

APPLICANT: MR MNCEDISI PATRICK KHUMALO

COURT FOR WHICH CANDIDATE APPLIES: GAUTENG DIVISION OF HIGH COURT

1. The candidate's appropriate qualifications

- 1.1. LLB (1987) and B.Proc (1985) (University of Zululand);
- 1.2. LLM (1989) (University of Pennsylvania, USA);
- 1.3. Higher Diploma in Company Law (1998) (WITS).

2. Whether the candidate is a fit and proper person

- 2.1. There is nothing in the candidate's application or judgments to suggest he is not 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. There are currently 73 full time judges on the Gauteng bench, comprising (as far as could be ascertained):
 - 3.1.1. 22 black women (17 African, 3 Indian, 2 Coloured);
 - 3.1.2. 25 black men (18 African, 5 Indian, 2 Coloured);
 - 3.1.3. 13 white women; and
 - 3.1.4. 13 white men.
- 3.2. The candidate is a black man.

4. The candidate's commitment to the values of the constitution

- 4.1. There is nothing in the candidate's application that reflects a recent commitment to the values of the Constitution.

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

- 5.1. In general, the candidate's judgments evidence a reliance on outdated sources of law and include very little, if any, reference to recent sources, including relevant case law from the Constitutional Court. See for example *Sithuse v PRASA* (A18/2012) ZAGPPHC (13 February 2020) at paragraph [32].

- 5.2. In the *Sithuse* case, the candidate went beyond the proven facts. See for example at paragraphs [37], [43], [44], [63] and [64].

- 5.3. In the subsequent appeal against that judgment, the candidate was criticised by the Supreme Court of Appeal as having misdirected himself “*by impermissibly placing the onus on [the defendant] to prove that [the plaintiff] had attempted to commit suicide. [The candidate's] decision to hold [the defendant] liable was made on an incorrect legal basis*”. In the same case, the Supreme Court of Appeal criticised the candidate for not considering “*the host of improbabilities*” involved. See paragraphs [26] and [30].

- 5.4. The candidate shows a superficial understanding of the law based on outdated sources but has set out incorrect legal principles in at least one judgment. In this regard, see paragraph 25 of the judgment in *Coetzee v Janse van Rensburg* (31884/2018) [2020] ZAGPPHC 457 (19 August 2020) regarding the law of defamation.

5.5. In *The Law Society of the Northern Provinces v Padayachy*, 2021 JDR 0760 (GP) the candidate opined that since a rule *nisi* had been issued, the onus had shifted to the respondent. That is not correct and shows a lack of awareness of procedural law and/or remarkably poor use of language.

6. Whether any judgments have been overturned on appeal

6.1. One judgment, discussed above, has been found that was overturned on appeal.

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

7.1. The candidate has many years of professional experience, including:

7.1 Legal Advisor at the Unizulu Legal Aid Clinic (December 1987 to June 1988).

7.2 Candidate Attorney at Cheadle Thompson and Haysom (January 1990 to December 1991).

7.3 Co-Founder and Director of Shabalala Maserumele (January 1992 to January 1993).

7.4 Professional Assistant at Cheadle Thompson and Haysom (February 1993 to October 1993).

7.5 Legal Advisor at Billiton (November 1993 to June 1998).

7.6 Co-Founder and Director at Maserumule Attorneys (July 1998 to August 2006).

- 7.7 Director at Brink Cohen Le Roux Inc. (January 2008 to December 2008).
- 7.8 Legal Manager FIFA World Cup SA (January 2007 to June 2009).
- 7.9 Head of Legal FIFA World Cup SA (2009 to June 2011).
- 7.10 Senior Consultant at Ntshebe Inc. Attorneys (2013 to date).

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

- 8.1. The candidate's use of language in judgments is poor. The text of the judgments reviewed is often confusing and in certain cases unintelligible. Judgments appear to be unedited.

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

- 9.1. Seven judgments were reviewed. The following judgments were not produced promptly:

- 9.1 *Coetzee v Janse van Rensburg* (31884/2018) [2020] ZAGPPHC 457 (19 August 2020). – defamation matter heard from 16 to 18 March 2020 where judgment was handed down on 19 August 2020.

- 9.2 *The Legal Practice Council v Meyer* 2021 JDR 0760 (GP)– application to strike an attorney from the roll heard on 3 August 2020 where judgment was handed down 26 February 2021.

- 9.3 *Sithuse v PRASA* (A18/2012) ZAGPPHC (13 February 2020)– damages claim heard on 23 October 2019 where judgment was handed down on 13 February 2020.

9.4 *LPC v Meyer* (59057/2019) 2021 JDR 0760 (GP) – striking off application heard on 3 August 2020 where judgment was handed down on 26 February 2021.

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

10.1. While it appears that the candidate is, in general, fair and impartial, the candidate appears to have made an award of punitive costs without such having been sought or pleaded in *Coetzee v Janse van Rensburg* (31884/2018) [2020] ZAGPPHC 457 (19 August 2020).

10.2. In *LPC v Meyer*, a striking off application, it was beyond question that the respondent had failed in her duties as an attorney. Her case seems to have been that she was addicted to narcotic drugs and her addiction was the cause of her behaviour. While the candidate fully set out the allegations against her, he only mentioned this aspect of the case in a single line at the very end of his judgment. The issue, which seems to be at the heart of the matter, was not examined thoroughly in the judgment. The candidate also did not refer to precedent dealing with such cases and what weight, if any, should be attached to such matters.

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

11.1. No adverse information was received.

12. **The candidate’s ability to conduct court proceedings**

12.1. There is nothing to suggest the candidate is unable to conduct court proceedings.

13. The candidate's administrative ability

- 13.1. The candidate produced a significant number of judgments more than three months after the hearings of the matters.

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

- 14.1. There is nothing to suggest that the candidate is not ethical or does not have integrity.

15. The candidate's judicial temperament

- 15.1. No adverse information was received.

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

- 16.1. During the candidate's LLB studies (which commenced during 1986), he volunteered at the University of Zululand's Applied Legal Studies Centre, including by supervising other undergraduate law students who volunteered their time there.

- 16.2. The candidate was also involved in a project called "Street Law" involving local schools around Kwa-Dlangeza and Esikhawini.

17. The candidate's potential

- 17.1. The candidate is 61 years old.

- 17.2. The reviewed judgments show that there are areas of critical importance where significant improvement is required.

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

- 18.1. The appointment of this candidate has the potential of sending a message to the community at large that persons lacking important judicial skills may be appointed as judges.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Bangiwe v Road Accident Fund 2021 (3) SA 172 (GP)

Unreported decisions

Coetzee v Janse van Rensburg (31884/2018) [2020] ZAGPPHC 457 (19 August 2020)

The Legal Practice Council v Meyer 2021 JDR 0760 (GP)

Law Society of the Northern Provinces v Padayachy (67941/2015) [2019] ZAGPPHC 400 (19 August 2019)

S v Tsotetsi 2019 JDR 1857 (GP)

Judgments upheld on appeal

None.

Judgments overturned on appeal

Sithuse v Passenger Rail Agency of South Africa (PRASA) and Another (A18/2012) ZAGPPHC (13 February 2020). Overturned by the SCA in *PRASA v Sithuse* (569/2020) [2021] ZASCA 78 (11 June 2021).