

APPLICANT: MR MUZIKAWUKHELWANA THOMAS NCUBE

**COURT FOR WHICH APPLICANT APPLIES: KWAZULU-NATAL
DIVISION, FOR SECONDMENT TO THE LAND CLAIMS COURT**

1. The candidate's appropriate qualifications

1.1 The candidate is appropriately qualified as illustrated by the following academic qualifications or courses, where the candidate:

1.1.1 obtained a B Juris from University of Zululand in 1983;

1.1.2 obtained an LLB from University of Zululand in 1997;

1.1.3 obtained a post graduate Diploma in Environmental law in 2002 at the University of Natal;

1.1.4 obtained an LLM in Environmental Law in 2003 from the University of Natal;

1.1.5 attended the aspirant judge's training course in 2012;

1.1.6 attended various regional courses in both regional criminal and civil courts in 2013;

1.1.7 attended Advanced Aspirant Judges Training in 2014;

1.1.8 acted as a judge of the Land Claims Court on several occasions since 2006;

1.1.9 acted as a judge of the Durban High Court on several occasions;
and

1.1.10 acted as a judge in the Johannesburg High Court during April – May 2009.

1.2 The candidate's career path:

1.2.1 The candidate attended Inchanga High School. He completed his matriculation and went on to study a B. Juris at University of Zululand.

1.2.2 The candidate took up employment with the Department of Justice as a court interpreter from 1982 to 1983.

1.2.3 The candidate then joined the ranks of prosecutors from 1983 to 1985. In 1985, the candidate was posted as a senior public prosecutor in the Umbumbulu Magistrates' Court.

1.2.4 From 1986 to 2013, the candidate was appointed as a permanent magistrate. He served his post initially at the Umbumbulu Court. In June 1990, he was later transferred to Simlangentsha, as assistant head of office. Thereafter, he was given prominent leadership roles as the "2.I.C" in the office of the Magistrate, Vulindlela in 1993.

1.2.5 On 4 November 2013, he was appointed as a regional magistrate, in the KwaZulu-Natal Region, which is the role the candidate is currently holding. The candidate performed his duties at Durban, Pinetown, Stanger, Maphumulo and Pietermaritzburg.

1.2.6 The candidate was appointed in various acting leadership roles as acting head of court and judicial head of the sub regions in

Hlanganani, Vulindlela, and Umlazu. Further, as acting chief magistrate and judicial head of administrative region No.06.

1.2.7 He has worked as an acting judge in the Land Claims Court, Durban High Court, and South Gauteng High Court.

1.2.8 Of significance, during the period he was working for the Department of Justice, the candidate studied and obtained an LLB in 1997; a post graduate diploma in 2000 in pollution control and land law (University of KwaZulu-Natal) and later, in 2013, a master's degree in environmental law. He has also worked as a part time lecturer for the University of Zululand.

2. Whether the candidate is a fit and proper person

2.1 The Magistrates Commission has issued a letter of good standing for the candidate. There is no reason to doubt that the candidate is 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 The appointment of the candidate would therefore broadly help to reflect the racial composition of South Africa.

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

4.1 There is only a small sample of judgments provided by the candidate. Such a sample base does not assist in giving a precise answer to a broad

and general question to consider holistically, the candidate's overarching abilities as a jurist. However, from the samples provided, it is clear that the candidate takes care in his judgments to research and consider the law and sets out the basis for his legal findings. His judgments seem in general, well-reasoned, and based on a demonstrated understanding of the legal principals at play, as well as balancing the needs of the community.

4.2 His extensive experience as a prosecutor, magistrate and acting judge have placed him in a position of great exposure of both civil and criminal law.

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

5.1 The candidate uses his academic grounding with aplomb in analysis of complex legal principles and considers comparative international jurisdictions for means of developing the South African law. This adds a dimension of liberal thinking and emphasises his characteristic of judicial flexibility.

5.2 In considering his *Mwelase* judgment, it is clear that the candidate displays his extensive and in-depth knowledge on land reform in South Africa and is able to navigate the complex realm of constitutional interpretation of the Land Reform (Labour Tenants) Act No 3 of 1996.

6. Whether any judgments have been overturned on appeal

6.1 No judgments were overturned on appeal.

6.2 Two of the candidate's cases were taken on appeal and the appeals were dismissed.

6.3 See AR345/2013 and AR353/2013 reported 2014 (3) All SA 577 (KZP) LCC 196/2013. Leave to appeal refused by SCA.

6.4 LLC 107/2013 *Mwelse* – appointment of a special master set aside by SCA, confirmed by the Constitutional Court – reported as 232/18 [2019] ZACC 2019 (11) BCLR 1358 (CC).

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

7.1 The candidate has remained in the Department of Justice for 30 years and has been a magistrate for 32 years. He is currently 63. In considering this candidate's judicial exposure, especially in leadership administrative roles within the courts, it has groomed the candidate well for a permanent appointment. Further, his extensive private academic study on Land and Environmental Law illustrates the passion this candidate holds for the field of this discipline. The sample of judgments given illustrates the candidate's confidence in dealing with both criminal, civil and land claims matters.

8. The candidate's linguistic and communication skills

8.1 The candidate's mother tongue is isiZulu. As he started out his career as a court interpreter, he is fluent in both English and isiXhosa. It is

submitted that his language abilities are an asset in assisting the representation of the racial and cultural composition of South Africa.

8.2 From a reading of the candidate's judgments, his English linguistic skills appear to be good. His judgments are well articulated, and the reasons given therefore are logical and find support in the law.

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

9.1 The candidate has reported only one outstanding judgment – high court case 466/2014 – the date reserved was 01-10-2019.

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

10.1 The letter of nomination from Adv Kadungure presents a glowing review on the candidate's judicial temperament and refers to him as "*a great thinker who has an in-depth understanding of the application of legal principles*". There is not a significant amount of information in this respect, however, no adverse comments have been received and the appeals against his judgments have not been successful.

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

11.1 No adverse comments have been received. The analysis of the candidate's judgments set out above indicates that the candidate carries out his role with the fairness and impartiality it requires.

11.2 This is illustrated in his *Mwelase* judgment (discussed fully below) and in *Philip Dintsi and Another v Van Breda and Another* LCC 15/2019 where the candidate assisted both occupants and land owners with a simple and practical solution by allowing occupants the rights to a key

to a gate, as the impact of forcing those individuals to climb a fence to access their homes was an affront to their human dignity, but preserved the owner's right to keep his livestock quarantined in the area.

12. The candidate's ability to conduct court proceedings

12.1 Having regard to courts at which the candidate sat, we can only conclude that he has the judicial ability to conduct court proceedings. No adverse comments have been received.

13. The candidate's administrative ability

13.1 No adverse comments have been received. The candidate has acted in various administrative positions where his responsibilities included court flow and case management, as well as quality assurance in the sub-region, and drafting judicial circulars:

13.1.1 Acting head of Court at Vulindlela Magistrate's Office;

13.1.2 Acting judicial head of the sub-region for the cluster system courts at Hlanganani Magistrates' Office;¹

13.1.3 Judicial Head and Area Cluster Head at Umlazi Magistrate's Court where the candidate was responsible for administration of six other districts – Chatsworth, Umbumbulu, Scottsburg, Umzumbe, Vulanehlo and Richmond;

¹ published under proclamation 629 [GG] 24842.

13.1.4 Acting Chief Magistrate for the district of Durban, and in this role, he acted as the Judicial Administrative Head for 32 magisterial districts.

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

14.1 No adverse comments have been received. In the application form the candidate notes that there have not been any disciplinary proceedings held against him.

15. The candidate's judicial temperament

15.1 It is apparent in the 5 sample judgments included that the candidate applies sound reasoning to his judgments and applies the law fairly. This is demonstrated in *Omesh Ramnarain v State* wherein he set aside a decision on a criminal appeal finding it was unreasonable for the magistrate in the court a quo to not have applied the doctrine of sudden emergency.

15.2 In this instance, the candidate provided a clear application of fairness and understanding of the legal principles at play, where he surmised that the clear evidence of a rock present in the appellant's car confirmed the appellant's version as reasonably possibly true and that once the rock had struck the windscreen – the appellant's visibility was completely impaired at the moment when he hit the cyclist, who was also driving on a portion of the road no reasonable driver would expect a cyclist to be present.

15.3 Further, the candidate states during his acting positions he took a hard-line approach to postponements – refusing them often where witnesses

were present, and he worked to dramatically reduce outstanding court rolls. No adverse comments have been received.

16. The candidate’s commitment to human rights, and experience regarding the values and needs of the community

16.1 The candidate’s commitment to human rights and his understanding of addressing the practical needs of the community for effective judicial intervention is illustrated in the bold steps taken by the candidate in the *Mwelase* Judgment,² wherein the candidate used both a keen mind and dexterity to fashion and implement unique judicial remedies to secure practical justice for land claimants.

16.2 The candidate received commendation from the Constitutional Court, who praised his unique approach calling it ‘effective judicial intervention’. In its judgment, *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another*³ the Court stated:

“While the applicants sought to downplay the significance of appointing a special master, it must be accepted that no court order has done anything quite like this before.”⁴

16.3 Further:⁵

² see n 4.

³ *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30.

⁴ See http://www.saflii.org/za/cases/ZACC/2019/30.html#_ftn2 accessed on 8 March 2020 at paragraph 38.

⁵ See supra, paragraph [49].

“The vulnerability of those who suffer most from these failures underscores how important it is for courts to craft effective, just and equitable remedies, as the Constitution requires them to do. In cases of extreme rights infringement, the ultimate boundary lies at court control of the remedial process. If this requires the temporary, supervised oversight of administration where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done. Here, the fact that the Department’s tardiness and inefficiency in making land reform and restitution real has triggered a constitutional near-emergency, as explained earlier. This fact underscores the need for practically effective judicial intervention.”

17. The candidate’s potential

17.1 The candidate is 63 years old and has practised as a permanent magistrate for a long time. He has served frequently as an acting judge. In view of the candidate’s extensive and long-standing experience, he can appropriately be evaluated on his track record and significant experience rather than upon his potential.

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

18.1 The candidate is a black man; a respected magistrate and acting judge, as well as a teacher and academic.

18.2 The candidate’s appointment will send a positive message to the community at large that transformation is alive. Especially so, in light

of his humble beginnings as a court interpreter and a self-made man. Further, the Candidate's extensive experience as a jurist, makes him a valuable asset on the bench, as does his pragmatic and "out-of-the-box" thinking to judicial remedies, as commended by the Constitutional Court.