

APPLICANT: MR PAUL DOCTOR NKUNA

**COURT FOR WHICH APPLICANT APPLIES: MPUMALANGA DIVISION
OF THE HIGH COURT, MBOMBELA & MIDDELBURG**

1 The candidate's appropriate qualifications

1.1 The candidate is duly qualified, having obtained the following degrees:

1.1.1 B. Juris LLB (University of Zululand), 1991.

1.1.2 LLB (University of Zululand), 1996.

1.1.3 LLM (University of the North, in collaboration with the then Potchefstroom University), 2002.

1.2 The candidate is experienced in the law, having worked as

1.2.1 Court Interpreter Clerk (1983 – 1988).

1.2.2 Assistant Prosecutor (1989 – 1991).

1.2.3 Public Prosecutor (1991 – 1993).

1.2.4 Acting Magistrate (April – July 1993).

1.2.5 Magistrate (July 1993 – 2004).

1.2.6 Regional Court Magistrate (2004 – Present).

1.2.7 Acting Judge, appointed at the Gauteng Division of the High Court during the following periods:

1.2.7.1 14 – 18 April 2014: Gauteng Division, Pretoria

2.1.6 The candidate has participated and occupied various applicable leadership positions in different professional bodies within the profession, which include the following:

2.1.6.1 Deputy Chairperson of the Judicial Officers Association of South Africa, Limpopo (JOASA) – 2007;

2.1.6.2 Chairperson of the Education Committee of the Association of Regional Magistrates of South Africa, Limpopo, (ARMSA) – 2009 to 2010;

2.1.6.3 Chairperson of the Ethics Committee of the Association of Regional Magistrates of South Africa, Limpopo (2011 to 2018);

2.1.6.4 Chairperson of the Association of Regional Magistrates of South Africa, Limpopo (2019 to date);

2.1.6.5 The candidate has also attended various relevant courses within the profession which, among others, include:

2.1.6.5.1 Law of Sentencing;

2.1.6.5.2 Commercial Crimes;

2.1.6.5.3 Child Witness Evidence and Sexual Offences Course;

2.1.6.5.4 Adjudication of the Intellectual Property cases;

- 2.1.6.5.5 Regional Civil and Divorce Court Adjudication;
- 2.1.6.5.6 Regional Court and Case Flow Management;
- 2.1.6.5.7 Environmental Offences and Related Organised Crimes;
- 2.1.6.5.8 Aspirant Judges Training Course; and
- 2.1.6.5.9 Advanced Aspirant Judges Training Course.

2.2 The candidate contributed to the community in the legal sphere in that:

2.2.1 The candidate delivered a paper on the proper adjudication of environmental matters to the District Magistrates at the request of SAJEI;

2.2.2 The candidate addressed the councillors of the Ba-Palaborwa Municipality on fraud and corruption;

2.2.3 On the 25th of October 2011, the candidate arranged for a live studio broadcast at his local community radio station where he together with the prosecutors and the Legal Aid attorneys were warning and advising the public about various legal issues;

2.2.4 The candidate has thus been involved in the transfer of skills.

2.3 It requires to be mentioned that, whilst there is no civil litigation pending against the candidate, he has been party to civil litigation. This matter was finalised in the North Gauteng High Court, Pretoria (case number 27972/2006) on the 15th of August 2012. Judgment was

granted against the candidate in favour of the Plaintiff. The candidate fully disclosed the circumstances relating to this aspect.

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

3.1 The candidate is an African man.

3.2 Considering what appears to be the current racial and gender composition in Mpumalanga Division of the High Court, the candidate's appointment **will not** make a positive contribution towards transformation of the judiciary by reflecting the gender composition of South Africa as there are already more males compared to females in the Mpumalanga Division.

3.3 In the above context his appointment will make a positive contribution towards the transformation of the judiciary in reflecting the racial, but not gender composition of the South Africa.

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

4.1 The candidate is experienced in the law, having regard to applicable employment history. On the available information, the candidate has significant experience in the adjudication of litigation by virtue of his appointment as a Magistrate for the past 28 years.

4.2 In addition:

4.2.1 The candidate has presented a lecture on fraud on corruption to the councillors Ba-Phalaborwa Municipality and lectures to

Magistrates in respect of environmental offences and their adjudication as well as related organised crimes.

4.2.2 The candidate has delivered a paper on the proper adjudication of environmental matters to District Magistrates.

4.2.3 The candidate has attended numerous courses including a public prosecutors course, Magistrate's criminal seminar, Magistrate's intermediate civil seminar, administrative justice workshop, Magistrate's domestic violence course, Magistrates decentralised criminal course, developing skills for effective delivery-social context training (law, race and gender), Magistrate's advanced civil seminar, sexual offences courses, law of sentencing, commercial crimes, child witness' evidence, adjudication of intellectual property cases, regional civil adjudication, divorce court adjudication.

4.3 It is difficult to accurately glean from the application precisely what the extent of the candidate's "knowledge of the law" is - given the limited scope of the information provided. The only available reference to determine the candidate's knowledge of the law is the sample of judgements delivered by the candidate. Regard being had to the sample of judgments included in the candidate's submission to the Commission, the following observations are made:

4.3.1 The candidate has a good command of the English language and displays a more than adequate proficiency in the substantive law as well as its application in practice.

- 4.3.2 The candidate's judgments follow a logical pattern, focus on the core issues and his reasoning is easy to follow.
- 4.3.3 An analysis of the judgments included by the candidate his application reveals that the candidate is able to reason independently (in considering/reviewing and even overturning/setting aside decisions of magistrates and the Master of the High Court) while providing well-reasoned justification for doing so.
- 4.4 The candidate however has only limited experience as an acting judge of the High Court, totalling 4 weeks of acting stints that took place more than seven (7) years ago.
- 4.5 Save to say that the candidate is evidently well-versed in criminal law, there is no indication that the candidate is experienced in a specific area of law.
- 4.6 No specific indication is to be found that the candidate is particularly well-versed in constitutional law.

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

- 5.1 The candidate demonstrated his commitment to the values of the Constitution.
- 5.2 The candidate is a member of the Executive Committee of the Phalaborwa Education Crisis Committee.
- 5.3 In 2013 the candidate was invited to address the Councillors of the Phalaborwa Municipality on fraud and corruption.

5.4 In 2013 he was as one of the presenters at the South African Judicial Education Institute (SAJEI) Regional Magistrates' Conference on Environmental Offences and related organised crimes.

5.5 In 2015 he was invited to address District Magistrates on the adjudication of environmental offences in Johannesburg.

5.6 The candidate also has involvement in:

5.6.1 Community initiatives, particularly the rendering of free legal advice to members of the community;

5.6.2 The furtherance of education, particularly the transfer of skills as a result of the lectures presented and the fact that he currently served as the Chairperson of the education committee of ARMSA; and

5.6.3 The serving on the Hoxani Royal Council's Constitutional Committee from 2007 to date, although no particularity is provided as to what his duties entailed.

6 Whether any judgments have been overturned on appeal

6.1 In his submission to the JSC, the candidate stated that there is no judgment on cases over which he has presided that has been overturned or upheld on appeal (The candidate's submission, paragraph 9.4, page 14).

6.2 In this regard, a judgment on appeal by Kganyago J (with whom Phatudi J concurred) in the unreported matter of *Thomas Mathebula v The State*,

Limpopo Division, Polokwane case number A51/2018, handed down 13 August 2020, requires mention.

6.3 The judgment on appeal overturns a guilty verdict and sentence imposed on an accused by a presiding regional magistrate in Palaborwa. The magistrate is identified as **PN Nkuna**. It is not clear whether the identified magistrate was in fact the candidate, but the correlation in name and seat constitute sufficient facts to warrant the inference that it may be a reference to the candidate.

6.4 If the magistrate referred to in the appeal judgement indeed is the candidate, the judgement is of significance, for these reasons:

6.4.1 *First*, the candidate did not disclose the judgment on appeal to the Commission (although this is possibly because this was not a judgement handed down while the candidate was sitting as an acting judge);

6.4.2 *Second*, the judgment specifically criticised the magistrate *a quo* for his conduct. Paragraph 31 of the judgment reads as follows:

“Another area of concern in the proceeding in the court a quo is the unwarranted interruptions and unjustifiable entry into the arena by the presiding magistrate. It will therefore be prudent to quote a few examples to show the seriousness of the misdirection by the trial magistrate.”

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

7.1 The candidate has significant experience in the adjudication of legal disputes by virtue of his appointment as a Magistrate for the last 28 years. The candidate was also appointed as Acting Judge of the High Court on (3) occasions in 2014.

7.2 The candidate appears to have particular experience in criminal litigation. The candidate has nevertheless presided over cases dealing with criminal and civil matters, and in his submission to the Commission the candidate indicated that he has a great interest in Environmental and Criminal law in general.

7.3 It is unclear, on the information provided to us, what the extent and breadth of the candidate's experience in the sphere of civil law is.

7.4 It is unclear, on the information provided to us, what constitutional law experience, if any, the candidate has.

8 The candidate's linguistic and communication skills

8.1 It is evident from the judgments attached that the candidate is proficient in the English language and possesses adequate written communication skills.

9 The candidate's ability to produce judgments promptly

9.1 On the information provided to us, it appears that the candidate is able to produce judgments promptly.

- 9.2 The application is however devoid of any facts relating to the judgments handed down by the candidate as a magistrate, neither whether these judgments were handed down promptly nor whether any other judgments, apart from the one mentioned above, was specifically confirmed or overturned on appeal.
- 9.3 The available facts direct to a conclusion that the candidate has the ability to deliver judgments promptly:
- 9.3.1 In the matter of *Maphalaphathwa and Another v Ratshibayi* [2015] JOL 32935 (LT), the matter was heard on 6/05/2015 and judgment was delivered two days later on 8/05/2015.
- 9.3.2 In the matter of *IC Project Management (Pty) Ltd t/a Illanga Construction v Foskor (Pty) Ltd and Another*, the matter was heard on 11 August 2017 and judgment was delivered on 25 August 2017.
- 9.3.3 In the matter of *National Director of Public Prosecutions v Acting Regional Magistrate Venter and Others*, the matter was heard on 24 April 2014 and judgment was delivered on 1 May 2014.
- 9.3.4 In a Road Accident Fund claim bearing case no. 660661/11 the matter was heard and finalised on the same day.
- 9.3.5 In the matter of *K v M and Others* (671/2013) [2014] ZALMPHC 7 (6 June 2014), the matter was heard on 5 May 2014 and judgment was delivered on 6 June 2014.

9.3.6 The candidate further indicates that he presided over a review under case no. 37/2014 and that he delivered judgment in the same week.

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

10.1 On the information provided, there are no reservations or concerns regarding the candidate's impartiality and fairness.

11 **The candidate's independent mindedness**

11.1 On the information provided there are no reservations or concerns regarding the candidate's independent mindedness, however, there are similarly no facts presented which would tend to show such independent mindedness.

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

12.1 Question omitted from review.

13 **The candidate's administrative ability**

13.1 The candidate appears to be administratively proficient:

13.1.1 From February 1983 – March 1986, the candidate was employed as an administration clerk at the Magistrate's Office Mhala - Bushbuckridge. He held the following positions: taxation clerk, registry clerk, population registration clerk, labour complaints clerk, pensions clerk, revenue clerk, clerk of the Civil Court, clerk of the Criminal Court and Court interpreter;

- 13.1.2 From April 1986 – July 1987, the candidate was employed as an administration clerk at the Magistrate’s Office Lulekani – Phalaborwa (Limpopo Province). He held the following positions: labour complaints clerk, clerk of the Criminal Court, clerk of the Civil Court, Court interpreter and registry clerk;
- 13.1.3 From August 1987 – December 1988, the candidate was employed as a senior administration clerk at the Magistrate’s Office Lulekani – Phalaborwa (Limpopo Province). He held the following positions: control Court interpreter, control clerk of the Civil Court, control clerk of the Criminal Court;
- 13.1.4 No further details are provided as to what the candidate’s specific duties were in those positions.

14 The candidate’s reputation for integrity and ethical behaviour

- 14.1 On the information provided to us, there does not appear to be any reason to doubt the candidate’s integrity and ethical behaviour. The only conditional concern relates to the judgment on appeal in *Thomas Mathebula v The State*, Limpopo Division, Polokwane case number A51/2018.
- 14.2 The judgment on appeal has been dealt with. The reason for the conditional concern resides in the limited uncertainty whether the appeal indeed was against a judgment by the candidate.

15 The candidate's judicial temperament

15.1 Save for the relevant criticism in *Thomas Mathebula v The State*, Limpopo Division, Polokwane case number A51/2018 (and should it indeed have been levelled against the candidate) there is no information provided upon which we can assess the candidate's judicial temperament.

15.2 It is to be mentioned that no indication could be found of any complaints or negative comments in relation to this issue.

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

16.1 The candidate's commitment to human rights, and experience regarding the values and needs of the community are apparent:

16.1.1 He is a member of the Hoxani Royal Council's Constitutional Committee and has been since 2007, although no specific details are provided as to what this entails;

16.1.2 He served as a member of the Phalaborwa Education Crisis Committee from 2011 – 2012;

16.1.3 He arranged a live studio broadcast with prosecutors and the Legal Aid in order to provide legal advice to members of the community.

17 The candidate's potential

17.1 The candidate demonstrates potential to contribute to the judiciary, having regard to his experience:

- 17.1.1 The candidate has extensive experience in the adjudication of litigation;
- 17.1.2 The candidate has demonstrated that he is able to produce judgements efficiently;
- 17.1.3 Various Judges of the High Court have concurred with the candidate's judgments – Judge Teffo in case no. A3045/2013; Judge Makhafola in case no. A05/2014.
- 17.2 The candidate appears to have significant experience in criminal litigation.
- 17.3 It is to be considered as a relevant factor that the candidate is 59 years of age and has been serving as a presiding officer for 28 years.

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

- 18.1 If the candidate is appointed, it will convey to the community at large that the judiciary:
 - 18.1.1 Consists of judges that are experienced in the adjudication of litigation;
 - 18.1.2 Is prioritising transformation;
 - 18.1.3 Consists of judges that are involved in and understand the needs of the community.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

The candidate does not appear to have any reported judgments

Unreported decisions

Unknown beyond those attached to the application

Judgments upheld on appeal

Unknown

Judgments overturned on appeal

Possibly *Thomas Mathebule v State* (set out above)

Further is undisclosed