

JSC INTERVIEW ROUND: OCTOBER 2022

CANDIDATE: JUDGE DAISY SEKAO MOLEFE

COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL

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

1.1. The candidate holds the following qualifications:

1.1.1. 1982 – B.Proc

1.1.2. 1984 – LLB

1.2. The candidate is appropriately qualified.

1.3. In addition, the candidate has completed the following:

1.3.1. 1988 – Member of the Law Society of the North

1.3.2. 1988 – Regional Director of Lawyers for Human Rights

1.3.3. 1980 – Member of the Black Lawyers Association

1.3.4. 1995 – Lecturer at the Law Society Law School

1.3.5. 1995 – Member of the Law Society Disciplinary Committee

1.3.6. 1999 – Examiner of Attorneys Admissions Exam

- 1.3.7. 2004 – Chairperson of Transnet Group Tender Board
- 1.3.8. 2004 – Chairperson of the Transnet Housing Tender Board
- 1.3.9. 2013 – Appointment as Judge of the High Court of South Africa
- 1.3.10. Member of the South African Chapter of International Association of Women Judges
- 1.3.11. Member of Women in Law & Leadership Academy

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 21 full time judges in the Supreme Court of Appeal, comprising (as far as could be ascertained):
 - 3.1.1. 10 black women (7 African, 2 Indian, 1 Coloured);
 - 3.1.2. 6 black men (5 African, 1 Indian);
 - 3.1.3. 1 white woman; and
 - 3.1.4. 4 white men.
- 3.2. 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. The candidate is 64 and has completed a period of 9 years of active service as a judge.

4.5. If appointed, the candidate could serve up to 6 years actively in office.

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

5.1. The candidate was the Regional Director for Lawyers for Human Rights from 1988 – 1992.

5.2. The candidate appears to have been very involved in education and training of aspirant and /or candidates of members of the legal profession.

5.3. These facts demonstrate the candidate's personal commitment to the values of the Constitution.

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

6.1. The Candidate has written judgments on a variety of legal aspects, such as general civil procedure, including the Uniform Rules of Court, administrative law, trusts, environmental law, criminal and criminal procedure law, the equality act, labour law, the financial markets act as well as incorporating and addressing constitutional issues and principles where applicable.

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

7.1. *Minister of Safety and Security v Morudu* [2015] JOL 33308 (SCA)
(Candidate's judgment overturned on appeal)

"[16] The court below (Molefe AJ) had regard to two decisions of the Constitutional Court, namely, K v Minister of Safety and Security 2005 (6) SA 419 (CC) and F v Minister of Safety and Security 2012 (1) SA 536 (CC) and stated that in adjudicating whether there should be vicarious liability, the focus is now on whether the connection between the conduct of the policeman and his employment was sufficiently close to render the Minister liable. Molefe AJ said the following (in paragraph [8]):

'The establishment of this connection is assessed by explicit recognition of the normative factors that point to vicarious liability.'

Following the constitutional court lead, she held that the fact that a member of the South African Police was on standby, rather than active duty, and the question of payment for the duty was not determinative. The following paragraph of the judgment of the court below sets the ratio for its conclusion that the appellant was vicariously liable (in paragraph [20]):

‘Although the second defendant murdering of the deceased had nothing to do with his official duties, I am of the view that there is a sufficiently close link between his act for his own personal gratification and the business of the first defendant. In this case, the second defendant was on standby duty as instructed by his employer, the first defendant. He utilised the employer’s vehicle to attend his personal matters by going to murder the deceased, which action was an intentional deviation from his duties.’

[37] considering the interplay between the factors set out by the Constitutional Court, I am unable to conclude that there is a sufficiently close link between Duba’s actions for his own interest and his duties as a policeman.

Appeal upheld with costs.”

- 7.2. *Minister of Environmental Affairs v Arcelormittal South Africa Limited* 2020 JDR 0644 (SCA) also reported (342/2019 [2020] ZASCA 40 (17 April 2020)

(Candidate’s judgment upheld on appeal)

“[21] in its judgement, the High Court concluded that the decisions of both the Minister and the DDG were materially flawed or influenced by an error of law or fact and that on this ground the review should therefore succeed. With respect to the WML’s, the High Court agreed with the submission advanced by counsel for AMSA that AMSA did not require a WML in respect of its old BOFSDS, which had been in existence prior to the commencement of the ECA and, later, the NEM:WA. It found that if the Department sought to bring AMSA within the purview of the NEM:WA – which repealed parts of the ECA – and regulation 7(1) which is to the same effect. And this, she failed to do.

[22] In the result, the High Court upheld AMSA’s review application and granted orders substantially in the terms sought in the notice of motion. However, the High Court, through what appears to be an inadvertence, omitted to grant an order reviewing and setting aside the DDG’s directive and compliance notice to which the appeal and objection to the Minister related. This was notwithstanding the fact that AMSA had explicitly sought such relief in its notice of motion. In the ordinary course, this would have meant that the directive and compliance notice as issued by the DDG would remain in force and effect. However, during the hearing before us, counsel for the parties were agreed that the High Court omission was the type of patent omission contemplated in rule 42(1)(b). Indeed, it is manifest from the tenor of its judgement that the High Court was minded to review and set aside the compliance notice and directive. Accordingly,

to the extent necessary, this palpable omission falls to be rectified. Thus, the proposed correction will be reflected in the order to be issued by this court.

[52] for all the foregoing reasons therefore the conclusion reached by the High Court cannot be faulted.

Appeal dismissed with costs, including costs of two counsel.”

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

8.1. The candidate has held the position of Judge of the High Court of South Africa for 9 years.

8.2. Before that, she practiced as an Attorney for 25 years.

9. The candidate’s linguistic and communication skills:

9.1. The candidate’s judgements are well-written and well-reasoned.

10. The candidate’s ability to produce judgments promptly:

10.1. The candidate mostly produces judgments promptly. There have been, as far as could be ascertained, two instances where the candidate has taken more than three months to deliver a judgment.

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

11.1. No adverse comments have been received.

12. **The candidate's independent mindedness:**

12.1. There is no indication that the candidate is not independent minded.

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

13.1. The candidate would appear to have good administrative skills.

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

14.1. The appointment of the candidate would send a positive message to the community.

14.2. The candidate, however, has only produced five reported judgments after nine years sitting as a Judge. She may perhaps benefit, therefore, from greater experience sitting in more complex matters.

**JUDICIAL CANDIDATES REVIEW SUB COMMITTEE OF THE
PRETORIA SOCIETY OF ADVOCATES.**

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *Motsepe v S* 2015 (5) SA 126 (GP)
- 1.2. *Wilkinson and Another v National Director of Public Prosecutions and Others* 2019 (2) SACR 278 (GP)
- 1.3. *4 Africa Exchange (Pty) Ltd v Financial Sector Conduct Authority and Others* 2020 (6) SA 428 (GJ)
- 1.4. *South African Fruit and Vegetable Cannery Association and Another v Impumelelo Agribusiness Solutions (Pty) Ltd and Others* [2021] 3 All SA 242 (GP)
- 1.5. *National Director of Public Prosecutions (Ex Parte Application)* 2022 (1) SACR 1 (SCA)

2. Unreported judgments:

- 2.1. *JM Makwela v The State* (A 545/2014) [2014] ZAGPPHC 959 (9 December 2014)
- 2.2. *Maepi v Abrahams* (43355/2015) [2017] ZAGPPHC 17 (30 January 2017)
- 2.3. *Schell v Rall* (A545/2016) [2017] ZAGPPHC 1177 (26 October 2017)

- 2.4. *C Koekemoer v Minister of Police* (9326/2015) [2017] ZAGPPHC 137 (10 March 2017)
- 2.5. *Arcelormittal South Africa Limited v Minister of Environmental Affairs and Another* (86171/2016) [2018] ZAGPPHC 577
- 2.6. *South African National Editors Forum and Others v The Economic Freedom Fighters and Others* 90405/18
- 2.7. *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others* (A355/18) [2019] ZAGPPHC 473
- 2.8. *Sithole v S* (A750/16) [2019] ZAGPPHC 495 (10 September 2019)
- 2.9. *Sasol Mine Limited v Paulos Nhlapo and 941 Others* JA 58/2020
- 2.10. *Petrus Bestbier and Others v Nedbank Limited* (150/2021) [2022] ZASCA 88
- 2.11. *Goedhals v Lodge* (37390/2020) [2022] ZAGPPHC 411 (6 June 2022)
3. Judgments upheld on appeal:
 - 3.1. *Minister of Environmental Affairs v Another v Arcelormittal South Africa Limited* 2020 JDR 0644 (SCA)
4. Judgments overturned on appeal:
 - 4.1. *Minister of Safety and Security v Morudu* [2015] JOL 33308 (SCA)