quo did not properly take into consideration. He thus concludes that a false charge has been laid against the appellant, without providing the legal or factual basis for how he arrived at that conclusion. Even if it is accepted that the family members of the victim were feuding, it does not automatically substantiate a claim that a false charge was laid against the appellant. It also does not negate the physical evidence of rape of the eleven year old given by the forensic nurse.

5.7.5 At paragraph 31, the candidate avers that the complainant was coerced into making a report and he concludes therefore that the appellant's version is reasonably possibly true, without further discussion.

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

6.1 A total of fourteen judgments have been considered, all of but one of which were written by the candidate, the other being a judgment with which the candidate simply concurred.

6.2 The candidate indicated (at paragraph 9.4 of his application) that he was aware of only one of his judgements (*Buthelezi v Road Accident Fund*) having been taken on appeal. That judgment is apparently pending before the Supreme Court of

Appeal and relates to the interpretation of the Road Accident Fund Transitional Act.

6.3 It is noted that some of the judgments were still as recent as July 2018, and others were straightforward and did not merit an appeal

6.4 There thus appears to be only one appeal pending against the candidate's judgments.

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

7.1 The candidate indicates that his principal areas of legal interest and involvement as an advocate have been civil law (personal injuries claims, contract and divorce), and labour law (CCMA and labour court matters).

7.2 He states under court experience in his application that he frequently appeared in court in criminal matters (high court), opposed motion applications, civil trials, CCMA arbitrations and the labour court. As to the proportion of his litigation work, he indicates the following.

7.2.1 Criminal law: 80%

7.2.2 Administrative law: 10%

7.2.3 Constitutional law: 10%

7.2.4 Labour law: 80%

7.3 Although the candidate appears to be an experienced advocate in the areas of criminal and labour law in particular, there appears to be somewhat of a lack of exposure and experience in the broader field of law required for the appointment as a judge. The Judicial Services Commission may deem it necessary for the candidate to obtain further exposure and experience through further acting appointments in the High Court.

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

8.1 The candidate's judgments reveal that he has good linguistic skills in English although he could benefit from proof-reading his judgments beforehand.

8.2 His proficiency in other languages is unknown.

8.3 No adverse comments were raised about the candidate's communication skills.

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

9.1 While the dates of the judgments appear readily from the face of the documents, the candidate has not included in his judgments the dates on which the matters were heard before him. It was therefore not possible to ascertain the duration of time that lapsed between date of hearing and date of judgment. Accordingly, no comment can be tendered as to the candidate's ability to produce judgments promptly.

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

10.1 There is no obvious indication that the candidate is unfair or lacking impartiality in the judgments he has delivered. No adverse comments have been received.

**11 The candidate's independent mindedness**

11.1 No adverse comments have been received.

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

12.1 No adverse comments have been received. The reviewers have not had personal experience before the candidate.

12.2 Accordingly, no meaningful comments can be made in this regard.

**13 The candidate's administrative ability**

13.1 The candidate has not indicated membership of any membership of legal organisations on his application form (paragraph 7). We are not in a position to provide any meaningful comments in this regard.

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

14.1 No adverse comments have been received.

**15 The candidate's judicial temperament**

15.1 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 indicates at pages 25C of his application that he is committed to the transformation of the judiciary, saying that women and younger people in particular should be elevated to the bench if suitably qualified.

**17 The candidate's potential**

17.1 The candidate may have potential for permanent appointment to the bench if he obtains further experience as indicated above as both his exposure in his practice and in his capacity as an acting judge are limited.

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

18.1 The appointment of the candidate would convey the message that the judiciary is serious about racial transformation and appointing candidates who are capable of being public servants and dedicated to performing their functions in a timely and courteous manner whilst striving for excellence.

**ANNEXURE: LIST OF JUDGMENTS CONSIDERED****Unreported Judgments**

*Galane obo Galane v The MEC for the Department of Health*, 35890/2014  
(6 July 2018)

*Firststrand Bank Limited v Johan Walkes*, Case No. 1173/2018

*Lester v The State*, Case No. A374/16

*Matshilwane v The Road Accident Fund*, Case No. 57635/2016

*Mountain View Investments v Altfund (Pty) Ltd*, Case No. 39169/2015

*Myburgh v Wiese*, Case No. 95071/2016

*Buthelezi v The Road Accident Fund*, Case No. 87223/14

*Makhanye v The State*, Case No. A165/2017

**Judgments Considered but not Listed by the Candidate in his Application**

*V v V* (11183/2018) [2018] ZAGPPHC 506 (11 May 2018)

*Munkhambe v The State* (A676/2015) [2017] ZAGPPHC 1274 (12 December 2017)

*Mamba v The Road Accident Fund* (7961/216) [2018] ZAGPPHC 428 (19 June 2018)

*Ngoma v Road Accident Fund* (43140/2016) [2017] ZAGPPHC 692 (26 October 2017)

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*Yebe v The Road Accident Fund (3833/16) [2018] ZAGPPHC 535 (15 March 2018)*

**Judgments in which the candidate concurred**

*Mbelu v State (A349/13) [2018] ZAGPPHC 544 (31 July 2018)*

