

APPLICANT: MR DANIEL MALEFU THULARE

COURT FOR WHICH CANDIDATE APPLIES: WESTERN CAPE HIGH COURT

1. The candidate's appropriate qualifications

- 1.1. B Iuris (UNISA, 1996)
- 1.2. Bachelor of Laws (LLB) (UNISA, 1998)
- 1.3. Master of Laws (LLM) (UNISA, 2002)
- 1.4. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

- 2.1. The candidate is presently the Chief Magistrate of Cape Town and has served eight (8) terms as Acting Judge at the Western Cape High Court, from 2017 until the end of 2018. The candidate also served as acting judge in the Gauteng North High Court during 2014 and 2016.
- 2.2. We are not aware of any professional complaint being made against the candidate in any of these capacities.
- 2.3. There seems to be no reason to find that the candidate is not fit and proper.

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 male.

- 3.2. His appointment would therefore enhance the representation of black persons on the bench.

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

- 4.1. The candidate has limited experience in a number of areas of the law, including immigration law, but substantial experience in criminal law.
- 4.2. The candidate has fifteen (15) reported High Court judgments and a number of unreported judgments.
- 4.3. The majority of matters (11) dealt with in the candidate's reported judgments entailed criminal trials.
- 4.4. One of his reported judgments was overturned on appeal. Three of his unreported judgments were reversed on appeal. These judgments are referred to in paragraph 6.1 below.
- 4.5. The candidate considered principles of constitutional law in certain of his judgments relating to immigration, equality and criminal matters. One of these judgments as referred to in paragraph 6.2 below, has been criticised and not followed in this court.
- 4.6. It appears that the candidate's knowledge of the law and his experience on the bench either in the Magistrate's Court or as acting judge are mostly confined to criminal, equality and immigration law.

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

- 5.1. There is no reason to doubt the candidate's commitment to the values of the Constitution. His experience on the bench in the field of Constitutional Law, however appears to be limited.

5.2. Constitutional considerations were mentioned in, or were central to, two of his judgments. These are:

5.2.1. *Inzinga Ranch CC vs Mashiyi* 2018 JDR 1456 (WCC) (a judgment wherein the question of racial discrimination in the workplace was discussed).

5.2.2. *Nandutu vs The Minister of Home Affairs* [2018] 3 ALL SA 259 (WCC), (a judgment wherein it was considered whether the prohibition against a foreign spouse of a South African citizen or permanent resident, holding a visitor's visa against applying for change of status while in South Africa, infringes the constitutional right to dignity). As noted, this judgment of the candidate was overturned on appeal (see: *Nandutu and Others vs Minister of Home Affairs and Others* (CCT 114/18) [2019] ZACC 24; 2019 (8) BCLR 938 (CC); 2019 (5) SA 325 (CC) (28 June 2019).

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

6.1. To our knowledge four of the candidate's judgments were overturned on appeal. The unreported judgments in which the candidate's judgments were overturned are: *S vs Cooper* 2019 JDR 0645 (SCA), *NC vs The State* (285/2018) [2019] ZASCA 50 (1 April 2019), *Uniting Presbyterian Church in SA and Another vs Reformed Presbyterian Church in Southern Africa and Others* (1438/2018) [2019] ZASCA 129 (30 September 2019). The reported judgment of the candidate which was overturned is: *Nandutu and Others vs Minister of Home Affairs* [2018] 3 ALL SA 259 (WCC).

- 6.2. It has further come to our knowledge that the Western Cape High Court in the decision of *Hano Mong vs The Director of Public Prosecutions and the Minister of Police*, Case Number 17593/2018 (dated 23 August 2019) found that the decision of the candidate (with which Dolamo, J concurred) in *S vs Madhina* 2018 JDR 2142 (WCC) was manifestly wrong (para [82] and [83]) and should not be followed because it is in conflict with a long line of decisions.

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

- 7.1. The candidate worked as an interpreter with the Department of Justice from 1991 to 1997. From 1996 to 1999 the candidate was a prosecutor with the Department of Justice. During 1999 the candidate was a candidate attorney with Du Preez & Nkozi Inc. From 1999 to 2005 the candidate was a magistrate. From 2005 to 2016 the candidate was a senior magistrate. From 2016 to date the candidate was the Chief Magistrate of Cape Town.
- 7.2. The candidate's extensive experience as a prosecutor, magistrate and acting judge exposed him to many years of law. He had a particular focus on criminal and immigration law.
- 7.3. About two thirds of the candidate's High Court trial experience is focused on criminal trials and appeals.
- 7.4. The candidate held the position as member (from 2000-2003), provincial chairperson (from 2004-2006), member (from 2005-2017) and president (from 2017 to date) of The Judicial Officers Association of South Africa (JOASA). The candidate has been a member from 1993 to date of the National Union of Public Service and Allied Workers (NUPSAW).

8. **The candidates linguistic and communication skills**

- 8.1. The candidate's written judgments portray a good profession of, and communication skills in English.
- 8.2. The candidate's National Senior Certificate shows that he is able to understand and communicate in Afrikaans.
- 8.3. The candidate's National Senior Certificate also shows that his first language is Tswana. It is not known whether he has any proficiency in any other African language.

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

- 9.1. The candidate's application portrays outstanding judgments of short periods only.

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

- 10.1. We have received comment from members indicating that the candidate approaches matters with an ostensibly high degree of certitude and obstinacy. Ironically, he was effectively told as much by Thandi Norman SC during his previous interview (<https://www.youtube.com/watch?v=zUSvgZrMXhQ&t=3702s>):

*"I am just concerned about something. You know what worries me is if you appoint someone as a judge you are giving someone more power, and you always worry because the person that possesses that power must always feel that other people can say I am wrong and accept it. Now having listened to you **I am concerned, in fact, I am bit scared...** You made a statement that two judges, Judge Henney and Samela have found differently, [to Thulare] but you insist that you are standing by your decision. That's my concern, at what point do you get to say, yes, I may be wrong, maybe they are quite correct, but to actually insist in the manner in which you are insisting, because*

I'll tell you what worries me: once you reach a point where you are a judge and another court finds that you are wrong, with that attitude it is going to be very difficult for you to accept that these judges are correct and you might have division where every time you are overturned by your colleagues, if you are sitting as a single judge and you are overturned by a full bench, it then becomes a problem. So please just deal with that I am very concerned."

- 10.2. Those remarks mirror the experience of some members who have appeared before the candidate. His unacceptable treatment of a junior member was taken up with him by a section member of the Bar.

11. The candidate's independent-mindedness

- 11.1. We refer to the comment under 10. above.

12. The candidate's ability to conduct court proceedings

- 12.1. We refer to the comment under 10. above.

13. The candidate's administrative ability

- 13.1. The profession cannot comment on the candidate's administrative abilities in his capacity as a magistrate or acting judge.
- 13.2. However, it appears from the written support for his application filed by the candidate's magistrate colleagues, that he was well organised and acted as a leader in his profession.

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

- 14.1. No complaints or queries about the candidate's ethical standards or integrity have been received.

15. The candidate's judicial temperament

15.1. Members who have appeared before the candidate note that he is irascible. We refer to the comment under 10 above.

15.2. He is not considered to have a sound judicial temperament.

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

16.1. The candidate's judgments, regarding issues of racial discrimination and immigration, though unreported, demonstrate his commitment to human rights and to the enhancement of the values and needs of the community.

17. The candidate's potential

17.1. The candidate's career as a magistrate and also his stints as an acting judge in two divisions of the High Court demonstrate his commitment to continue to contribute to transformation both inside and outside the legal profession.

17.2. The candidate's potential insofar as the quality and diversity of his judgments are concerned, ought to be weighed up objectively with those of other applicants. He does not seem to have the required judicial temperament.

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

18.1. The candidate is black. He is supported by the Black Lawyers Association who has reiterated that the candidate encouraged black

lawyers to serve both as commissioners of the Small Claims Court and to act as magistrates in vacant positions.

- 18.2. The candidate's appointment would send a message to the legal and wider community that black male candidates of undoubted integrity and who also have the support of female members of the profession, can add value to the development of our constitutional democracy.