

APPLICANT: ADVOCATE JABULANI SELBY NYATHI

**COURT FOR WHICH CANDIDATE APPLIES: GAUTENG DIVISION OF
THE HIGH COURT**

1. The candidate's appropriate qualifications

1.1. B Juris;

1.2. LLB.

2. Whether the candidate is a fit and proper person

2.1. There is nothing in the candidate's application or judgments to suggestion that 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 knowledge of the law, including constitutional law

4.1. The candidate's judgments vary in their treatment of the law.

4.1.1. The candidate's judgments in the matters involving criminal trials, and road accident claims reflect a sound knowledge of the law, and application thereof to the facts.

4.1.2. The candidate's judgments that turn on administrative or constitutional issues are less deeply reasoned and are generally cursory both in their treatment of the law and their application thereof to the facts of the matter before the candidate.

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

5.1. The candidate has performed several stints as an acting judge.

5.2. The candidate's *curriculum vitae* does not record any other extra mural activities showing a commitment to the values of the constitution.

5.3. Some of the candidate's judgments address the Constitution.

6. Whether any judgments have been overturned on appeal

6.1. No judgments on appeal have been found.

6.2. In the case of *Power Horse Energy Drinks GmbH v Tribeone Festivals (Pty) Limited* (28106/2016) [2018] ZAGPJHC 526 (12 September 2018) ('*Power Horse Energy Drinks GmbH*'), Justice van der Linde made the following remarks in respect of an interlocutory order granted by the candidate:

The respondent's [opposed] application to compel the applicant to furnish security succeeded before my colleague Nyathi, AJ but his Lordship refused the application for striking out. His Lordship did not provide reasons for his order.

- 6.3. In the unreported decision of *Royal AM Football Club v National Soccer League and others* Case No. 21/27854, Windell J had occasion to address the order granted by the candidate in his judgment *Royal AM Football Club v National Soccer League and others* Case No. 27854/2021 ('*Royal AM Football Club*'). Windell J made the following remarks in respect of the order granted:

In paragraph 2 of the Nyathi order, the court declares "conduct of the NSL inconsistent with the constitution and/or in contravention of PAJA." The declaratory order is imprecise, but from a perusal of the notice of motion, in that matter, in so doing, Nyathi AJ merely adopted the phrasing of the relief sought by Royal AM.

In 14 June 2021, Nyathi AJ granted an ex-tempore order that mimicked the relief sought by Royal AM in prayers 1, 2 and 3.1 of its notice of motion. On 21 June 2021, Nyathi AJ handed down the written judgment and order. The order contained therein is different from the order granted ex tempore on 14 June 2021, in that the words "and/or appeal" was omitted.

I am not convinced that there are no reasonable prospects of success on appeal. The most obvious reason for this is that paragraph 2 of the order of Nyathi AJ is unfortunately so vague that it has no meaningful content.

6.4. The unsuccessful parties in *Royal AM Football Club v National Soccer League and others* Case No. 21/27854 (Justice Windell's judgment) and in the case of *Royal AM Football Club v National Soccer League and others* Case No. 21/27854 (the candidate's judgment) have lodged applications for leave to appeal.

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

7.1. The candidate has practiced as an advocate for almost twelve years. The candidate has practiced as a prosecutor, including as a senior prosecutor, for seven years. The candidate has served as an additional magistrate for a year. The candidate has acted as a judge on several occasions.

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

8.1. The candidate writes and communicates clearly.

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

9.1. Of the candidate's judgments that are available on SAFLII, most are handed down within a month and a month and a half of the recorded hearing date.

9.2. The judgment in *Mokalapa v Minister of Police* (49336/2014) [2018] ZAGPPHC 564 (3 August 2018) took just over four and a half months to be handed down from the recorded hearing date.

9.3. Several of the candidate's judgments record that they concerned urgent applications but appear to have taken over a month to be decided by the candidate.

10. The candidate's fairness and impartiality

10.1. There is no suggestion that the candidate is not fair or is impartial.

11. The candidate's independent mindedness

11.1. There is no suggestion that the candidate is not independently minded.

12. The candidate's ability to conduct court proceedings

12.1. The candidate is well qualified to conduct court proceedings. His judgments of trial matters reflect a capable treatment of the evidence.

13. The candidate's administrative ability

13.1. The candidate was *inter alia* General Manager: Legal Services for roughly three years for the State Information Technology Agency (Pty) Ltd and would presumably have administrative abilities from that role.

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

14.1. There is no suggestion that the candidate lacks integrity or does not act ethically.

15. The candidate's judicial temperament

15.1. There is no suggestion that the candidate lacks 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 *curriculum vitae* reflects no particular commitment to human rights or experience with regard to the value and needs of the community.

17. The candidate's potential

17.1. The candidate has no reported judgments, either of judgments written by him when acting as a judge or as an advocate.

17.2. The comments made by Justice van der Linde and Justice Windell reflect poorly on the candidate's potential in that:

17.2.1. In *Power Horse Energy Drinks GmbH*, the candidate appears to have issued an order in opposed proceedings without giving a reasoned order.

17.2.2. In *Royal AM Football Club*, the candidate appears to have granted an order that was vague to the point of being unenforceable and varied between when the *ex tempore* judgment was granted and the written judgment was provided. It should be noted, however, that application for leave to appeal against Justice Windell's judgment has been lodged, and the candidate's initial decision was decided in circumstances of considerable urgency.

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

18.1. The candidate's appointment at this stage would not send an appropriate message to the community in respect of the calibre of candidates for appointment.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

None.

Unreported Decisions

Matsatsela v Road Accident Fund (2016/07258) [2017] ZAGPJHC 156 (20 June 2017)

Mmamoleboge Investments CC and Others v Crimson and Properties 351 (Pty) Ltd and Others (23731/2018) [2021] ZAGPPHC 289 (11 May 2021)

Mokalapa v Minister of Police (49336/2014) [2018] ZAGPPHC 564 (3 August 2018)

Molefe v S (A293/2017) [2018] ZAGPJHC 107 (11 April 2018)

Goliath v S (A03/2017) [2017] ZAGPJHC 114 (19 April 2017)

Gryphon Airlines SA (Pty) Ltd v International Air Services Council and Another (56163/2020) [2021] ZAGPPHC 282 (19 April 2021)

Tlakula and Others v Absa Bank Ltd (29037/2010) [2017] ZAGPJHC 158 (20 June 2017)

Swanepoel and Another v S (23004/2021) [2021] ZAGPPHC 432 (19 April 2021)

Swart v van der Elst Attorneys (2014/08898) [2017] ZAGPJHC 194 (15 May 2017)

Salentias Travel and Hospitality CC v Dey Street Properties (Pty) Ltd and Another (14780/ 2021) [2021] ZAGPPHC 238 (19 April 2021)

Ntsube v Road Accident Fund (A3020/2015) [2018] ZAGPJHC 133 (15 May 2018)

Phalala and Another v Mashamaite and Another (87755/2190) [2021] ZAGPPHC
242 (26 April 2021)

Pinnacle Micro (Pty) Ltd v Invent Digital CC and Others (A243/2016) [2017]
ZAGPJHC 159 (20 June 2017)

Ncube v S (A243/2016) [2017] ZAGPJHC 113 (20 April 2017)

Youth Laboratories (Pty) Ltd v Vresthena (Pty) Ltd (12248/2021) [2021] ZAGPPHC
248 (19 April 2021)

Manka v Master of the High Court, Pretoria and Others (2020/46493) [2021]
ZAGPPHC 235 (19 April 2021)

EQiGATE (Pty) Limited v Myburgh (13128/2021) [2021] ZAGPPHC 458 (29 June
2021)

Absa Bank Limited v Cholwich (2016/20145) [2017] ZAGPJHC 155 (20 June 2017)

Judgments upheld on appeal:

None found.

Judgments overturned on appeal:

None found.