

APPLICANT: JUDGE M MOLEMELA

COURT FOR WHICH CANDIDATE APPLIES: CONSTITUTIONAL COURT

1. The candidate's appropriate qualifications:

1.1. The candidate holds the following degrees and diplomas:

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)

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

1.2. The candidate has certificates in:

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

1.2.2. Estate Agency (Estate Agency Affairs Board).

1.3. The candidate has participated in short courses relating to:

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

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

1.4. The candidate has held the following judicial positions:

- 1.4.1. Acting Judge, Free State Division of the High Court (Sept – Oct 2005; Oct – Nov 2006; July – Sept 2007);
- 1.4.2. Acting Judge, Gauteng Local Division of the High Court, Johannesburg (Nov 2007 – April 2008);
- 1.4.3. Permanent Judge, Free State Division of the High Court (July 2008 – 31 May 2018). Judge President (2015 – 31 May 2018)
- 1.4.4. Acting Judge, Labour Appeal Court (2012 – 2014);
- 1.4.5. Acting Judge, Competition Appeal Court (2012 – 2014);
- 1.4.6. Judge of Appeal, Labour Appeal Court (1 June 2014 to date);
- 1.4.7. Acting Judge, Constitutional Court (1 February 2015 – May 2015);
- 1.4.8. Acting Judge, Supreme Court of Appeal (December 2016 – 30 September 2017);
- 1.4.9. Judge of Appeal, Supreme Court of Appeal (1 June 2018 to date).
- 1.5. Prior thereto, the candidate was an arbitrator at the CCMA from 1999 – 2001.
- 1.6. The candidate 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).
- 1.7. 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. At present there are nine permanently appointed justices of the Constitutional Court. Five are black men and four are black women.

3.3. The appointment of the candidate would help to reflect the gender composition of South Africa as the Court's current composition is less than 50% women.

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

4.1. The candidate has, since 2005, held various permanent and acting 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.

4.2. We located 12 reported decision in which the candidate authored a judgment. These include judgments which relate to criminal law, administrative law, medical negligence, trusts, insolvency, access to information, and local government.

- 4.3. However, the candidate has written substantially more judgments that were not reportable. We located 84 judgments which have been published but not reported.
- 4.4. It is notable that two of the candidate's judgements have been applied by the Constitutional Court. *Provincial Minister for Local Government Western Cape v Oudtshoorn Municipal Council 2015 (6) SA 325 (CC)* was applied in *President of the Republic of South Africa v Democratic Alliance 2020 (1) SA 428 (CC)*. *Tsoaeli v S 2018 (1) SACR 42 (FB)* was applied in *Mlungwana v S 2019 (1) BCLR (CC)*.
- 4.5. In *Morudi v NC Housing Services & Development Co Ltd 2017 JDR 1614 (SCA)* the candidate wrote a dissenting opinion. This matter concerned an appeal against a decision of the Northern Cape Division to refuse a rescission application. The majority dismissed the appeal. The candidate dissented and would have upheld the appeal. On appeal the Constitutional Court noted that the difference between the majority and minority as being that the while both accepted that the applicants for rescission (respondents in the main application) had been cited as shareholders, the minority (i.e. the candidate) accepted this meant they were cited personally. The majority held they were not.
- 4.6. The Constitutional Court vindicated the candidate's position on this point and went on to uphold the appeal.
- 4.7. The candidate has produced numerous judgments across a variety of areas of law and her judgments have twice been cited by the Constitutional Court. This is indicative of a sound and comprehensive knowledge of the law.

5. The candidate's commitment to the values of the constitution:

5.1. The candidate has been involved a number of organisations which promote the values of the constitution. These include: the Free State Rural Development Association; the Free State Centre for Human Rights; the Black Lawyers Association; and the Black Lawyers Associations Legal Education Centre.

5.2. Generally, the judgments reviewed demonstrate sound and compassionate consideration. Where appropriate the judgments consider and apply the values and principles embodied in the Constitution.

5.3. The candidate is committed to constitutional values and the advancement of the values of the constitution.

6. Whether any judgments have been overturned on appeal:

6.1. The candidate lists two judgments which were successfully appealed:

6.1.1. *Lekhele v The State* (case No 234/2008). We have been unable to locate a copy of this decision.

6.1.2. *Liberty Group v Jordaan* (Case No A289/2011) 2012 JDR 1828 (FB). While the appeal was upheld, the appeal court noted that: the matter was conducted over several days over a period of several days; the record was voluminous; and the issues were complex.

6.2. The small number of judgments successfully appealed against indicate that the candidate has a good knowledge of the law and applies it accurately.

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

7.1. The candidate's application indicates a long and broad professional history, having commenced practice as a prosecutor in 1987 and since then has:

7.1.1. Practiced as an attorney (1993 – 1999; 2002 – 2007);

7.1.2. Sat as a commissioner for the Commission for Conciliation, Mediation and Arbitration (1999 to 2001)

7.1.3. Held acting and permanent positions as a judge of the High Court, Labour Appeal Court, and Supreme Court of Appeal as well as acting positions on the Competition Appeal Court 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. Of the 96 reported or published judgement reviewed the overwhelming majority were produced promptly. Only two entailed a protracted delay:

9.1.1. *Oppelt v Department of Health, Western Cape 2016 (1) SA 325 (CC)* was heard on 26 February 2015 and judgment was delivered on 14 October 2015.

9.1.2. *Shell SA Energy (Pty) Ltd v National Bargaining Council for the Chemical Industry 2013 JDR 0173 (LAC)* was heard on 15 March 2012 and judgment was delivered on 12 December 2012.

9.2. The candidate's record indicates that she produces judgments promptly.

10. The candidate's fairness and impartiality:

10.1. No adverse comments have been received in this regard. The judgments reviewed do not indicate that the candidate's fairness and impartiality are subject to question.

11. The candidate's independent-mindedness:

11.1. Many of the judgments reviewed are dissenting or separate judgments. This is indicative of the candidate applying her mind independently.

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.

12.2. There have been no complaints or adverse comments as to her ability to conduct court proceedings.

12.3. Therefore, there is no reason to doubt the candidate's 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 as does the fact that she served as the Judge President for the Free State Division of the High Court.
- 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 been involved in a number of organisations which promote the values of the constitution. These include: the Free State Rural Development Association; the Free State Centre for Human Rights; the Black Lawyers Association; and the Black Lawyers Associations Legal Education Centre.

17. The candidate's potential:

- 17.1. The candidate has an established judicial career and has served as both a High Court and appellate judge. Two of her judgments have been applied by the Constitutional Court.

17.2. This speaks to a high level of judicial potential.

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

18.1. The candidate's appointment is likely to communicate the following:

18.1.1. a commitment to gender transformation at the Constitutional Court.

18.1.2. a commitment to promoting judges who have established judicial careers and extensive experience.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions:

Doorewaard and Another v S 2021 (1) All SA 311 (SCA)

Airports Company South Africa Soc Ltd v Imperial Group Ltd and Others 2020
(4) SA 17 (SCA)

*Haarhoff and Another v Director Of Public Prosecutions Eastern Cape
(Grahamstown)* 2019 1 All SA 585 (SCA)

AN v Member of the Executive Council for Health, Eastern Cape 2019 (4) All SA
1 (SCA)

Harvey NO and Others v Crawford NO and Others 2019 (2) SA 153 (SCA)

*Recycling and Economic Development Initiative of South Africa NPC v Minister
of Environmental Affairs* 2019 (3) SA 251 (SCA)

Griessel NO and Others v De Kock and Another 2019 (5) SA 396 (SCA)

Mahaeane and Another v AngloGold Ashanti Ltd 2017 (6) SA 382 (SCA)

Oppelt v Department of Health, Western Cape 2016 (1) SA 325 (CC)

*Provincial Minister for Local Government, Western Cape v Oudtshoorn
Municipal Council and Others* 2015 (6) SA 115 (CC)

Tsoeli and 98 Others v The State 2018 (1) SACR 42 (FB)

S v Pilane 2017 (2) SACR 154 (SCA)

Unreported decisions:

84 additional, unreported, decisions were considered to evaluate the promptness of delivery of judgment but were not considered for substance.

Judgments upheld on appeal

Morudi v NC Housing Services & Development Co Ltd 2017 JDR 1614 (SCA)

The candidate lists 8 other decisions as having been unsuccessfully appealed. We were not able to locate the appeal judgments in respect of any of these matters.

Judgments overturned on appeal

Liberty Group v Jordaan 2012 JDR 1828 (FB)

Lekhele v The State (case No 234/2008). We have been unable to locate a copy of this decision.