

JSC INTERVIEW ROUND: OCTOBER 2022

CANDIDATE: MS MAS-UDAH PANGARKER

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

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

1.1. The candidate has the following qualifications:

1.1.1. BA – UCT 1992; and

1.1.2. LLB – UWC 1994.

1.2. The candidate is appropriately qualified.

1.3. The candidate has also held the following positions:

1.3.1. Practising attorney (1997 – 2002)

1.3.2. The candidate is a regional magistrate. She was first appointed as a magistrate in May 2002. She acted as a regional magistrate (in the civil court) from August 2010, and was permanently appointed as a regional magistrate in August 2016.

1.3.3. The candidate was an acting judge of the Western Cape High Court for six months in 2021.

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 25 full time judges on the Western Cape bench, comprising (as far as could be ascertained):

3.1.1. 10 black women (3 African, 1 Indian, 6 Coloured)

3.1.2. 7 black men (6 African, 1 Indian)

3.1.3. 3 white women

3.1.4. 5 white men

- 3.2. The candidate is a black Coloured 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 51 years old.

4.5. If appointed, the candidate could serve up to 19 years actively in office.

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

5.1. Before joining the Magistracy, the candidate records that in 2001 she was a member of a Muslim Personal Law working group, Shura ya Bafazi. She gave free legal advice to members of Cape Town's Muslim community in relation to all aspects of Shariah law generally (including marriages in wills), and to women in the Muslim community.

5.2. The candidate was also selected as one of the first Acting Regional Magistrates. She reports having spearheaded the introduction of Civil Regional Courts, which includes training and assisting other Magistrates joining the Regional Courts. The Regional Courts are an important addition to South Africa's administration of justice and to advance the section 34 right of access to justice and the rule of law.

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

- 6.1. In considering the candidates written judgments as an acting High Court judge, it is clear that she has a good knowledge of the law, and of constitutional law.
- 6.2. Five judgments which have been reported in printed law reports, demonstrate her knowledge of the law.
- 6.3. First, in *S v Manise* 2022 (1) SACR 412 (WCC) the candidate (Henney J concurring) dealt with the procedural and substantive requirements for plea and sentencing agreements under section 105A of the Criminal Procedure Act. The candidate dealt with the impact of the failure of parties and the presiding Magistrate to comply with the provisions of section 105A on the conviction and sentencing of the accused. In a well-reasoned judgment, she explained why the irregularities did not vitiate the conviction, but that the sentence would need to be revisited.
- 6.4. Second, in *Recycling and Economic Development Initiative of South Africa NPC v Tubestone (Pty) Ltd* [2022] 1 All SA 774 (WCC), the candidate had to address the principles of administrative law which govern the effectiveness of administrative decisions which have not been set aside (in the case subordinate legislation), and the circumstances in which parties may raise the alleged invalidity of such action collaterally as a defence or ground of opposition. The candidate demonstrated a good knowledge of the recent case law dealing with collateral challenges and the applicability of the *Oudekraal* principle.

- 6.5. Third, *Trustees for the time being of the Bymyam Trust v Butcher Shop and Grill CC 2022 (2) SA 99 (WCC)* was a commercial matter concerning whether a lessee could claim a remittal of rental due to the Covid-19 pandemic. The candidate carefully considered the contractual relationships between the parties in finding that the lessee – who had sublet the premises to a related entity – could not claim remittal of rental while not being in occupation of the property, and was still liable to pay rental.
- 6.6. Fourth, in *S v Stuurman; S v Khonze 2021 (2) SACR 559 (WCC)* the candidate was required to deal with the status of criminal proceedings that had commenced before regional magistrates who, before the conclusion of the proceedings, were appointed as judges of the High Court. She found that upon their appointment as High Court judges, the regional magistrates no longer had jurisdiction over the matter due to their unavailability. Applying old authorities, the candidate found that the proceedings were nullities and abortive, which did not require any setting aside by the High Court.
- 6.7. Finally, in *Department of Environmental Affairs, Forestry and Fisheries v B Xulu & Partners Incorporated and Others [2021] 3 All SA 166 (WCC)*, the candidate held an attorney and his firm in contempt of six orders of the Western Cape High Court. She summarised and applied the principles governing contempt of court, and emphasised that court orders are binding and that it would lead to chaos should parties be entitled to decide what orders to comply with. She also emphasised that the sanction for contempt “*should not have as its focus, punishment, but rather to bring the contemnor to his/its senses, protect*

the rule of law and restore and vindicate the dignity of the Court” (para 70).

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

7.1. The candidate reports that to her knowledge three of her judgments have been taken on appeal, but that the appeals are not yet finalised.

7.2. We have not been able to find any appeal judgments in respect of her decisions.

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

8.1. The candidate has many years of experience presiding in the District and Regional Magistrates Courts in both civil and criminal matters.

8.2. The candidate also reports having presided in a wide variety of matters in the High Court.

9. The candidate’s linguistic and communication skills:

9.1. The candidate’s judgments are well written and well reasoned, and display a good command of the English language.

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

10.1. The candidate reports that on more than one occasion she handed down judgments more than three months after the matter was heard. Two of

these judgments are reported and deal with complex matters (*REDISIA* and *Bymyam Trust* discussed above).

- 10.2. The candidate also records that a complaint was made about the delivery of her judgment in a matter. She reports that the complaint and response are in the court file. She also records that judgment was handed down precisely three months after it was reserved.
- 10.3. The candidate records that she reserved a judgment on 23 May 2022, which was still outstanding at the time she completed the questionnaire.

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

- 11.1. The candidate has ample experience in conducting court proceedings.
- 11.2. Her ability to make decisions concerning proceedings fairly and appropriately has been commented on favourably by the Supreme Court of Appeal.
- 11.3. The candidate was the appellant in *Pangarker N.O. v Botha* 2015 (1) SA 503 (SCA). The High Court had set aside a decision she had made in divorce proceedings, on the basis that her failure *mero motu* to postpone the proceedings at the request of one of the parties, was a gross irregularity.
- 11.4. The Supreme Court of Appeal (*per* Mhlantla JA; Mthiyane DP, Lewis and Wallis JJA and Legodi AJA concurring) firmly disagreed with the High Court's findings and indeed criticised the High Court. The Supreme Court of Appeal held:

“[29] Counsel for [the respondent] submitted that the magistrate should have postponed the trial. This argument is devoid of substance and falls to be rejected. The approach by the magistrate was appropriate under the circumstances and she acted properly. She was faced with a trial that had already been postponed three times to accommodate Mr Botha and Mrs Botha clearly wished to achieve finality. She considered what was fair to both parties, including the possibility of a postponement, and decided that the matter should proceed. The record shows that she deliberated anxiously before reaching that decision. Her conduct cannot be faulted.

[30] The judgment of the High Court in finding that the failure to postpone the trial constituted a gross irregularity is disturbing as it is not supported by the facts. First, the High Court erred when it interpreted the magistrate’s response to Mr Derris as a refusal to grant the postponement. She merely indicated that there were only two magistrates presiding in the divorce court and their roll was full. The attack is further unjustified as all she did was to explain the state of affairs in that court. Nothing prevented Mr Botha and his legal representative (either Mr Derris or another attorney) from launching a formal application for a postponement on the first day of the trial or an urgent application for a postponement. They did not do so.

[31] Second, the High Court failed to appreciate the principles applicable in respect of postponements and recusal applications. There was only one application before the magistrate – this was

for her recusal - which was properly dismissed. In the present matter, Mr Botha read into the record his application for the recusal of the magistrate. She warned him of the consequences. He stated in unequivocal terms that he had been instructed by Mr Derris to leave the court room after reading the application into the record. He elected not to participate in the proceedings and left the court of his own volition. There could have been no doubt that he knew of the consequences. It must be emphasised that throughout this saga, Mr Derris remained on record. The unavailability of a legal representative is not necessarily a basis for a postponement of a matter. On the facts of the matter there was no basis for the magistrate to postpone the trial in vacuo.

[32] Third, the High Court failed to consider Mrs Botha's competing right to have the dispute settled swiftly. It did not take into account the history of the matter. There had already been two prior postponements on similar grounds where Mr Botha's interests were accommodated. It is evident that he had ample opportunity to attain a legal representative and prepare for trial.

*[33] Fourth, the criticism of the magistrate is unjustified. There is no doubt that Mr Botha engineered an application for a postponement under the guise of a recusal application. This application was a transparent and dishonest strategy to obtain a postponement. The decision of this court in *Take and Save* referred to in para 26 above is instructive. He fell foul of the principles espoused in that case. It is incomprehensible how it*

could be said that the magistrate had committed a gross irregularity under these circumstances.”

12. The candidate’s independent mindedness:

- 12.1. As already mentioned, the candidate held an attorney and his firm to be in contempt of court.
- 12.2. The attorney is well-known in Cape Town and the orders which the candidate was asked to enforce pertain to very acrimonious proceedings between the attorney and his former client, the Department of Environmental Affairs, Forestry and Fisheries.
- 12.3. As an Acting Judge, the candidate demonstrated clear independent mindedness in her decision.

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

- 13.1. There is no reason to doubt the candidate’s administrative ability. As already mentioned, she was involved in setting up the Civil Regional Magistrates Courts upon their establishment.

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

- 14.1. The candidate has lengthy experience in dealing with various matters in the Magistrates Court and in the short period of time in which she acted at the High Court, produced well-reasoned judgments (five of which are reported).

- 14.2. Her appointment would strengthen the reputation of the Western Cape High Court bench.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED1. Reported judgments:

- 1.1. *Recycling and Economic Development Initiative of South Africa NPC v Tubestone (Pty) Ltd* [2022] 1 All SA 774 (WCC)
- 1.2. *S v Manise* 2022 (1) SACR 412 (WCC)
- 1.3. *Trustees for the time being of the Bymyam Trust v Butcher Shop and Grill CC* 2022 (2) SA 99 (WCC)
- 1.4. *S v Stuurman; S v Khonze* 2021 (2) SACR 559 (WCC)
- 1.5. *Sigcawu v S* 2022 (1) SACR 77 (WCC) (co-written with Henney J)
- 1.6. *Department of Environmental Affairs, Forestry and Fisheries v B Xulu & Partners Incorporated and Others* [2021] 3 All SA 166 (WCC)

2. Unreported judgments:

- 2.1. *Zinjanje v S* (A75/2020) [2021] ZAWCHC 185 (15 September 2021)
- 2.2. *K2017455767 (South Africa) (Pty) Ltd v Murray NO and Others* (17255/2020) [2021] ZAWCHC 143 (2 August 2021)
- 2.3. *Klaasen v S* (A99/2021) [2021] ZAWCHC 116 (9 June 2021)
- 2.4. *Coosner v Nuttall* (16244/2020) [2021] ZAWCHC 40 (8 March 2021)
- 2.5. *DJB v MB* (13973/2020) [2021] ZAWCHC 27 (18 February 2021)