

## **APPLICANT: ADVOCATE NCEBA KIRBY DUKADA**

### **COURT FOR WHICH APPLICANT APPLIES: MTHATHA**

Comments were previously submitted relating to the candidate for the April 2021 JSC interviews. The candidate withdrew his application at his interview stating that he had been unable to obtain a letter of good standing from the Johannesburg Society of Advocates (“JSA”).

Many of the previous comments will be repeated herein. Dukada SC provided a response to the previous comments made, which is attached as “**R1**” (without annexures).

#### **1 The candidate’s appropriate qualifications**

1.1 B.Juris (Walter Sisulu University 1983)

1.2 LLB (University of Natal 1988)

1.3 The candidate is appropriately qualified

#### **2 Whether the candidate is a fit and proper person**

2.1 The candidate did not provide a letter of good standing from the Johannesburg Society of Advocates (JSA) in his previous application. In his response (page 5 of “**R1**”) the candidate attached a letter from the JSA dated 2 February 2021, which is attached hereto as “**R2**”, which states at paragraph 5 that “*There is presently one pending investigation which is being carried out by the Society’s Professional and Fees Sub-Committee, into his professional conduct.*” The candidate resigned from the JSA on 4 May 2021 with immediate effect.

2.2 The candidate's current application states that he ceased practicing in 2020 (which is not understood as he previously indicated that he was practicing at the JSA in 2021) and that on 2 June 2021 he was admitted as a member of the Mthatha Society of Advocates. The letter of good standing from the Mthatha Society of Advocates is dated 21 June 2021.

Reports from two government departments relating to the candidate's conduct were referred to the JSA which are dealt with below.

2.3 During 2015 the Department of Justice issued a report, under reference 82/2015, regarding allegations of fraudulent activities at the Mthatha State Attorney's office dealing with the candidate. The report is attached as "A" (annexures thereto are not attached) and includes the statement that the candidate charged more than one day fee on various dates.

2.4 The aforesaid report was referred to the JSA and the candidate's response thereto is attached as "B".

2.4.1 The candidate's explanation for charging more than one day fee on one day is, generally, because he worked on one matter from 04h00/05h00 to 13h00 and on another matter from 14h00 to 22h00/23h00.

2.5 The candidate provided a letter from the JSA, dated 6 September 2018 and attached as "R3", which stated that he was not guilty of unprofessional conduct.

2.6 By letter dated 16 September 2020 the Special Investigating Unit (SIU) addressed correspondence to the JSA relating to possible improper or

unlawful conduct by the candidate, which is attached as “C”. The statement of Mr Bantu Peter, referred to in annexure “C”, is attached (without annexures to the statement). The report included some of the invoices which were referred to in “A”.

2.7 A spreadsheet of the invoices referred to in the statement of Mr Peter, limited only to the dates on which more than one day fee has been charged on one date, is attached as “D”. The candidate has charged more than one day fee on 42 dates and the day fee which appears in bold and italics are days on which the invoice reflects that the candidate was in court. The invoices referred to therein are attached and referenced as they are in “C”.

2.8 The report of the SIU was referred to the JSA and the candidate’s response thereto is attached as “E”.

2.8.1 The candidate’s response to charging more than one day fee on one date is, generally, the same as those contained in “B”.

2.9 In response to the previous comments, at page 4 of “R1”, the candidate refers to a further report, which is attached as “R4”, and states that it is clear from the report that he is not guilty of any unlawful conduct.

2.10 The following is highlighted from “R4”:

2.10.1 On 4 occasions the candidate charged three separate day fees on a single day (page 6, paragraph 1);

2.10.2 On 10 occasions the candidate charged two separate day fees on a single day (page 6, paragraph 2);

- 2.10.3 The candidate has failed to maintain proper accounts and “*this does not constitute a mere technical misdemeanour but represents a series of repeated omissions which has resulted in investigations by two organs of state. The member’s conduct has in this regard had the result of bringing the advocates’ profession into disrepute.*” (page 14); and
- 2.10.4 “*...if evidentially established, sustain a transgression by the member of the Rules of the JSA and will thus constitute unprofessional conduct. It is recommended that Profcom pursue these aspects of the matter.*” (page 15)
- 2.11 Despite the candidate’s resignation from the JSA, it was resolved to continue with the investigation emanating from the report of the SIU given the seriousness of the complaint. The disciplinary proceedings have not yet been finalised. The candidate’s statement at page 18 of his application that “*the Professions and Fees Committee of the Bar sent to me a report exonerating me of any criminal offence*” is not accurate as the investigation is proceeding.
- 2.12 It is raised for consideration that the candidate should have disclosed the above in the questionnaire in response to paragraph 1 (*Are there any circumstances, financial or otherwise, known to you which may cause you embarrassment in undertaking the office of a judge?*) and paragraph 4 (*Is there any other relevant matter which you should bring to the attention of the commission*”). The candidate answered “NO” to both questions.

The issue of potentially invalid VAT numbers was previously raised and is raised again for consideration.

2.13 The SARS website has been accessed to perform a VAT vendor verification on the two VAT numbers reflected on the candidate's invoices (numbers 48101612828 and 481016128). Both VAT numbers on the SARS website indicate "Invalid VAT number". This appears to have previously been raised (see paragraph 2.3.56 of "A"). Accordingly, a concern is raised as to whether the candidate is in fact registered for VAT and whether VAT is being paid to SARS. The candidate's response, in "RA1", is that the offices of SARS should have been approached. It is the candidate's duty to deal with the concern raised and to show that his tax affairs are in order.

2.14 On the information available it cannot be stated 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 male.

3.2 The candidate's appointment would help reflect the racial composition of South Africa.

3.3 The candidate's appointment would not help reflect the gender composition of South Africa.

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

4.1 Only three judgments authored by the candidate have been disclosed, with one being reported.

4.2 The candidate has been a prosecutor, magistrate, and an advocate for more than 30 years.

4.3 The candidate has also been a Senior Counsel for more than 14 years.

4.4 The candidate has been taken various stints as an acting judge in a number of provinces.

#### **5 The candidate's commitment to the values of the Constitution**

5.1 This cannot be fairly commented on in light of the serious allegations reported by the SIU and the concern relating to the candidate's VAT registration status.

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

6.1 No judgments appear to have been overturned on appeal.

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

7.1 The candidate has been a clerk, prosecutor, assistant magistrate and advocate.

7.2 The candidate has failed to disclose the exact dates of his acting appointments and this can accordingly not be commented on.

## 8 **The candidate's linguistic and communication skills**

8.1 The candidate's linguistic and communication skills are adequate.

8.2 The candidate speaks fluent english and isixhosa.

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

9.1 In *National Council of Societies for the Prevention of Cruelty to Animals v Al Mawashi and others* (pages 36-54 of the candidate's application) it indicates that the application was urgent and heard on 6 August 2020. Only after the parties addressed correspondence to the Registrar seeking the judgment was an order delivered on 25 August 2020. Reasons for the order were handed down on 15 October 2020.

9.1.1 Although the issue of urgency was argued at the hearing, paragraph 7 of the judgment states "*The urgency is no longer in issue at this stage because I have already granted an order permitting the First and Second Respondents to transport sheep...*"

9.2 Further concerns have been raised regarding the conduct of the candidate in the aforesaid matter, which concerns are reflected in the correspondence attached as "F".

9.2.1 The candidate made an order, after being requested to do so, approximately 18 days after the matter was argued in circumstances in which each day was costing a litigant R1million.

9.2.2 The candidate undertook to provide reasons by 15 September 2020 and failed to do so.

- 9.2.3 The candidate's failure to provide reasons led to the Judge President's intervention being requested on 22 September 2020.
- 9.2.4 A judgment in a separate, but related, application relating to costs was only handed down on 5 November 2020. Despite repeated attempts to set down an application for leave to appeal, this was unsuccessful.
- 9.2.5 The Judge President had to be approached (again) and the application for leave to appeal has been allocated to a different judge.
- 9.2.6 The aforesaid was raised in the previous comments regarding the candidate and he denied that the application for leave to appeal was allocated to a different judge. Attached hereto, as "G", is the application for leave to appeal the candidate's judgment. Paragraph 1 of "G" confirms that the application for leave to appeal was allocated to a different judge.
- 9.3 The conduct of the candidate, as reflected in "F", is not befitting of a judicial officer and appears to contravene Article 10(a), (b), (c), (d) and (g) of the Code of Judicial Conduct relating to diligence and the candidate incorrectly stated that the application for leave to appeal was allocated to a different judge.

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

- 10.1 There is nothing to suggest that the candidate is not fair and impartial.

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

11.1 There is nothing to suggest that the candidate is not independent.

## **12 The candidate's ability to conduct court proceedings**

12.1 There is nothing to suggest that the candidate does not have the ability to conduct court proceedings, save for what is stated above.

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

13.1 The candidate appears to lack the required and necessary administrative ability, which inadequacy is reflected in "F".

13.2 The candidate was however once Chairperson of the Transkei Society of Advocates now the Mthatha Society of Advocates, where he demonstrated good administrative skills.

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

14.1 Reference is made to what is stated above regarding the candidate's behaviour and conduct.

14.2 Based on the information contained in the report from the SIU, the concerns regarding the candidate's registration for VAT and the candidate's conduct reflected in "F" it cannot be stated that the candidate has the integrity and ethics required of a judicial officer.

## **15 The candidate's judicial temperament**

15.1 There is nothing to suggest that the candidate's judicial temperament is not adequate.

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

16.1 There is nothing to suggest that the candidate is not committed to human rights.

**17 The candidate's potential**

17.1 The candidate is currently 63 years of age (date of birth 18 January 1958) and, if appointed, would serve for a maximum number of approximately 12 years.

17.2 The candidate has indicated in his CV that he suffers from a medical condition but has not provided sufficient detail to assess whether the candidate's health is a concern which should be considered. The candidate was previously hospitalised for an extended period of approximately 2 months in 2020. This was raised in the previous comments regarding the candidate and his response, at paragraph 4 of "R1", was "*I had deemed it not necessary to give any details because I considered that my health condition is not directly relevant to the application. I suffer from diabetes which is a chronic medical condition and I continue to treat it*". The candidate failed to disclose this medical condition in his current application.

17.3 In the candidate's CV under health it is disclosed that "*I have recovered from a medical condition which affected my mobility by attending physiotherapy and biokinetics*". It is understood that the candidate was also recently hospitalised during 2021.

17.4 Despite the above the candidate, at paragraph 11 of the questionnaire, indicates “NO” to the question “*Is there anything about the state of your health which should be disclosed to the commission?*”

17.5 The candidates age and health is accordingly of concern.

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

18.1 Reference is made to the concerns raised above regarding the serious allegations of unprofessional conduct, the invalidity of the candidate’s VAT number and his conduct as reflected in “F”. The appointment of the candidate in these circumstances would negatively impact on the public’s perception of the integrity of the judiciary.

## **ANNEXURE: LIST OF JUDGMENTS CONSIDERED**

### **Reported decisions**

The candidate only has 2 reported judgments:

*Jenkins v Government of the Republic of South Africa and Another* 1996 (3) SA 1083  
(TKS)

*Avusa Publishing Eastern Cape (Pty) Ltd v Qoboshiyane NO and Others* 2012 (1)  
SA 158 (ECP)

### **Unreported decisions**

As reflected in the candidate's application.

### **Judgments upheld on appeal**

*Avusa Publishing supra* was upheld on appeal.

### **Judgments overturned on appeal**

No judgments which were overturned on appeal could be identified.