

APPLICANT JUDGE MAHUBE BETTY MOLEMELA

COURT FOR WHICH CANDIDATE APPLIES: CONSTITUTIONAL COURT

1. The candidate's appropriate qualifications:

1.1. The candidate holds the following degrees:

1.1.1. BA, University of Fort Hare (1986);

1.1.2. B Proc, University of Fort Hare (1993);

1.1.3. LLB, University of the Free State;

1.1.4. DIP Adv Labour Law, University of Johannesburg (1998);

1.1.5. LLM (Mercantile Law), University of the Free State (2000); and

1.1.6. DIP Business Management Studies, Buckinghamshire Chilterns University College (2001).

1.2. The candidate has a certificate in –

1.2.1. Advance Military Law (Thaba Tshwane College, SANDF);

1.2.2. Estate Agency (Estate Agency Affairs Board);

1.2.3. The enforcement of socio-economic right in Africa (University of Pretoria); and

1.2.4. Human Rights (Danish Centre for Human Rights, Copenhagen).

1.3. The candidate has held the following judicial positions:

- 1.3.1. Acting Judge, Free State Division of the High Court (Sept – Oct 2005; Oct – Nov 2006; July – Sept 2007);
- 1.3.2. Acting Judge, Gauteng Local Division of the High Court, Johannesburg (Nov 2007 – March 2008);
- 1.3.3. Permanent Judge, Free State Division of the High Court (July 2008 – 31 May 2018);
- 1.3.4. Acting Judge, Labour Appeal Court (2012 – 2014);
- 1.3.5. Acting Judge, Competition Appeal Court (2012 – 2014);
- 1.3.6. Judge of Appeal, Labour Appeal Court (1 June 2014 to date);
- 1.3.7. Acting Judge, Constitutional Court (January – May 2015);
- 1.3.8. Acting Judge, Supreme Court of Appeal (December 2016 – 30 September 2017);
- 1.3.9. Judge President, Free State Division of the High Court (2015 – 31 May 2018); and
- 1.3.10. Judge of Appeal, Supreme Court of Appeal (1 June 2018 to date).
- 1.4. Prior thereto, the candidate was an arbitrator at the CCMA from 1999 – 2001.
- 1.5. The candidate has also practiced as an attorney for a number of years (1993 – 2008) and worked as a part time law lecturer at the University of the Free State (2001 – 2003).
- 1.6. The candidate is appropriately qualified.

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

2.1. The candidate has held many judicial positions.

2.2. There are no adverse comments as to the candidate's fitness for appointment as a Judge of the Constitutional Court.

2.3. Accordingly, the candidate is eminently fit and proper for an appointment to 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 black woman.

3.2. There are currently only eight permanent members of the Constitutional Court (five men and three women, of which only one is white, being a white man).

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 commitment to the values of the constitution:

4.1. As a practicing attorney, the candidate served as a board member of the Free State Rural Development Association, a non-profit organisation whose mission was to contribute towards strengthening, facilitating and advocating for the development of rural communities. From early in her career, the candidate showed a passion for advancing the rights of indigent persons.

- 4.2. Further, the candidate has been a member of the YWCA and the Catholic Women's League and used these organisations to address members on gender-based violence and the applicable legal framework.
- 4.3. The candidate's judgments demonstrate a strong commitment to constitutional values and an understanding of various Constitutional imperatives. The candidate appears not to shy away from her powers and / or duties as a Judge, to further Constitutional imperatives. The judgments delivered by the candidate underpin the values and principles enunciated in the Constitution.
- 4.4. The candidate is committed to constitutional values and advances the values of the constitution in her professional and personal life.

5. The candidate's knowledge of the law, including constitutional law:

- 5.1. The candidate has held various judicial positions in the High Court, Labour Court, Labour Appeal Court, Supreme Court of Appeal and the Constitutional Court. The candidate has been exposed to various fields of law and their operation in our legal system.
- 5.2. In addition, the candidate has obtained certificates in the subjects mentioned in paragraph 1.2 above and is currently completing her LLD in the protection of the environment in terms of section 24 of the Constitution, at the University of Pretoria.
- 5.3. The candidate has 214 reported judgments (spanning 2006 to present). The candidate only lists two judgments that were successfully appealed: *Lekhele v The State* (case No 234/2008) and *Liberty Group v Jordaan*

(Case No A289/2011). This indicates that the candidate not only understands the law but is able to accurately apply the law.

5.4. The candidate lists the following cases in which the judgments were written by her:

5.4.1. *Oppelt v The Head of the Health Department of the Health Provincial Administration Western Cape* [2015] ZACC 33: 2016 (1) SA 325 (CC)

The court deals with medical negligence claims and re-confirmed the test applicable to the assessment of expert evidence.

5.4.2. *Provincial Minister for Local Government. Environmental Affairs and Development Planning. Western Cape v Municipal Council of The Oudtshoorn Municipality And Others* [2015] ZACC 24; 2015 (6) SA 115 (CC)

At issue was the constitutional validity of s 30 (4) of the Local Government Municipal Structures Act 117 of 1998. The court found that the wide language in that provision rendered it inconsistent with s 160 (3)(b) of the Constitution.

5.4.3. *Tsoaeli & 94 Others v The State* 2018 (1) SACR 42 (FB)

The appellants were charged with various contraventions of the Regulation of Gatherings Act. The court did not countenance the notion of "automatic prohibition of gatherings." For purposes of a proper perspective, the court examined the pre-constitutional legislation that had similar provisions that were intended to

preserve the apartheid political order. It found that the interpretation attached to the RGA by the State offended the "principle of legality" as expressed in the maxim "no crime without law." Several dicta in this approval by the Constitutional Court in *Mlungwana & Others v The State* 2019 (1) SACR 429 (CC): [2018] ZACC 45 at Para 19 and 65.

5.4.4. *The State v Pilane* 2017 (2) SACR 154 (SCA)

This judgment laid down the proper interpretation to section 165 of the criminal procedure act regarding the administration of the oath in criminal proceedings.

5.4.5. *Morudi And Others v NC Housing Services and Development CO and Others* [2017] ZASCA 121

The case dealt with the rescission of judgment, in terms of rule 42(1)(a) the Uniform Rules of Court is available to parties who were present at a hearing but were not allowed to participate in the proceedings, provided those parties are able to show prejudice and a direct interest in the proceedings. This was a dissenting judgment that was upheld by the Constitutional Court.

5.4.6. *D Kumalo And Another v Twin City Developers (Pty) Ltd* (2017) ZASCA 143

This was an appeal against a cost order made by the Land Claims Court against farmworkers that had unsuccessfully brought an application for an interim interdict against the owner of the

business operated on the farm pending the hearing of an eviction application.

5.4.7. *Haarhoff and Another v Director Of Public Prosecutions* |2018| ZASCA 184

This case dealt with the procedure to be followed when an admonition is administered in terms of s 164 of the Criminal Procedure Act. The court held that the competence of the witness was a discrete inquiry and that the test is satisfied if it has been that the witness was cognizant of the moral duty to tell the truth.

5.4.8. *Redisa v Minister of Environmental Affairs: Kusaga Taka v Environmental Affairs* |2018| ZASCA 1

This matter dealt with an application to wind up a solvent company in terms of s 81 of the Companies Act. The issue was whether the Minister of Environmental Affairs may be granted standing in the public interest and if so, whether it was just and equitable to wind up the company . This was the first time the Supreme Court of appeal had considered a matter of this nature.

5.4.9. *Harvey No and Others v Crawford And Others* 2019 (2) SA 153 (SCA)

The matter concerned the interpretation of a Trust Deed that was drafted in 1953. At issue was whether the term "children" in the Trust Deed included adopted children. The matter is currently on the roll of the Constitutional Court.

5.4.10. *Griessel NO v Van Wyk NO & Others* 2019 ZASCA 95

The court dealt with whether the beneficiaries referred to as 'potential beneficiaries' in a discretionary trust acquired rights capable of protection.

5.5. The candidate has extensive experience in producing judgments. The candidate's judgments are well written. Further, the candidate has produced many dissenting judgments indicating the candidate's independent-mindedness.

6. Whether any judgments have been overturned on appeal:

6.1. Not known.

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

7.1. The candidate has an impressive professional history. It includes the following highlights:

7.1.1. She has obtained two degrees, various diplomas and certificates;

7.1.2. She was a professor of law at the University of the Free State from 2002 to 2004;

7.1.3. She has practiced as an attorney (1993 – 1999; 2002 – 2007);

7.1.4. She was appointed as an arbitrator for the Commission for Conciliation, Mediation and Arbitration (CCMA) in 1999 and held that position until 2002; and

7.1.5. She has held various judicial positions in numerous courts including the Labour Appeal Court, the Supreme Court of Appeal and the Constitutional Court.

8. The candidate's linguistic and communication skills:

8.1. The candidate's judgments read well and show advanced linguistic and communication skills. The candidate has an excellent understanding of the English language and is able to communicate effectively.

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

9.1. The candidate only has one outstanding Supreme Court of Appeal judgment. The candidate has circulated her judgment, she is merely awaiting the other Judge's comments.

9.2. The candidate's record indicates an ability to work efficiently and to produce judgments promptly.

10. The candidate's fairness and impartiality:

10.1. No adverse comments have been received in this regard.

11. The candidate's Independent-mindedness:

11.1. The candidate's judgments, in which she does not shy away from grasping the nettle when required to do so, are a testament to her independent-mindedness.

11.2. There is no record of any complaint or incident indicating a lack of independent-mindedness on the part of the candidate.

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

12.1. The candidate is an experienced Judge, who has, for a number of years, held a seat at various courts including the High Court, Supreme Court of Appeal and Constitutional Court. With this judicial track record, it can be accepted that the candidate has the requisite ability to conduct court proceedings properly.

12.2. There is no reason to doubt her ability to conduct court proceedings.

13. The candidate's administrative ability:

13.1. The candidate's record of producing judgments promptly appears indicative of her ability to administer her role efficiently.

13.2. No adverse comments have been received.

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

14.1. No adverse comments have been received in this regard.

14.2. There is nothing else on record to indicate that the candidate's integrity or ethics have ever been compromised.

15. The candidate's judicial temperament:

15.1. No concerns appear from the judgments we have considered.

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 for many years been actively involved in teaching vulnerable communities about gender-based violence and the applicable legal frameworks.

16.2. Through education, the candidate has no doubt furthered the constitutional goal of promoting access to justice.

17. The candidate's potential:

17.1. The candidate's established academic and judicial career, and in particular, her experience as a long-standing Judge of both the High Court and the Supreme Court of Appeal demonstrates that she has the skills required to fill the post of a Judge of the Constitutional Court.

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

18.1. The candidate's appointment would be seen in the public and legal domain as being fitting and appropriate to aid the continued efficiency and effectiveness of the Constitutional Court. In this way, it would preserve and enhance the integrity of the court.

18.2. The candidate is an experienced and competent judge who will bring value to the Constitutional Court.