

CANDIDATE: JUDGE MMATHEBE VIOLET PHATSHOANE

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**POSITION FOR WHICH THE CANDIDATE IS APPLYING: DEPUTY
JUDGE PRESIDENT, NORTHERN CAPE DIVISION OF THE HIGH
COURT**

1. The candidate's appropriate qualifications

1.1. The candidate holds the following qualifications:

1.1.1. B Proc (University of the North – April 1995);

1.1.2. LLB (University of the Free State – March 1997);

1.1.3. LLM (University of the Free State – March 1999);

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 is not a fit and proper person (either in her application and/or in any of the comments received).

2.2. On the contrary, the candidate appears to have had a distinguished legal career over the past 22 years, commencing as a researcher in the Supreme Court of Appeal (1996), as an attorney (1997 to 2011) and as a Judge of the Northern Cape Division (from May 2011 to the present date - she was also an acting Judge in the NCD for an unbroken period from January 2010 until her permanent appointment in May 2011).

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 woman.

3.2. 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. A perusal of the cases cited by the candidate in which she has presided, reveals that she has a sound knowledge of the law, including Constitutional Law. The candidate has experience in many areas of the law.

4.2. The candidate has been a permanent Judge of the Northern Cape Division since May 2011, having previously been an acting Judge in that Division from January 2010 to May 2011. She also acted as a Judge in the Labour Court of South Africa for a single term during 2016, and from August 2016 to May 2017 she was an acting Judge in the Labour Appeal Court.

4.3. During her time as a Judge and acting Judge of the abovementioned Courts she has penned numerous reported judgments.

4.4. The candidate has referred in her application to at least 3 judgments which have been reversed on appeal. These are dealt with under paragraph 6 below.

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

5.1. The candidate's commitment to the values of the Constitution is apparent from various judgments of hers, including inter alia *NDPP v Scholtz and others* 2017 (1) SACR 483 (NCK), *Steward v The State* 2017 (1) SACR 156 (NCK) and *Ferreira v Minister of Safety and Security and another* (1696/2011) [2015] ZANCHC 14 (4 September 2015).

5.2. Although these judgments did not deal directly with constitutional issues per sé, they emphasised and relied (inter alia) on leading Constitutional Court judgments.

6. Whether any judgments have been overturned on appeal

6.1. The candidate has referred to the following judgments:

6.1.1. *MBS Transport CC v CCMA & Others; Bheka Management Services (Pty) Ltd v Kekana and 2 others* 2016 (37) ILJ 684 (LC). This was overturned on appeal by the Labour Appeal Court, which judgment is reported under *CCMA v MBS Transport CC and Others, CCMA v Bheka Management Services (Pty) Ltd and Others* (2016) 37 ILJ 2793 (LAC).

Whereas the candidate dismissed two urgent applications to stay enforcement awards issued in terms of section 143 of the Labour Relations Act 66 of 1995 by the CCMA, on the basis that the CCMA does not have jurisdiction to issue writs of execution in respect of the arbitration awards issued by it, the Labour Appeal Court held that:

“Section 145(3) is clear. The enforcement of an arbitration award may be stayed by the Labour Court. The section has no qualification or limitation. The enforcement of any arbitration award issued in terms of the Act may be stayed by the Labour Court. Therefore, the enforcement of a certified award which is deemed to be an order of the Labour Court in respect of which a writ was issued may be stayed by the Labour Court pending its decision. The Labour Court may therefore stay the enforcement of an award pending its decision in the review application. It follows that the court a quo’s conclusion in relation to the Labour Court’s lack of jurisdiction to stay CCMA certified awards is incorrect.”

6.1.2. *State v Van Schalkwyk* (case number CA&R119/2014). The SCA decision is reported under *Van Schalkwyk v The State* [2016] ZASCA 49; 2016 (2) SACR 334 (SCA).

The Appellant’s conviction of murder with intention in the form of *dolus eventualis* in the court a quo, was upheld on appeal by a 3-2 majority decision. In the premises, the conviction of murder was set aside and replaced with one of culpable homicide.

6.1.3. *S v Botha* (case number 449/11). The appeal is cited as *Botha v S* (901/2016) [2017] ZASCA 148 (8 November 2017), in which the appeal against conviction was dismissed, but the appeal against sentence upheld. The matter was remitted to the court a quo for purposes of sentencing.

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

- 7.1. The candidate commenced her legal career as a judge's researcher in the Supreme Court of Appeal in 1996. Thereafter, she was a candidate attorney from 1997 to 1999 and an attorney from 1999 to May 2011 (and director from approximately 2000 to May 2011).
- 7.2. She was appointed as a judge of the Northern Cape Division in May 2011, having acted as a Judge in the NCD since January 2010 until her permanent appointment.
- 7.3. She also acted as a Judge in the Labour Court of South Africa for a single term during 2016, and from August 2016 to May 2017 she was an acting Judge in the Labour Appeal Court.
- 7.4. Finally, the candidate has acted as the Deputy Judge President of the Northern Cape High Court, as well as of the Labour Courts (although paragraph 24 of the candidate's application form refers to the period of 3 June 2017 to the present, it is unclear as to what period of time was spent as the ADJP of the NCD, and what period of time was spent as the ADJP of the Labour Courts).

8. The candidate's linguistic and communication skills

8.1. The submissions received from the Northern Cape Society of Advocates refer to the candidate as proficient in English and an able communicator in that language. This is borne out by her judgments.

9. The candidate's ability to produce judgments promptly

9.1. According to the candidate's application form, she has no outstanding judgments.

9.2. If regard is had to certain of the candidate's judgments, the following time-frames become apparent:

9.2.1. *NDPP v Scholtz and others* 2017 (1) SACR 483 (NCK) – heard on 28 September 2016 and judgment delivered on 6 December 2016 (i.e. 2 months and 8 days later);

9.2.2. *Steward v The State* 2017 (1) SACR 156 (NCK) – heard on 15 June 2016 and judgment delivered on 9 September 2016 (i.e. 2 months and 24 days later);

9.2.3. *S v Setholo* 2017 (1) SACR 544 (NCK) – heard on 13 December 2016 and judgment delivered on 3 March 2017 (i.e. 2 months and 21 days later);

9.2.4. *Minister of Higher Education & Training & Another v Business Unity SA & Another* (2018) 39 ILJ 160 (LAC) – heard on 31 May 2017 and judgment delivered on 1 November 2017 (i.e. 5 months and 1 day later);

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- 9.2.5. *MBS Transport CC v CCMA & Others; Bheka Management Services (Pty) Ltd v Kekana and 2 others* 2016 (37) ILJ 684 (LC) – heard on 10 September 2015 and judgment delivered on 6 November 2015 (i.e. 1 month and 26 days later);
- 9.2.6. *MBS Transport CC v SAMWU & Others* (case number J1807/2015 – Labour Court of South Africa, Johannesburg) – heard on 10 July 2015 and judgment delivered on 6 November 2015 (i.e. 3 months and 27 days later); and
- 9.2.7. *Ferreira v Minister of Safety and Security and another* (1696/2011) [2015] ZANCHC 14 (4 September 2015) – heard on 28 April 2015 and judgment delivered on 4 September 2015 (i.e. 4 months and 6 days later).

10. The candidate’s fairness and impartiality

- 10.1. The candidate appears to be fair and impartial and no adverse comments have been received.

11. The candidate’s independent mindedness

- 11.1. The judgments delivered by the candidate display an adequate degree of independent mindedness and no adverse comments have been received.

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

12.1. The candidate has been a (permanent) Judge since May 2011, as well as an acting Judge from January 2010 to May 2011.

12.2. Again, no adverse comments have been received and there appears to be no question as to Phatshoane J's ability to conduct court proceedings.

13. The candidate's administrative ability

13.1. The candidate is an experienced administrator, having been a director of two attorneys' firms before her appointment to the Bench. She has also served as an Acting Deputy Judge President as set out at paragraph 7.4 above.

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

14.1. No adverse comments have been received and there appears to be no reason to question the candidate's reputation for integrity and ethical behaviour.

15. The candidate's judicial temperament

15.1. No adverse comments have been received and there appears to be no reason to question the candidate's 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 has been actively involved in her community, having served on various committees and in various positions of leadership in the community. She has been actively involved in the education and

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further training of law students, having been an external moderator and external examiner at the University of the Free State, as well as having lectured candidate attorneys at the School for Legal Practice.

16.2. During her 10 years as a labour law practitioner, she would frequently represent less privileged employee litigants in various forums, for reduced or no fees.

16.3. The candidate's commitment to human rights is also borne out by a perusal of her judgments.

17. The candidate's potential

17.1. The candidate has, since 2010, shown her potential as a judge. There is no reason to believe that she would not be an able and effective Deputy Judge President. Clearly her appointment would contribute to transformation.

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

18.1. The candidate is a Black woman. As such, her appointment to the position of Deputy Judge President would send a positive and transformative message to the community at large.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

State v Scholtz and others K/S 20/2013

NDPP v Scholtz and others 2017 (1) SACR 483 (NCK)

Steward v The State 2017 (1) SACR 156 (NCK)

S v Setlholo 2017 (1) SACR 544 (NCK)

Minister of Higher Education & Training & Another v Business Unity SA & Another
(2018) 39 ILJ 160 (LAC)

*MBS Transport CC v CCMA & Others; Bheka Management Services (Pty) Ltd v
Kekana and 2 others* 2016 (37) ILJ 684 (LC)

MBS Transport CC v SAMWU & Others (case number J1807/2015 – Labour Court
of South Africa, Johannesburg)

Ferreira v Minister of Safety and Security and another (1696/2011) [2015]
ZANHC 14 (4 September 2015)

State v Van Schalkwyk (case number CA&R119/2014)

S v Botha (case number 449/11)