

JSC INTERVIEW ROUND: OCTOBER 2022

CANDIDATE: MS LULEKA FLATELA

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

**1. The candidate's tertiary qualifications, professional admissions,
honours, and permanent judicial appointments:**

1.1. The candidate holds the following degrees:

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 is appropriately qualified.

1.3. The candidate's professional admissions:

1.3.1. Admission as an attorney (2001); and

1.3.2. Admission as a conveyancer (2002).

1.4. The candidate has no permanent judicial appointments.

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 81 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. 31 black men (23 African, 5 Indian, 3 Coloured);

3.1.3. 14 white women; and

3.1.4. 17 white men.

- 3.2. Insofar as the Land Claims Court is concerned, there are currently four sitting judges:

3.2.1. 1 black Indian woman, who was appointed to the Cape High Court for purposes of secondment;

3.2.2. 1 black African man, who was appointed to the KwaZulu-Natal High Court for purposes of secondment;

3.2.3. 1 white woman, who was appointed to the Gauteng High Court for purposes of secondment; and

3.2.4. 1 white man, who was appointed to the Gauteng High Court.

- 3.3. The candidate is a black African woman.

4. The maximum time period the candidate could serve if appointed:

4.1. Section 176(2) of the Constitution provides that all judges other than Constitutional Court judges “*hold office until they are discharged from active service in terms of an Act of Parliament.*” The Act in question is the Judges Remuneration and Conditions of Employment Act 47 of 2001.

4.2. Section 3(2)(a) of the Act provides that, subject to section 4(4), a judge will ordinarily be discharged from active service upon reaching the age of 70 if, by that date, they have completed a period of active service of not less than ten years. If not, they will be discharged from active service after having completed ten years of active service.

4.3. Section 4(4) allows for a judge who reaches the age of 70 to continue serving until the age of 75 if, at the time of turning 70, they have not yet served 15 years’ active service.

4.4. Section 3(2)(b) makes provision for a judge to request to be discharged from active service upon turning 65 if, by that point, they have performed active service for a period of 15 years.

4.5. The candidate is currently 44 years old.

4.6. If appointed, the candidate could serve up to 25 years in office.

5. The candidate’s personal commitment to the values of the Constitution:

5.1. 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.

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

5.2.1. 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.

5.2.2. 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.

5.3. It is not apparent from the candidate's application if these matters were undertaken *pro bono*, or at a reduced fee. That said, the candidate's CV notes that she is referred to as the "*peoples lawyer*" due to availing herself for *pro bono* work.

5.4. The candidate's commitment to the values of the Constitution may also be reflected in her membership of the following bodies:

5.4.1. Pan Africanist Student Movement of Azania (PASMA), from 1996 to 1999;

5.4.2. the Black Lawyers Association, from 2000; and

5.4.3. 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.

5.5. Depending on her reasons for having pursued her particular 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 8 below.

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

6.1. Having had regard to the candidate's CV, 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.

6.2. 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.

6.3. 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.

6.4. None of the judgments referred to in support of her application have any direct bearing on constitutional law. Accordingly, it is not possible to determine the extent of the candidate's knowledge of this field of law.

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

7.1. The candidate's first acting appointment started in March 2021. To date, none of her decisions appears to have been the subject of a judgment on appeal.

7.2. The candidate has indicated that there are appeal hearings pending but has not indicated which matters are pending. In her previous application, she listed two decisions in respect of which leave to appeal had been sought. In both matters, leave to appeal was subsequently granted.

7.3. In *Industrial Development Corporation of South Africa v Energy Fabrication (Pty) Ltd and Others* [2022] ZAGPJHC 112, leave to appeal to the full court was granted (in part).

7.4. In *Riches and Beyond (Pty) Ltd and Others v Ramela and Others* [2022] ZAGPJHC 32, leave to appeal to the SCA was granted.

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

8.1. The candidate has had the following professional experience:

8.1.1. junior attorney in private practice (January to March 2003);

8.1.2. legal researcher in the Mthatha High Court (April 2003 to July 2006);

8.1.3. assistant state attorney (2006 to 2009);

8.1.4. senior assistant state attorney (2009 to 2015); and

8.1.5. practising as an attorney, for her own account (2015 to date).

- 8.2. The candidate spent a large part of her nine years in the Office of the State Attorney focusing on land restitution matters. 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 has not been involved in any cases that resulted in reported judgments.
- 8.3. 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.
- 8.4. 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). From 19 July 2021 to 31 January 2022, she acted as a judge of the Gauteng Division and the Land Claims Court.
- 8.5. 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.

9. The candidate's linguistic and communication skills:

- 9.1. Based on the more than 20 judgments she has delivered (including applications for leave to appeal), the candidate generally

demonstrates good written linguistic skills in English. In the main, her judgments are well written and well reasoned.

- 9.2. That said, her judgment in *Thobejane and Others v Regional Land Claim Commissioner for Limpopo and Others* [2022] ZALCC 3 (14 February 2022) raises concerns. It does not explain adequately why relief that was not sought was granted, and why the parties did not appear to have been provided an opportunity to make submissions on that issue.
- 9.3. Further concerns arise from her follow-up judgment in *Thobejane and Others v The Regional Lands Claim Commissioner for Limpopo and Others* [2022] ZALCC 18 (17 June 2022), which initially fails to make clear how the matter had previously been handled (resulting in the earlier judgment and order). It is only quite far into the new judgment that one is able to make some sense of the relationship between the two.

10. **The candidate's ability to produce judgments promptly:**

- 10.1. The candidate does not have any reserved judgments.
- 10.2. In her previous application (April 2022 round of interviews), the candidate listed nine judgments that had been reserved for longer than two months. Of those judgments, two took marginally longer than three months to be handed down, a third took almost four months, and a fourth took about 4½ months:
- 10.2.1. *Francois (Craffert) v Road Accident Fund* [2021] ZAGPPHC 884 (trial ended on 29 October 2021; judgment delivered on 8 February 2022)

- 10.2.2. *Cassiem v Road Accident Fund* [2022] ZAGPPHC 94 (hearing on 29 October 2021; judgment delivered on 9 February 2022)
- 10.2.3. *Kruger v Road Accident Fund* [2022] ZAGPPHC 112 (hearing on 29 October 2021; judgment delivered on 21 February 2022)
- 10.2.4. *Hawando v Road Accident Fund* [2022] ZAGPPHC 159 (hearing on 29 October 2021; judgment delivered on 11 March 2022)
- 10.3. The reviewers are not aware of any special circumstances that existed to cause and/or contribute to the delay in delivering the *Kruger* and *Hawando* judgments.
11. **The candidate's ability to conduct court proceedings fairly, efficiently and effectively:**
- 11.1. No adverse comments have been received in this regard.
12. **The candidate's independent mindedness:**
- 12.1. There is nothing to suggest that the candidate is not independent minded. On the contrary, her judgments appear to reflect independent-mindedness.
13. **The candidate's administrative ability (other than in relation to court proceedings):**
- 13.1. There is nothing to suggest that the candidate lacks administrative ability.

- 13.2. A concern arises from the candidate's response to question 10 of the application, which concerns what a candidate believes to be their most significant contribution to the law. In response to this question, the candidate exhibits poor comprehension skills by pointing to others' contributions that have had a significant impact on her.
14. **The message that the candidate's appointment would send to the public at large:**
- 14.1. While the candidate has 19 years of relevant experience, the absence of information regarding the complexity of the matters she ran as an attorney makes it difficult properly to assess the nature and breadth of her experience, and accordingly, to express an opinion on the message that would be sent to the public at large were she to be appointed.
- 14.2. That said, these concerns (regarding her apparent lack of experience in and exposure to sufficiently complex matters, as an attorney) appear to be somewhat ameliorated by the nature and extent of the experience she has obtained as an acting judge, both in the Land Claims Court, and in the High Court.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED1. Reported decisions

None

2. Unreported decisions

- 2.1. *Oostenwald and Another v Retignled and Others* [2022] ZALCC 10
(attached to application)
- 2.2. *Thobejane and Others v The Regional Lands Claim Commissioner for Limpopo and Others* [2022] ZALCC 18
- 2.3. *Thobejane and Others v Regional Lands Claim Commissioner for Limpopo and Others* [2022] ZALCC 3
- 2.4. *Mahlangu v Du Plessis; Du Plessis v Mahlangu and Another* [2022] ZALCC 9 (attached to application)
- 2.5. *Mnguni v Lekalakala and Others* [2022] ZAGPJHC 118
- 2.6. *Dube v Ndlovu and Others* [2022] ZAGPJHC 37
- 2.7. *Cassiem v Road Accident Fund* [2022] ZAGPPHC 94
- 2.8. *Kruger v Road Accident Fund* [2022] ZAGPPHC 112
- 2.9. *Hawando v Road Accident Fund* [2022] ZAGPPHC 159
- 2.10. *Francois (Craffert) v Road Accident Fund* [2021] ZAGPPHC 884
- 2.11. *Mhlaba v The Registrar of Deeds Pietermaritzburg and Others* [2021] ZALCC 30

- 2.12. *Mpheleng Community Property Association v Mokwana and Others*
[2021] ZALCC 23
- 2.13. *Industrial Development Corporation of South Africa v Energy
Fabrication (Pty Ltd 2021 JDR 3047 (GJ)*
- 2.14. *Sato Samson v Cedric Adam van Straten and Another* (attached to
April 2022 application)
- 2.15. *Jansen and Others v The State* (attached to April 2022 application)
- 2.16. *Dhlamini v Barnard N.O and Others* (attached to application)

3. Judgments upheld on appeal

None

4. Judgments overturned on appeal

None