

CANDIDATE: JUDGE YVONNE THOKOZILE MBATHA

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COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL

1 The candidate's appropriate qualification and work experience

1.1 The candidate has a B Proc degree from the University of Zululand (1983).

1.2 Her experience includes:

1.2.1 Acting Justice of Appeal, Supreme Court of Appeal (December 2016 – November 2017)

1.2.2 Judge of the KZN High Court (June 2011 -)

1.2.3 Acting Judge, KZN High Court (2005,2006, November 2010, May 2011)

1.2.4 Director Y Y Mbatha & Partners Inc (Dec 2008 – May 2016)

1.2.5 Director YT Mbatha van Rensburg Inc (Oct 2006 – November 2008)

1.2.6 Sole Proprietor YT Mbatha and Partners (January 1989 – No date provided)

1.2.7 Professional Assistant EA Jadwat & Co (June – November 1988)

1.2.8 Admitted as Attorney (April 1987)

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- 1.2.9 Article Clerk, Botha, Du Toit & Saville (1985 - 1987)
- 1.2.10 Unregistered articles, Charmaine Pillay & Associates (June 1984 – November 1984)
- 1.3 The candidate is a Judge in the KwaZulu-Natal Division of the High Court.
- 1.4 The candidate is appropriately qualified.

2 Whether the candidate is a fit and proper person

- 2.1 The candidate was an attorney for 28 years before being appointed to the bench, having been admitted in 1987. She has been actively involved in organizations such as the Black Lawyers Association.
- 2.2 In 2008 – 2010 she served as a chairperson of the Northern Natal Region.
- 2.3 She is a member of the South African Chapter of the International Association of Women Judges.
- 2.4 The candidate served as a member of the intellectual property committee of the Law Society of South Africa between 2005-10 and its insolvency committee from 2008-10. She served as vice-president of the KwaZulu-Natal Law Society from 2006-07 and as a member of the Electoral Court during the 1994 elections.
- 2.5 Her judgments show a commitment to the core values and principles of the South African Constitution and to the interests of justice. The

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analysis of the candidate's judgments indicates that she performs her judicial role with fairness and impartiality.

2.6 She is a fit and proper person.

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

3.1 The candidate is a Black woman.

3.2 The Supreme Court of Appeal bench currently composes 22 Justices of Appeal, of whom 15 are men (5 white, 6 black, 3 Indian and 1 coloured) and 7 are women (5 black, 1 white and 1 Indian).

3.3 The appointment of female candidates to senior positions in the judiciary currently lags behind the goal of equal gender representivity, and the candidate's appointment would therefore further this end.

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

4.1 The candidate's judgments demonstrate a wide-ranging knowledge of the law. She has written judgments in civil matters, criminal matters, as well as constitutional matters.

4.2 The candidate's unreported judgment in *Ethekwini Municipality v Mounthaven (Pty) Ltd* (1985/2014) [2015] ZAKZDHC 78 (30 September 2015) was upheld by both the Supreme Court of Appeal in *eThekwini Municipality v Mounthaven (Pty) Ltd* 2018 (1) SA 384 (SCA) which dismissed the appeal, and the Constitutional Court in *eThekwini Municipality v Mounthaven (Pty) Limited* 2019 (2) BCLR 236 (CC) which refused the application for leave to appeal.

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

5.1 The candidate's commitment to the values of the Constitution was evident even before she was appointed to the bench. Her membership in organizations such as the Eyethu Educational Trust, the St Anthony's Children's' home, the Blaauwbosch Development Community as well as the Black Lawyers Association shows her passion for community development and her commitment to the development of the country.

5.2 The candidate has some 120 judgments under her name recorded on SAFLII spanning her judicial career. An analysis of the Juta publications, reveals that there are 18 reported decisions in the South African Law Reports and South African Criminal Law Reports where she was on the bench. Of these 18 decisions, the candidate penned 4 decisions (3 pertaining to crime and sentencing, and one RAF matter), she concurred in the decision of 13 judgments; and she wrote a dissent in one decision (the Maheene decision, discussed further below).

6 Whether any judgment has been overturned on appeal

6.1 In her previous interview before the JSC, the candidate was asked to comment on two particular decisions. These were *S v Ngubane and Maheene*.

6.2 In *S v Ngubane & Others*, the candidate handed sentences ranging from five years to life sentences for the various crimes alleged despite the State not seeking convictions on many of the charges.

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- 6.3 On appeal, a full KwaZulu-Natal High Court Bench found there was no “reliable evidence” before the candidate to sustain a conviction on any of the counts and the appellants ought to have been acquitted.
- 6.4 The full bench further noted that counsel for the state confirmed that in the Court a quo he did not seek a conviction against the appellants in respect of the counts. Notwithstanding this the candidate convicted the appellants on those counts.
- 6.5 The candidate’s peers on appeal looked into her judgment and held that no reasons were given why she disagreed with the submissions and concessions made by the State. The judgment did not record the concessions made by the State at all.
- 6.6 In their view a Court declining to act in accordance with such concessions made by the State is duty bound to explain where the State erred. In this case this was not done. As a consequence, the First, Third, Fourth and Fifth Appellants were sentenced to three life terms of imprisonment in circumstances where the State had conceded that there was insufficient evidence against them. It was held that it is indeed so that the evidence presented in the Court a quo raised strong suspicions against the Appellants. However, it is trite that suspicions do not amount to proof beyond reasonable doubt.
- 6.7 The candidate was previously questioned on this judgment at her JSC interview. Her response at the JSC was that she granted leave to appeal in the judgment because it was important to her that maybe another judge could have come to a different conclusion than hers in the matter.

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Her concern was that there was a grey area in relation to the issue of common purpose in so far as the accused were concerned.

6.8 The appeal by the ten convicted men was upheld and their convictions and sentences set aside.

6.9 In *Mahaeeane and Another v AngloGold Ashanti Ltd*, the candidate dissented from the majority judgment while acting on the Supreme Court of Appeal. The matter dealt with mineworkers who had contracted silicosis while working at *AngloGold Ashanti*.

6.10 The mineworkers had requested information from AngloGold through the Promotion of Access to Information Act. The company, citing a prospective class action suit in which it was involved, and where certification had been granted pending an appeal, refused to disclose the relevant information. Having lost in the High Court, the mineworkers had appealed to the SCA.

6.11 The majority found that the appellants did not require the information to formulate their claim and that the requested records did not relate to the exercise of the right to claim damages but to the evaluation of whether the appellants should do so or not. The reasons given, therefore, do not meet the test of the records being required to ‘exercise or protect’ the right relied upon.

6.12 In her dissent, the candidate was of the view that the appellants had met the criteria required in section 50(1) of PAIA since they had met the procedural requirements of the Act and the record requested was required for the exercise or protection of their rights. The candidate

found the appeal should succeed, holding that the mineworkers had no alternative source, save for the PAIA process, to access their personal records from the employer. Molemela AJA also dissented, agreeing with the candidate that the appeal should succeed.

6.13 It appears that the matter was not appealed (or if appealed, not appealed successfully) to the Constitutional Court. Accordingly, the dissenting views of the candidate and Molemela AJA were not vindicated on appeal.

6.14 Recently, the candidate's judgment was partly overturned in *Attwell Sibusiso Makhanya v Minister of Water Affairs and Sanitation and Others* (handed down by the SCA on 30 November 2018). The matter concerned a challenge by the Applicant to his suspension following findings of impropriety in a forensic report. The candidate, sitting as a court of first instance, and hearing the matter as a matter of urgency, issued an order which was subsequently amended (by her), setting aside the Minister's decision to extend the terms of office of the Board of Umhlathuze Water, setting aside the disciplinary proceedings, and ordering ENS Africa to conduct such disciplinary proceedings and to submit its recommendations for consideration by the newly-appointed board. The candidate ordered that the orders of invalidity should be suspended for 180 days from the date of the order for the Minister to appoint a new Board.

6.15 The appeal was upheld by the SCA (at least partly) on the basis of "further evidence" introduced before the SCA subsequent to the candidate's judgment. Nevertheless, the SCA overturned the

candidate's decisions to suspend the declarations of invalidity in respect of both the invalidity of the Board and the disciplinary proceedings. In respect of the suspension of the declaration of invalidity of the disciplinary proceedings, the SCA held "a slightly different view to that of the high court" and held that "there was no basis to suspend the declaration of invalidity of the decision to initiate a disciplinary hearing. This is so because such a declaration did not invalidate the report which formed the basis of the allegations against [the Applicant]."

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

7.1 The candidate has 28 years of experience as an attorney. She has been on the bench since 2005 to date. This period on the bench also includes the period when she was acting.

8 The candidate's linguistic and communication skills

8.1 From the judgments it is clear that the candidate expresses herself well in plain language. This makes her judgments clear and easy to understand. She is fluent in both IsiZulu and English.

9 The candidate's ability to produce judgments promptly

9.1 There is no one pattern in the time the candidate takes to deliver her judgments. Some judgments are delivered on the same day others take up to 2 to 3 months. However, it appears that the candidate displays the ability to produce judgments without excessive delay.

10 The candidate's fairness and impartiality

10.1 Save for the criticism in respect of her judgment in *S v Ngubane*, the analysis of her judgments shows that the candidate carries out her role with fairness and impartiality.

11 The candidate's independent mindedness

11.1 The analysis of the judgments shows that the candidate has an independent mind and is able to apply herself properly – including by delivery of a dissenting judgment as manifested in the case of *Mahaeeane and Another v AngloGold Ashanti Ltd.*

12 The candidate's ability to conduct court proceedings

12.1 Having been a judge since 2005 the candidate appears to have many years' experience in conducting court proceedings.

13 The candidate's administrative ability

13.1 There is no reason to doubt the candidate's administrative abilities.

14 The candidate's reputation for integrity and ethical behavior

14.1 The candidate practised as an attorney for 28 years. She has earned respect from members of the community. She is well respected among her peers, the legal practitioners and by the community as a whole.

15 The candidate's judicial temperament

15.1 In researching the candidate, only favourable reports about her conduct in court 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 been actively involved in organizations that promote community development and transformation.

17 The candidate's potential

17.1 Taking into account the legal knowledge and experience the candidate has acquired over the years, if appointed she is likely to be of value on the SCA.

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

18.1 Appointing the candidate to the SCA will send a message to the community that the judiciary in the country continues to transform and to empower women.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

*eThekwini Municipality v Mounthaven (Pty) Ltd [2016] JOL 34155 (KZD) -
Reported at SCA and Constitutional Court*

Krivokapic v Trans net Ltd t/a Portnet [2018] 4 All SA 251 (KZD)

*Passenger Rail of South Africa v Moabelo 1082/2016[2017] ZASCA 144 (2 October
2017)/ 2017 (4) All SA 648 (SCA)*

*Maheene & Another v AngloGold Ashanti Limited [2017] 3 All SA 458 (SCA) -
Reported at SCA*

Button NO v Akbur 2015 SA CLR 421 (KZD)- Commercial Law report

*Haigh Farming (Pty) Ltd v EG Elliot Real Estate CC 2015 SA CLR 451 (KZP) -
Commercial Law report*

*Maheene & Another v AngloGold Ashanti Limited 2017 (6) SA 382 (SCA) -
Reported at the SCA*

S v Heroldt 2018 (2) SACR 69 (KZP)

S v Xaba and Others 2018 (2) SACR 387 (KZP)

S v Mbokazi 2017 (1) SACR 317 (KZP)

*Harrielall v University of KwaZulu-Natal 2017 JDR 0565 (SCA) CCT 100/ 1 7
[2017] ZACC 3 8, 2018 (1) BCLR 1 2CC 3 1 00 - Constitutional Court*

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Unreported decisions

*Makhanya v Minister of Water Affairs and Sanitation & others [2016] JOL 36966
(KZP)*

EES Dunn v RAF [2018] ZAKZDHC 45

Septoo v The Road Accident Fund 2017 JDR 1913 (SCA)

*The Ingonyama Trust and others v Umlalazi Municipality and others (2017] JOL
38113 (KZP)*

Judgments upheld on appeal

*Sonwabo Magazi & Another v The State AR233/2016 - An ATM bombing case --
conviction confirmed and sentence upheld to a limited extent by the Full Bench,
KZN*

Moodley v The Kenmont School & Others Case No. 828/2010 - Confirmed by SCA

*Standard bank of South Africa v Lorenzo Builders (Pty) Ltd (formerly Lorenzo
Builder CC. & Others case No.4689/2009 - on appeal it appears as Dax
Edward Goose & Others v Standard Bank of South Africa Ltd. Case
No.AR494/2016 - Confirmed by Full Bench KZP*

*eThekwini Municipality v Mounthaven (Pty) Ltd Case No. 19 85/201 4 -Confirmed
by SCA and Constitutional Court*

Judgments overturned on appeal

*Sonwabo Magazi & Another v The State AR233/2016 - conviction
confirmed and sentence upheld to a limited extent*

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eThekwini Municipality v Breakers Share Block Limited Case No. 42/2016 - set aside by the SCA

N v Central Authority for the Republic of South Africa Case No. 1876/2014 - appeal court approved ruling but set aside because of the applicant's delay in proceeding with the appeal as a result that it was no longer in the best interest of the child to return to Ireland. The applicant was ordered to pay the respondents cost of appeal as a punitive measure. See appeal court ruling in AR571/15

Ngubane & others v The State (Full bench, KZN) Case No 93/2013P Convictions and sentences set aside