

**APPLICANT: ADV PORTIO DIPUO PHAHLANE**

**COURT FOR WHICH CANDIDATE APPLIES: HIGH COURT**

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

- 1.1. B Proc – 2000, Vista University (Mamelodi Campus).
- 1.2. LLB – 2002, Vista University (Mamelodi Campus).
- 1.3. Practising advocate since February 2003 at the Church Square Bar, Pretoria.

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

- 2.1. Letter of good standing from the LPC.
- 2.2. Letter of good standing from the Church Square Bar.
- 2.3. Confirmation that the candidate is fit and proper is contained in the support letter by Adv Mphaga (DPP).

**3. Whether the candidate's appointment would help to reflect the racial and gender composition of South Africa:**

- 3.1. Yes, the candidate is black and female.

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

- 4.1. In the JSC questionnaire, which would benefit from more detail, the candidate states that her practice consists predominantly of criminal work, with 10% attributable to administrative law and 10% attributable to constitutional law, although no further details are

provided in this regard. She also mentions that she specialises in personal injury claims.

- 4.2. Whilst sitting as an acting judge on 9 different occasions between November 2017 and December 2020, the candidate states that she has presided over a wide range of matters, including criminal trials, appeals and reviews, civil trials and reviews, opposed and unopposed motions and divorces.
- 4.3. A search for judgments by the candidate reveals at least 32 judgments whilst acting, the majority of which she penned. The topics traverse criminal law, administrative law, RAF matters, family law, insolvency law, NCA matters, and general procedural matters.
- 4.4. As one can expect from someone with the candidate's experience, her judgments in criminal and RAF matters are well-reasoned and sound. The matters of *Chikane v S* and *Jonker v RAF*, which the candidate attaches to her application, illustrate this.
- 4.5. In the matter of *Masindi & Another v National Director of Public Prosecutions* 2020 (1) SACR 216 (GP), where the candidate wrote the judgment on behalf of the Full Court, she drew on her experience in criminal law, combined with a good understanding of the law of evidence, in an appeal relating to the determination of quantum for unlawful detention.
- 4.6. In the matter of *Lisoti Logistics v Vaal Maseru & Another*, which is contained in the candidate's application, she correctly sets out the law relating to absolution from the instance to overturn an incorrect decision from the court *a quo*.

- 4.7. The candidate's decision in *Continental Power Supplies (Pty) Ltd v the Minister of Trade and Industry* 2020 JDR 2601 (GP) related to a review of administrative action under PAJA. Although it referred to constitutional case law on the topic, it is an area of law in which the candidate would benefit from more exposure.

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

- 5.1. Part of the candidate's practice includes briefs from Legal Aid. The letter of support from Manzini talks to the candidate's "*eagerness to ensure justice and [the] best possible outcome for her clients*".
- 5.2. Save to mention that she occasionally represents the poor "*with no expectation [of] a fee*" and routinely accepts briefs from the Legal Aid, there is no further insight from the candidate regarding her commitment to constitutional values.
- 5.3. The letter of support from Ngobeni (DPP) provides an example of defending an accused under trying circumstances. He also mentions that the candidate is "*very much awake to the principles of Ubuntu*".

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

- 6.1. The only judgment that we came across from the candidate that was overturned on appeal is in the matter of *The Director of Public Prosecutions v Mbonani* 2020 JDR 2039 (SCA). The candidate's judgment in the court *a quo* was handed down on 13 March 2018, during the candidate's second acting appointment. It was a criminal case which focused on the admissibility of a confession and circumstantial evidence. Although the judgment in the court *a quo* reflects her relative inexperience at the time, it provides a valuable

yardstick to measure her significant improvement as an acting judge since then.

- 6.2. In the candidate's JSC questionnaire, she indicates that the result of the SCA judgment was that "*[the] matter was referred back (by the SCA) for sentence to be imposed on the accused*". This is incorrect. Although the SCA dismissed the appeal in respect of the main counts of premediated murder, robbery and rape, it overturned the court *a quo*'s acquittal of the accused on the alternative counts of murder (without planning or premeditation) and theft, and replaced that order with a guilty finding of murder and theft.

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

- 7.1. The candidate has practised as an advocate for approximately 18 years. Her practice appears to be relatively confined to criminal and personal injury matters, in which she has considerable experience.
- 7.2. However, and to the candidate's credit, her varied judgments in her capacity as an acting judge display a potential to develop her knowledge in other areas of law. In particular, she will benefit from further experience in the fields of administrative and constitutional law.

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

- 8.1. The candidate's earlier judgments were sometimes difficult to follow and tended to meander somewhat. Her linguistic and communication skills, at least in respect of drafting judgments, has improved significantly since then. The candidate's more recent judgments are much easier to follow.

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

9.1. The candidate's ability to produce prompt judgments is highly commendable. Of the 32 judgments considered, only 1 took approximately 6 months. The large majority of judgments were handed down within a month (or often sooner) with a few taking approximately 2 months.

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

10.1. Save for what is mentioned in paragraph 12 below, there is nothing to suggest that the candidate is not fair or impartial. The candidate's fairness and impartiality are most notably displayed in her criminal judgments where she appears balanced both in respect of the accused and the state.

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

11.1. There is nothing to suggest that the candidate does not bring an independent mind to bear in the matters she presides over.

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

12.1. One of our colleagues reported that she had appeared before the candidate for the applicant in an unopposed matter during December 2020. The respondent appeared in person and raised an issue of prescription in open court. The respondent was not sworn in to give any evidence regarding prescription. Instead of removing the matter from the unopposed roll and directing the respondent to file papers setting out his/her defence under oath so that it may be considered for the opposed roll, the candidate improperly upheld the prescription point and dismissed the application.

12.2. Another colleague reported that he was acting for the RAF in a matter that came before the candidate during mid-2020 (on the Zoom platform). The matter became settled and stood down to the next day so that our colleague could prepare a draft order of settlement, which was to be made an order of court. The draft order was prepared and submitted to the candidate. When the granted order was returned to our colleagues' instructing attorney, the candidate had unilaterally reduced his agreed fee from 2 days to 1 day. The concern is that the candidate did so without raising the issue with our colleague or giving him an opportunity to explain the fee that he charged.

12.3. Both of the above examples raise a concern that the candidate did not fully appreciate certain procedural requirements in the respective courts or sufficiently allow for *audi alteram partem*.

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

13.1. The relative speed with which the candidate hands down her judgments attests to her administrative ability. Her diligence and work ethic is also confirmed in the support letter by Mphaga, who states that the candidate seldom leaves her offices before 20h00 and regularly works on weekends.

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

14.1. The support letter from Ngobeni states that the candidate's "integrity, responsibility and objectivity within the profession would be a huge benefit".

14.2. The nomination from Adv Pienaar SC also states that he "has full confidence in her practice ethics, her integrity and humility".

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

- 15.1. Having appeared before the candidate in a Full Court appeal in a construction-related matter, the reviewer notes that the candidate did not engage much with either side. The reason for this may have been that the issues were fairly crisp and the questions were adequately covered by the senior judge presiding with her.
- 15.2. During introductions prior to the matter being heard, the candidate came across as courteous.

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

- 16.1. The candidate refers in her *curriculum vitae* to only two examples of *pro bono* work in 2017 and 2019, since commencing practise as an advocate in 2003.
- 16.2. The candidate has been marking assignments and examination scripts for legal students at UNISA since 2016.
- 16.3. In 2019 the candidate donated to a charity drive established by a senior judge to provide wheelchairs to disabled students at universities.

**17. The candidate's potential:**

- 17.1. With the benefit of more exposure to constitutional and administrative law matters, the candidate shows potential. Her judgments have improved significantly since when she first sat as an acting judge.

17.2. The only remaining concern relates to the two experiences relayed by our colleagues that are referred to in paragraph 12 above.

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

18.1. The candidate is a black single mother of 4 children between the ages of 12 and 30. She has practised as an advocate for 18 years, relying largely on criminal work and briefs from Legal Aid. She has developed her skills as an acting judge through her 9 appointments since November 2017. All of these qualities would send a positive message to the community at large should she be appointed.

**ANNEXURE: LIST OF JUDGMENTS CONSIDERED****Reported decisions:**

*Masindi & Another v National Director of Public Prosecutions* 2020 (1) SACR 216 (GP)

**Unreported Decisions:**

*Mogale v The Minister of Police* 2020 JDR 0948 (GP)

*Jonker v Road Accident Fund* 2020 JDR 0145 (GP)

*JP v JH* 2020 JDR 0512 (GP)

*Strauss v Kruger* 2020 JDR 0661 (GP)

*Tammy Taylor JJ (Pty) Ltd v Tammy Taylor Nails SA Franchising (Pty) Ltd* 2020 JDR 0662 (GP)

*BMW Financial Services (South Africa) (Pty) Ltd v Moosa* 2020 JDR 0716 (GP)

*Tension Overhead Electrification (Pty) Ltd v Ircon International Limited* 2020 JDR 0984 (GP) (prepared by Davis J)

*Continental Power Supplies (Pty) Ltd v The Minister of Trade and Industry* 2020 JDR 2601 (GP)

*Lisoti Logistics v Vaal Maseru & Another* (attached to application)

*Chikane v S* (attached to application)

**Judgments upheld on appeal:**

None.

**Judgments overturned on appeal:**

*S v Mbonani* 2018 JDR 0536 (GP) partially overturned in *The Director of Public Prosecutions: Gauteng Division, Pretoria v Mbonani* 2020 JDR 2039 (SCA).