

JSC INTERVIEW ROUND: APRIL 2022

CANDIDATE: MS LULEKA FLATELA

**COURT FOR WHICH CANDIDATE APPLIES: GAUTENG DIVISION
OF THE HIGH COURT (FOR SECONDMENT TO THE LAND CLAIMS
COURT)**

1. The candidate's tertiary qualifications, professional admissions and honours:

1.1. The candidate holds the following formal qualifications:

1.1.1. BProc, Walter Sisulu University (2000);

1.1.2. LLM, with specialisation in commercial law, UNISA (2005);
and

1.1.3. Certificate in ADR, University of Pretoria, in association with
AFSA (2010).

1.2. The candidate's professional admissions and honours:

1.2.1. Attorney (2001); and

1.2.2. Conveyancer (2002).

1.3. The candidate possesses the requisite qualifications for the position for which she has applied.

2. The candidate's integrity and ethics:

2.1. No circumstances are known that would suggest that the candidate is not a person of integrity with a reputation for ethical behaviour or is not a fit and proper person for appointment.

3. Whether the candidate's appointment would help to achieve an appropriate racial and gender composition on the bench:

3.1. There are currently 80 full-time judges on the bench of the Gauteng Division, comprising (as far as could be ascertained):

3.1.1. 19 black women (14 African, 4 Indian, 1 Coloured);

3.1.2. 30 black men (22 African, 6 Indian, 2 Coloured);

3.1.3. 15 white women; and

3.1.4. 16 white men.

3.2. Insofar as the Land Claims Court is concerned, there are currently five sitting permanent judges (including three from the Gauteng Division), of which three were appointed to the High Court for purposes of secondment. Of the five judges, there are:

3.2.1. 2 black (Indian) women, one of whom was appointed to the High Court for purposes of secondment;

3.2.2. 1 black man, appointed for purposes of secondment;

3.2.3. 1 white woman, appointed for purposes of secondment; and

3.2.4. 1 white man.

3.3. The candidate is a black (African) woman.

4. **The candidate's personal commitment to the values of the Constitution:**

4.1. A candidate's commitment to the values of the Constitution may be reflected in the type of work done as a legal practitioner, particularly if it is clear that the candidate has (a) chosen to work in a particular field of law; and/or (b) undertaken particular work either pro bono or at a reduced rate. On its own, however, providing legal services on public interest matters does not necessarily demonstrate any personal commitment to the values of the Constitution.

4.2. The candidate has listed three matters that may demonstrate a personal commitment to the values of the Constitution:

4.2.1. In *Rapau v University of Limpopo*, the candidate successfully represented student activists during the #FeesMustFall campaign, following their suspension by the Vice Chancellor of the University of Limpopo, and their exclusion from participation in SRC Elections.

4.2.2. In *Motsamai v Minister of Justice and Correctional Services* (case no. 2011/34327) and *Malefane v Minister of Justice* (case no. 2016/10025), the candidate successfully represented former APLA combatants in obtaining parole.

- 4.3. It is not apparent from the candidate's application if these matters were undertaken *pro bono* or at a reduced fee.
- 4.4. The candidate's commitment to the values of the Constitution is reflected in her membership of:
- 4.4.1. Pan Africanist Student Movement of Azania (PASMA), from 1996 to 1999;
- 4.4.2. the Black Lawyers Association, from 2000; and
- 4.4.3. the South African Women Lawyers Association, which seeks to promote gender equality and human rights in the legal services sector and society, from 2015 to date.
- 4.5. Depending on her reasons for having pursued this career path, the candidate's commitment to the values of the Constitution may also be reflected in her having worked in the public service for 12 years. In this regard, see paragraph 7 below.

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

- 5.1. Having had regard to the candidate's curriculum vitae, it would seem that she has had exposure to diverse areas of the law, either in her practice as an attorney, or as an acting judge. Such areas include criminal law, land claims work, and commercial law.
- 5.2. While employed in the office of the state attorney, she briefed counsel in numerous matters brought in terms of the Restitution of Land Rights Act 22 of 1994. Given the provisions of section 25 of the Constitution relating to land restitution and reform, such matters

often raise constitutional issues. This experience is relevant to the position for which the candidate applies.

- 5.3. Whilst practising as an attorney, the candidate does not appear – for the most part – to have practised in the field of constitutional law, although it is likely that in her representation of students in the #FeesMustFall campaign, she raised constitutional issues. None of the judgments referred to in support of her application have any direct bearing on this field of law. Accordingly, it is not possible to determine the extent of the candidate’s knowledge of constitutional law.

6. Judgments of the candidate that have been overturned, upheld or commented on, on appeal:

- 6.1. The candidate’s first acting appointment started in March 2021. To date, none of her decisions has been appealed.
- 6.2. The candidate lists two judgments in respect of which leave to appeal has been sought. As at 6 December 2021, neither application had been heard.

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

- 7.1. The candidate has had the following professional experience:
- 7.1.1. junior attorney in private practice (January to March 2003);
- 7.1.2. legal researcher in the Mthatha High Court (April 2003 to July 2006);
- 7.1.3. assistant state attorney (2006 to 2009);
- 7.1.4. senior assistant state attorney (2009 to 2015); and

- 7.1.5. practising as an attorney, for her own account (2015 to date).
- 7.2. The candidate spent a large part of her nine years in the Office of the State Attorney focusing on land restitution matters. But despite having practised as an attorney for over 15 years, she appears not to have been involved in novel or complex areas of law that have resulted in reported judgments. In her application, she indicates that she was not involved in any cases that resulted in reported judgments.
- 7.3. Moreover, the candidate only identifies three cases of significance over a legal career spanning 19 years. While these cases may have been politically important, they do not appear to have dealt with any novel or complex areas of the law. Accordingly, the candidate's application raises concerns regarding her exposure to sufficiently complex matters.
- 7.4. The candidate has also obtained experience as an acting judge of the High Court. Her first acting appointment was from 12 April to 21 May 2021 (Eastern Cape Division, Grahamstown). Since 19 July 2021, she has been acting as a judge of the Gauteng Division and the Land Claims Court.
- 7.5. Despite having practised for over 19 years in total, including over 15 years as an attorney, it is difficult, based on the candidate's application and CV, to determine whether the extent and breadth of

her professional experience justifies a permanent appointment to the bench at this stage.

8. The candidate's linguistic and communication skills:

8.1. Based on the seven judgments she has delivered, the candidate demonstrates good written linguistic skills in English. In the main, her judgments are well-written and well-reasoned.

8.2. That said, her most recent judgment, *Thobejane and Others v Regional Land Claim Commissioner for Limpopo and Others* [2022] ZALCC 3, does raise concerns. It does not explain adequately why relief was granted that was not sought, and why the parties do not appear to have been provided an opportunity to make submissions on that issue.

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

9.1. The candidate's list of reserved judgments is longer than her list of delivered judgments. She lists nine outstanding judgments as at the time of submitting her application. At that time, none of the nine had been reserved for longer than two months. (The dates on which judgment was reserved ranged from 11 to 29 October 2021.)

9.2. Without the candidate's input, it is not possible to determine whether any or all of these reserved judgments have been delivered as at the date of submission of these comments (23 February 2022). The judgments do not appear on SAFLII.

9.3. On 14 February 2022, the candidate handed down judgment in *Thobejane*. It was heard on 14 September 2021, but was not listed as a reserved judgment in the application. Although a relatively short

judgment dealing only with a handful of issues, and although the candidate's workload does not appear to have been overwhelming, it was delivered five months after the hearing. This would call into question the candidate's ability to produce judgments promptly.

10. The candidate's ability to conduct court proceedings fairly, efficiently and effectively:

10.1. No adverse comments have been received in this regard.

11. The candidate's independent-mindedness:

11.1. There is nothing to suggest that the candidate is not independently minded. On the contrary, her judgments appear to reflect independent-mindedness.

12. The candidate's administrative ability (other than in relation to court proceedings):

12.1. There is nothing to suggest that the candidate lacks administrative ability.

13. The message that the candidate's appointment would send to the public at large:

13.1. There are concerns regarding the candidate's apparent lack of experience in and exposure to sufficiently complex matters.

13.2. While the candidate has 19 years of experience, the absence of information regarding the complexity of the matters she has run makes it difficult to assess the nature and breadth of her experience.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

None

Unreported decisions

Mhlaba v The Registrar of Deeds Pietermaritzburg and Others [2021] ZALCC

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Mpheleng Community Property Association v Mokwana and Others [2021]

ZALCC 23

Industrial Development Corporation of South Africa v Energy Fabrication (Pty)

Ltd 2021 JDR 3047 (GJ)

Thobejane and Others v Regional Lands Claim Commissioner for Limpopo and

Others [2022] ZALCC 3

Sato Samson v Cedric Adam van Straten and Another (attached to application)

Jansen and Others v The State (attached to application)

Dhlamini v Barnard N.O and Others (attached to application)

Judgments upheld on appeal

None

Judgments overturned on appeal

None