

*CANDIDATE: DAVID MAKHOBA*

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**COURT FOR WHICH APPLICANT APPLIES: NORTH AND SOUTH  
GAUTENG HIGH COURT**

**1 The candidate's appropriate qualifications:**

1.1 The candidate holds the following qualifications:

1.1.1 B. Iuris – UNISA (1989)

1.1.2 LLB – Vista University (1997)

1.1.3 LLM - UP (2001)

1.2 The candidate possesses the requisite qualifications for the position for which he has applied.

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

2.1 The candidate has acted as a magistrate since approximately 1995 to present date. The candidate has acted as a judge in the High Court on a number of occasions.

2.2 Nothing in the candidate's judgements stood out to the reviewers as indicating that the candidate is not a fit and proper person.

**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.

3.2 While his appointment will contribute to racial representivity, it will not contribute to the gender transformation of the judiciary.

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

4.1 The candidate practised as a public prosecutor in the district court from 1990 to 1992. The candidate was appointed as a public prosecutor in the regional court in 1992. The candidate served as a district court magistrate from 1995 to 1999, the candidate was thereafter appointed as a regional court magistrate from 1999 and has served as such to present date.

4.2 The candidate has acted as a judge in the North and South Gauteng High Courts on a number of occasions during the following years: 2002, 2003, 2004, 2005, 2013, 2014, 2015, 2016, 2017, 2018, and 2019;

4.3 The candidate lists his experience in relation to the above periods as being split between criminal and civil work.

4.4 The reviewers were unable to find many instances in which the candidate was tasked with principles which specifically relate to Constitutional law. As a consequence of which, the reviewers are unable to comment on this particular aspect in much further detail.

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

5.1 In accordance with what is stated at paragraph 4.4 above, the reviewers are unable to comment on the specific aspect. The reviewers were unable to find anything in the candidate's judgements to indicate that his commitment to the values in the Constitution ought to be called into question.

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

6.1 Judgement handed down by the candidate in the matter of S. V. Molimi was partially overturned on appeal to the Supreme Court of appeal ([2006] JOL 17061 (SCA)), and fully overturned on appeal to the Constitutional Court (S v MOLIMI 2008 (3) SA 608 (CC))

6.2 The reviewers note that the candidate listed that "*conviction and sentence* was confirmed by the supreme Court of Appeal, *only to be set aside by the Constitutional Court*";

6.3 Relevant portions of both judgements are set out below:

***THE SUPREME COURT OF APPEAL:***

*the appeal by the appellants against their convictions on counts 1, 2 and 4 are dismissed;*

*the appeal by the appellants against their convictions on counts 3, 5, 6 and 7 is upheld. Their convictions and sentences on these counts are set aside<sup>1</sup>; (our emphasis)*

***THE CONSTITUTIONAL COURT:***

*Condonation for the late filing of the application for leave to appeal is granted;*

*Leave to appeal is granted;*

*The appeal is upheld;*

*The order of the Supreme Court of Appeal is set aside to the extent set out below:*

*'The appeal by the first appellant against his convictions and sentences on counts 1, 2, 3, 4, 5, 6 and 7 is upheld. His convictions and sentences on those counts are set aside.'<sup>2</sup>*

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

- 7.1 The candidate lists working experience as a state prosecutor for a period of approximately four years from 1990 to 1994;
- 7.2 The candidate lists significant experience whilst serving as a magistrate. The candidate's tenure as a magistrate spans approximately 24 years;
- 7.3 As elucidated above, the candidate has served as an acting judge on a number of occasions;

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<sup>1</sup> Judgement by the supreme Court of Appeal in the matter between Molimi & another v S [2006] JOL 17061 (SCA) at paragraph 39 thereof

<sup>2</sup> S v MOLIMI 2008 (3) SA 608 (CC) at paragraph 56

7.4 The reviewers are unable to comment on the candidate's practice as either an attorney, or an advocate. With reference to the candidate's application it does not appear that the candidate has ever practised in either such capacity.

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

8.1 The candidate has indicated that he is able to communicate in the following languages: Zulu and Sotho (home languages), English, Afrikaans, Tswana, Xhosa, Tsonga, and Venda<sup>3</sup>;

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

9.1 On an overall conspectus of the candidate's judgements, it appears that the candidate produces judgements promptly.<sup>4</sup>

9.2 The vast majority of the candidate's judgements were delivered timeously.

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<sup>3</sup> found at page 18 of the applicant's application

<sup>4</sup> Save perhaps matter 4 on page 34 of his application, which appears to have been delivered some 3 years after the fact

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

10.1 The reviewers were unable to glean anything from the judgements reviewed which call the candidate's impartiality and fairness into question.

**11 The candidate's independent mindedness:**

11.1 Apart from the fact that the reviewers were unable to find any dissenting judgements delivered by the candidate, there is nothing to suggest that the candidate is not independently minded.

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

12.1 The candidate has served as a magistrate for approximately 24 years. The candidate has also served as an acting judge on a number of occasions.

12.2 Worth considering, perhaps, are the Supreme Court of Appeal, as well as the Constitutional Court's comments in relation to the manner in which the candidate conducted the proceedings in the matter between S V. Molimi.

12.3 Most notable are paragraph/s 26 to 28 of the Supreme Court of Appeal's judgement, and paragraph/s 37 to 44 of the Constitutional court's judgement in the matters of Molimi & another v S [2006] JOL 17061 (SCA) and S v MOLIMI 2008 (3) SA 608 (CC), respectively.<sup>5</sup>

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<sup>5</sup> the reviewers suggest that the above judgements be read in order to place the comments in proper context

**13 The candidate's administrative ability:**

13.1 No adverse comments have been received in this regard.

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

14.1 The reviewers are unaware of any aspect which may impugn the candidate's reputation.

**15 The candidate's judicial temperament:**

15.1 The reviewers are unaware of any matter which is suggestive of a lack of judicial temperament on the part of the candidate.

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

16.1 The candidate lists his most significant contribution to the law and the pursuit of justice in South Africa as being his membership of the International Association of Women Judges (the South African Chapter), in 2013<sup>6</sup>.

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<sup>6</sup> At page 13 of his application, paragraph 10

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**17 The candidate's potential:**

17.1 The candidate is 56 years of age and has held the position of magistrate for quite some time.

17.2 The candidate presided over the Molimi matter approximately 15 years ago and has acted as a judge of the High Court on a number of occasions since.

17.3 On an overall conspectus, the candidate appears to have handled many matters of a criminal nature.

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

1.1 The candidate is a black man and his appointment will send a positive message to the community at large.

18.1 The candidate has risen to the rank of regional court magistrate from his initial appointment as a prosecutor some 24 years ago.

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## **ANNEXURE: LIST OF JUDGMENTS CONSIDERED**

### **Reported decisions**

The reviewers were unable to find any reported decisions. The decisions listed by the candidate appear to be unreported<sup>7</sup>.

### **Unreported decisions**

*M v M [3584/2013] 10 February 2017 ZAGPPHC 100;*

*Botha v The Regional Magistrate, Springs Mrs B Oswell 2017 JDR 0592 (GP)*

*Ramdin v Minister of Police 2019 JDR 0058 (GJ)*

*Rashijane v Minister of Safety and Security 2016 JDR 1156 (GP)*

*S v Cindi 2016 JDR 1502 (GP)*

*Essop v Breezewood Trading 88 CC 2016 JDR 1514 (GP)*

*S v Balete 2014 JDR 0826 (GNP)*

*S v Appelgryn 2014 JDR 0829 (GNP)*

*S v Grobbelaar 2014 JDR 0830 (GNP)*

*S v Mofokeng 2014 JDR 0926 (GNP)*

*S v Mofokeng 2014 JDR 0926 (GNP)*

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<sup>7</sup> A list derived from JUTA is attached

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*S v Mashengoane* 2014 JDR 1070 (GP)

*Mchepu v Road Accident Fund* 2014 JDR 1179 (GP)

*S v Moditsi* 2003 JDR 0163 (W)

*Mthimkhulu v Road Accident Fund* (48531/2014) [2017] ZAGPPHC 666 (21 September 2017)

*Zaina v Road Accident Fund* (CC55528/2015) [2017] ZAGPPHC 592 (25 August 2017)

*Mehrez and Another v Ndwandwe* (65685/13) [2017] ZAGPPHC 405 (23 March 2017)

*Sekgala v Nedbank Limited* (12231/2014) [2017] ZAGPPHC 159 (17 February 2017)

*Mchepu v Road Accident Fund* (66306/2012) [2014] ZAGPPHC 433 (30 May 2014)

*Uphawo Technologies CC v Martin Morgan Motors CC* (12512/2012) [2017] ZAGPPHC 51 (17 February 2017)

*DPI Plastics (Pty) Limited Trading as Incledon v Route 7 Trading 181 CC and Another* (CC23195/2013) [2017] ZAGPPHC 638 (3 October 2017)

*Ex parte: Nothnagel; In re: Nothnagel v Law Society of the Northern Province* (74204/2015) [2017] ZAGPPHC 362 (10 March 2017)

### **Judgments upheld on appeal**

*Molimi:*

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As elucidated above, the Molimi matter was partially upheld on appeal to the Supreme Court of Appeal but then overturned in the Constitutional Court.

*Dlamini:*

(primarily leave to appeal) State v Dlamini which originated in the Pretoria Regional Court.

In the above matter the candidate dismissed the appellant's application for leave to appeal against both the conviction, as well as the sentence which he imposed. The appellant then petitioned the North Gauteng High Court which dismissed leave to appeal on the basis that there were no prospects of success in respect of both the conviction and sentence.

The appellant then applied for leave to appeal against this order to the High Court. The application was granted by Mothle and Baqwa JJ as follows:

'Your application for condonation for the late filing of this application is granted as well as your application for special leave to appeal to the Supreme Court of Appeal in terms of s 20(4) of the Supreme Court Act 59 of 1959'

The matter then came before the Supreme Court of Appeal<sup>8</sup>, the issue before the SCA was whether the High Court ought to have granted leave to appeal. The SCA did not find that there were any reasonable prospects that the appeal against both the conviction and sentence might succeed, in the result, the appeal was dismissed.

### **Judgments overturned on appeal**

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<sup>8</sup> S v Dlamini 2015 JDR 0612 (SCA)

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*Molimi:*

As elucidated above, the Molimi matter was partially overturned on appeal to the Supreme Court of Appeal, and fully overturned on appeal to the Constitutional Court.