

APPLICANT: MR DANIEL MAFELEU THULARE

**COURT FOR WHICH CANDIDATE APPLIES: WESTERN CAPE
DIVISION OF THE HIGH COURT OF SOUTH AFRICA**

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 two terms 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.

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 man.
- 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. Two of his reported judgments were 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 in which the candidate considered whether the prohibition against a foreign spouse of a South African citizen or permanent resident, holding a visitor's visa 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 five (5) 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 command 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 reflects one outstanding judgment reserved on **6 November 2020**. Given that the candidate's questionnaire for judicial appointment was signed on **30 June 2021**, the delay in producing this judgment casts doubt on the candidate's ability to consistently produce judgments promptly. It is further concerning that the candidate's excuse during his interview in **April 2021** before the Judicial Services Commission ("the JSC") for the delay in handing down this judgment promptly, was that the matter was complex. This casts doubt on the candidate's ability to adjudicate in complex civil matters.

10. The candidate's fairness and impartiality

10.1. Subject to our comments in paragraph 15 hereunder, we are not aware of any complaints that have been made pertaining to the candidate's fairness and impartiality.

11. The candidate's independent mindedness

11.1. Subject to our comments in paragraph 15 hereunder, we are not aware of any complaints that have been made pertaining to the candidate's independent mindedness.

12. The candidate's ability to conduct court proceedings

12.1. Subject to our comments in paragraph 15 hereunder, we are not aware of any other complaints that have been made pertaining the candidate's ability to conduct court proceedings.

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. We do have reservations about the candidate's integrity and ethical behaviour following his statements in his JSC interview in **April 2021** that we comment on in paragraph 15.3 hereunder.

15. The candidate's judicial temperament

- 15.1. Several senior and junior members of the profession, (black and white; male and female) have expressed concern about the candidate's judicial temperament, which includes concerns that he approaches matters with an ostensibly high degree of certitude and obstinacy.
- 15.2. The candidate's incapability of accepting another court's finding that his views may be wrong, as portrayed in the candidate's JSC interview during **October 2019**, adds to the concern about the candidate's judicial temperament. The concerns raised by then Commissioner Thandi Norman SC during that interview in relation to the candidate's ability to self-reflect are particularly significant. The candidate's response during his JSC interview in **April 2021** did not alleviate this concern. His explanation was to the effect that he ought to have discussed and explained in his judgment that his interpretation of the leading authority was different to that of the other court which criticised his views. Indeed, it appears that the candidate has not come to accept that his views may have been incorrect. In short, at no point during his most recent interview, did the candidate show a genuine appreciation that it is essential for a judge to have the willingness and humility to recognise and accept that sometimes his or her viewpoint may in fact be incorrect.
- 15.3. During the candidate's JSC interview in **April 2021** he also stated that he had no recollection about an occasion where, in fact, a senior practitioner had to come to address him about the unfair and unsatisfactory manner in which he treated a junior practitioner in open court. This statement is concerning as we established with Adv Rudi

van Rooyen SC that he indeed had a discussion with the candidate about having acted in a demeaning and obstinate manner towards a junior practitioner in open court. At the time, and to the candidate's credit, he listened to, and *appeared* to receive Van Rooyen SC's complaint patiently and courteously. The fact, however, that the candidate stated that had no recollection of this discussion confirms in all probability that the candidate finds it difficult, if not impossible, to accept that his viewpoint and conduct in court may on occasion be inappropriate and indeed injudicious. Even more disconcerting is the fact that the candidate's denial of the discussion between him and Van Rooyen SC can only be attributed to a poor memory (about an important event), or dishonesty. Neither of these characteristics ought to be ascribable to a prospective judge.

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 his stints as an acting judge in two divisions of the High Court demonstrate his commitment to continue to contribute to transformation both within and outside of 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.

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 which 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. He is also supported by the National Association of Democratic Lawyers, and International Association of Women Judges.

18.2. The candidate's appointment would confirm the commitment of the JSC to recommend, *inter alia*, black men for elevation to the bench.

18.3. However, the candidate's appointment above and before equally or better suited black women candidates would send a message that the JSC's commitment to rid the bench of male dominance is to be questioned. What is more, given the serious concerns aired by past interviewees at the JSC, in relation to the alleged lack of courteous treatment which they received from judicial colleagues particularly at the SCA, it is essential that the JSC recommend candidates with a demonstrable appreciation that in our constitutional order, it is essential for judges to treat those who appear before them, fellow judicial officers and the public at large with dignity. The concerns raised in relation to the candidate regarding his temperament should accordingly be at the fore of the Commission's consideration of this candidate, particularly

when regard is had to the fact that at least two of the other candidates for the position under consideration are black men, who are not only suitably qualified, but have during their acting stints demonstrated the requisite levels of judicial decorum, ability and temperament.