JSC INTERVIEW ROUND: APRIL 2023

GAUTENG DIVISION OF THE HIGH COURT

CANDIDATE: ADVOCATE THEMBI PRECIOUS BOKAKO

COURT FOR WHICH CANDIDATE APPLIES: GAUTENG DIVISION

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

1.1. Degrees conferred on the candidate:

1.1.1. LLB – University of Zululand (2002);

1.1.2. LLM – Vrije University Amsterdam, Netherlands (2005); and

1.1.3. MBA – Regency Business School (2011).

1.2. The candidate practised as a member of the Johannesburg Society of Advocates from 2003 to 2008.

1.3. During the period 2008 to 2013 the candidate held positions as a State Advocate, the Executive Manager of the office of the Public Protector and as the Company Secretary of the Johannesburg Roads Agency.

1.4. The candidate again became a member of the Johannesburg Society of Advocates in 2013 and has remained a member of that society ever since.

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 75 full time Judges on the Gauteng Division bench, comprising (as far as could be ascertained):

3.1.1. 22 black women (16 African, 4 Indian, 2 Coloured);

3.1.2. 24 black men (17 African, 4 Indian, 3 Coloured);

3.1.3. 14 white women; and

3.1.4. 15 white men.

3.2. The candidate is a black 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 54.

4.5. If appointed, the candidate could serve up to 16 years actively in office.

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

5.1. The candidate has shown a commitment to the values of the Constitution by being willing to transfer skills to junior colleagues in the legal profession. This often takes time, and the candidate's willingness to do so, as shown in the recommendation letter written by Ms Amanda Dladla, is commendable. It demonstrates a commitment to go beyond the ordinary collegial relationship of an attorney and advocate in a mentoring relationship. It helps to create diversity in the legal profession and furthers access to justice.

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

6.1. A number of judgments of the candidate demonstrate weak legal reasoning, and a reliance on authority without a proper basis being set out therefor.

6.2. In *Pelaelo Brilliant Phetla v 21st Century Life (Pty) Limited* (under Gauteng Division, Johannesburg case number 2019/44492) the candidate presided over an application to compel delivery of a

document. Despite the applicant not seeking such relief, the candidate made an order for payment by the respondent to the applicant of R250 000, with interest, because – according to the candidate – it would be "*just and equitable for the court to do so*" based on what the candidate called "*the respondent's undue enrichment":*

6.2.1. The candidate wrote at paragraph 1 of her judgment that "*[t]his is an application brought by the Applicant to compel the Respondent to furnish him with the signed Memorandum of Agreement and Share Certificate*." There is nothing in the judgment which indicates that alternative relief was sought by the applicant.

6.2.2. The candidate concluded at paragraph 35 of her judgment that:

> *"Although the court finds that the Applicant has not made out a case for the relief sought, the court cannot overlook the fact that the respondent is unduly enriched by the money in its possession from the date upon which it was deposited into its account to date. It follows therefore that it would be just and equitable for the court to order the refund of the money to the Applicant. It cannot be disputed that the capital amount in the sum of R250.000.00 yielded interest in favour of the Respondent from the date upon which it was deposited into the Respondent's account to date. It is then just and equitable that the capital amount should be refunded to the Applicant with interest."*

6.2.3. The order made by the candidate reads:

> *"1. The application insofar as the relief sought is dismissed.*
>
> *2. The Respondent is ordered to refund the Applicant …*
>
> *3. The Capital amount in the sum of R250 000 shall be paid with interest …*
>
> *4. Applicant is ordered to pay the cost on party and party scale".*

6.3. This judgment demonstrates a serious shortcoming in legal reasoning by the candidate, and the candidate should be requested to explain understanding of the law in this regard.

6.4. In *Minister of Health and Another v Solidarity Trade Union and Others In re: Solidarity Trade Union and Others v Minister of Health and Others* (61844/2021) [2022] ZAGPPHC 907 (15 November 2022) the applicant sought an order declaring sections 36 to 40 of the National Health Act unconstitutional. The sections regulate the 'certificate of need' scheme. In terms of this legislative scheme, every healthcare provider/establishment or agency must obtain a 'certificate of need' before such a facility or person may operate healthcare services:

6.4.1. The applicant's primary contention was that the scheme was irrational and violates the separation of powers, and unjustifiably limits sections 10, 21, 22 and 25 of the Constitution;

6.4.2. The matter proceeded unopposed because the state respondents, who had been served, failed to respond to the application. The candidate therefore only had the submissions of the applicant to determine whether the impugned provisions were unconstitutional;

6.4.3. In order to determine whether there was an infringement of rights, the candidate quotes extensively from various texts. However, the candidate fails to explain why those texts were persuasive in her decision-making. For example, the candidate reached the conclusion that the impugned provisions of the National Health Act infringe section 10 and refers to the following sources:

6.4.4. Paragraph 114 of the judgment:

> *"In the South African context, Davis J warned that the Court has given dignity both a content and a scope that make for a piece of jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer. This court further subscribes to a theory or a view in that recognition and respect for inherent dignity relates to types of treatment that are inconsistent with inherent dignity, as proscribed by international and national law texts. McCrudden refers to the second element as the 'relational claim'. In other words, it emphasises the relationship and expectations of the individual vis-à-vis the perceptions of his community – the so-called dignity of recognition, being the social dimension of*

dignity. As contended by the Applicants, this court supports the principle in that the right to human dignity is the right to be treated with inherent and infinite worth, this right also safeguards a person's reputation built upon his or her own individual achievements. The obligation of the state is to respect the decisions that each person has made for themselves. The state must treat each person as ends in themselves and not merely as a means to an end.";

6.4.5. Paragraph 115 of the judgment:

"As a matter of interest for the court in making a determination, this following extract is persuasive in supporting this court's decision:

'Human dignity's fusion of moral law with legal theory. The theoretical basis for the three elements of dignity can be linked to Kant's moral and legal theories, which provide a legal framework to constitute human dignity as an a priori constitutional value and as the basis for human rights. Kant's claim of equal inherent dignity is regarded as the basis of human rights. His notion of moral ethics was first published in Grundlegung zur Metaphysik der Sitten73 in 1785, in which he argued that human reason, as the distinctive feature of humanity, induces people to act out of respect for universalised law-like conduct of themselves and others. To act because of reason is to act exclusively out of a moral duty. This notion of duty

is connected to respect for the human dignity of ourselves and others – dignity is ultimately the supreme value to be respected as an end in itself, so that humanity should never be treated as a means only (the categorical imperative). Kant's moral system requires internal compliance, whereas a legal system demands external compliance. In addition, the moral system exclusively accentuates the fulfilment of duties, whereas the legal system expands on the notions of objective rights and enforceable personal rights. Article 1(1) of the Grundgesetz of Germany Basic Law is rooted in the Kantian notion of a reciprocal duty to rights.'"

6.4.6. At paragraph 114 of her judgment the candidate states:

> *"[T]his court further subscribes to a theory or a view in that recognition and respect for inherent dignity relates to types of treatment that are inconsistent with inherent dignity, as proscribed by international and national law texts."*

6.4.7. There is no further explanation of what "*international and national law texts*" are referred to and on what basis the candidate has decided to import them or subscribe to these theories in her decision. The candidate mentions an academic source which refers to McCrudden's second element as the "*relational claim*". There is no discussion in the judgment as to what these elements are in order to contextualise the statement in the judgment.

6.4.8. Throughout the candidate's discussion on the right to dignity, portions of the judgment appear to be copied verbatim from the journal article titled “The core meaning of dignity” by R Steinmann. For example:

6.4.9. At paragraph 114 of the judgment:

> *“In the South African context, Davis J warned that the Court has given dignity both a content and a scope that make for a piece of jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer.” (See section 1 of Steinmann’s article.)*

6.4.10. At paragraph 113 of the judgment:

> *“The sources of human dignity in modern constitutionalism, the Universal Declaration of Human Rights (1948) (Universal Declaration) and the International Charter of Human Rights (1948) (Charter), accede to a preconception of dignity as a basis for human rights.”*

6.4.11. The whole of paragraph 115 of the judgment appears to be copied verbatim.

6.4.12. Despite a careful search in the judgment, the reviewing team has not found any reference to the Steinmann article, even though the candidate clearly placed heavy reliance on it in her analysis of the right to dignity.

6.4.13. The candidate quotes an entire discussion on Kant and the German Basic Law and does not attempt to explain why she considers this was persuasive to her decision-making.

6.4.14. The candidate's discussion of constitutional rights (especially the right to dignity) fails to have regard to any of the recent judgments of the Constitutional Court or Supreme Court of Appeal dealing with that right.

6.5. At paragraph 37 of her judgment in *Absa v Mokitimi* 10255/2015 (GP), the candidate held that "*[a]s a prerequisite to the granting of an interim interdict for the return of a vehicle owned by the applicant, the applicant must establish that it cancelled the agreement and that the cancellation was communicated to the respondent*." At paragraph 41 of the judgment, the candidate concluded: "*Therefore, the dispute concerning the cancellation of the agreement does not preclude the granting of the interim interdict pending the outcome of the action, provided that all the requirements of an interim interdict are satisfied*." It is clear from this that the candidate held that the cancellation of the relevant agreement was both a requirement, and not.

6.6. In *BL v AL* 2021 JDR 3126 (GP), the candidate did not take cognisance of the fact that Uniform Rule 43 had been amended. At paragraph 22 of her judgment, the candidate wrote: "… *In addition, the rule imposes limitations on the party which are calculated to ensure not only that the application is expeditiously finalised but also that legal representatives are limited in the fees that may properly be charged for the conduct of interim proceedings in*

matrimonial matters" (underlining added). This limitation had been repealed by GN R1055 of 29 September 2017.

6.7. In *Thusanyo Investments (Pty) Ltd v Maduo Supply & Projects CC* 2022 JDR 0425 (GP) the candidate presided over a liquidation application. The respondent raised four points *in limine*, which included that an improper security certificate had been provided and failure to serve on the relevant trade unions:

6.7.1. The candidate held that the certificate from the Master had to be issued not more than 10 days before the application and that a copy of the application had to be served on the Master. However, the candidate did not deal with the question as to whether there had been compliance with these requirements.

6.7.2. As far as the issue relating to service was concerned, the candidate cited Uniform Rule 6 and relied on two unreported judgments cited as *Herman v SetMak Civils* (5495/2011) [2012] ZAFSHC 58 (5 April 2012) and *HBT Construction and Plant Hire CC v Uniplant Hire CC* 2012 JDR 0334. However, it is clear from the candidate's summary of these judgments that they do not deal with service. The candidate wrote:

> *"In these judgments it is confirmed that a solvent CC can only be wound up by the Court on application of a creditor thereof if business rescue proceedings have ended and it is just and equitable that the CC be wound-up, alternatively if it is otherwise just and equitable for the CC to be wound up. The mere fact that a CC is not paying the creditor's debt is, however, not ground which makes it just and equitable for a CC*

to be wound-up and a creditor will have to prove factual insolvency of the CC."

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

7.1. The candidate wrote at paragraph 9.4 of the Questionnaire for Candidates for Judicial Appointment:

"Still pending, thus far and I haven't had sight of any appeal judgements."

7.2. The reviewing team was unable to find any judgments of the candidate that have been overturned, upheld or commented on, on appeal.

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

8.1. The candidate has practised as an advocate for about fifteen years.

8.2. The candidate acted as a Judge during the following periods:

8.2.1. 8 October 2018 to 14 December 2018;

8.2.2. 28 January 2019 to 29 March 2019;

8.2.3. 27 July 2020 to 18 September 2020;

8.2.4. 18 January 2021 to 26 March 2021;

8.2.5. 19 July 2021 to 17 September 2021;

8.2.6. 17 January 2022 to 25 March 2022; and

8.2.7. 18 July 2022 to 16 September 2022.

8.3. The candidate describes the proportions of her litigation work in the following fields at paragraph 6.2 of the Questionnaire for Candidates for Judicial Appointment:

8.3.1. Criminal law: 70%;

8.3.2. Administrative law: 10%;

8.3.3. Constitutional law: "Never appeared in the Constitutional Court";

8.3.4. Labour law: 30%; and

8.3.5. Other areas of civil law: "*Divorce, Rule 43, RAF, Medical negligence, Unlawful arrest and unlawful detention, family law, customary law, delictual claims, local government and procurement law*."

9. **The candidate's linguistic and communication skills:**

9.1. In *Minister of Health and Another v Solidarity Trade Union and Others In re: Solidarity Trade Union and Others v Minister of Health and Others* (61844/2021) [2022] ZAGPPHC 907 (15 November 2022) terminology which would ordinarily appear in heads of argument or pleadings found their way into the judgment (for example "this honourable court"). The difference in writing style can be observed at paragraph 26 (at p 170 of the application).

9.2. The candidate's judgments contain many spelling and grammatical errors.

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

10.1. The reviewing team found the following judgments that were produced by the candidate three months or more after the respective hearings:

10.1.1. *BL v AL 2021 JDR 3126* (GP): Judgment produced three months after the hearing;

10.1.2. *Frank v Learned Magistrate Prinsloo 2021* JDR 1751 (GJ): Judgment produced five months after the hearing;

10.1.3. *Simba v Absa Bank Limited* 2022 JDR 0288 (GP): Judgment produced five months after the hearing;

10.1.4. *Thusanyo Investments (Pty) Ltd v Maduo Supply & Projects CC* 2022 JDR 0425 (GP): Judgment produced six months after the hearing; and

10.1.5. *Top Lay Egg Co-Op Limited and Others v Minister of Agriculture Forestry and Fisheries and Others 2022 JDR 0311* (GP): Judgment produced seven months after the hearing.

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

11.1. No circumstances are known that would suggest that the candidate does not have the ability to conduct court proceedings fairly, efficiently, and effectively.

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

12.1. Whilst the candidate has written numerous judgments, she has no reported judgments. The candidate's judgments, in particular her judgment in *Minister of Health and Another v Solidarity Trade Union and Others In re: Solidarity Trade Union and Others v Minister of Health and Others* (61844/2021) [2022] ZAGPPHC 907 (15 November 2022) demonstrates that the candidate looked at other sources to guide her decision-making. Although the candidate quotes extensively from various texts, she does not explain why those texts were persuasive in her decision-making. One example of this is the above quoted extract from paragraph 115.

12.2. The candidate quoted an extract from a journal article without explaining why she considered it particularly persuasive. Having cited the extract, the candidate moved on to discuss section 21 of the Constitution, thereby leaving the analysis incomplete. Moreover, the extract ends abruptly and appears to be incomplete. Much of this judgment appears to be a "cut-and-paste" of different sources and ideas, which sometimes appear to have no relation to one another.

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

13.1. Other than the rate at which the candidate has produced judgments, the candidate's administrative abilities are not apparent from the information at hand.

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

14.1. Based on the information set out above, the candidate's appointment would send a message to the public at large that it is not necessary for judges to conform to the highest of standards. This is illustrated by the following facts, explained more fully above:

14.2. In *Pelaelo Brilliant Phetla v 21st Century Life (Pty) Limited* (an unreported judgment by the candidate under Gauteng Division, Johannesburg case number 2019/44492) the candidate made an order granting relief that was not sought, on the basis that it would be "just and equitable for the court to do so".

14.3. In *Minister of Health and Another v Solidarity Trade Union and Others In re: Solidarity Trade Union and Others v Minister of Health and Others* (61844/2021) [2022] ZAGPPHC 907 (15 November 2022):

14.3.1. The candidate quoted extensively from various texts without explaining why those texts were persuasive in her decision-making.

14.3.2. Throughout the candidate's discussion on the right to dignity, portions of the judgment appear to be copied verbatim from the journal article titled *"The core meaning of dignity"* by R Steinmann without the candidate acknowledging the author or the source.

14.3.3. The candidate's discussion of constitutional rights (especially the right to dignity) is incoherent and fails to have regard to

any of the recent judgments of the Constitutional Court or Supreme Court of Appeal.

14.4. In *Absa v Mokitimi* 10255/2015 (GP) the candidate made contradictory findings.

14.5. In *Simba v Absa Bank Limited* 2022 JDR 2115 (GP) 2022 the candidate applied an incorrect test regarding the question of costs.

14.6. In *BL v AL* 2021 JDR 3126 (GP) the candidate did not take cognisance of the fact that Uniform Rule 43 had been amended.

14.7. In *Thusanyo Investments (Pty) Ltd v Maduo Supply & Projects CC* 2022 JDR 0425 (GP) the candidate failed to deal with an issue pertinently raised by a party and quoted irrelevant case law as authority.

14.8. The candidate lacks the linguistic abilities one would expect of a judge.

14.9. The candidate produced five judgments three months or more after the hearing.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

1.1. None

2. Unreported judgments:

2.1. *Absa v Mokitimi* 10255/2015 (GP)

2.2. *AV v Road Accident Fund* 2021 JDR 3352 (GP)

2.3. *BL v AL* 2021 JDR 3126 (GP)

2.4. *Frank v Learned Magistrate Prinsloo* 2021 JDR 1751 (GJ)

2.5. *Pelaelo Brilliant Phetla v 21st Century Life (Pty) Limited* 2019/44492 (GJ)

2.6. *Pretorius v Khutso Naketsi Communal Property Association* 2021 JDR 1861 (GP)

2.7. *S v Mutsweni* 2021 JDR 2096 (GP)

2.8. *John Wright Veneers (SA) (Pty) Ltd v Komatiland Forests Soc (Pty) Ltd* 2022 JDR 2618 (GP)

2.9. *Minister of Health and Another v Solidarity Trade Union and Others In re: Solidarity Trade Union and Others v Minister of Health and Others* (61844/2021) [2022] ZAGPPHC 907 (15 November 2022)

2.10. *Puma Energy Procurement South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service* 2022 JDR 2687 (GP)

2.11. *Simba v Absa Bank Limited* (68888/2016) [2022] ZAGPPHC 548 (14 July 2022)

2.12. *Simba v Absa Bank Limited* 2022 JDR 2115 (GP)

2.13. *Simba v Absa Bank Limited* 2022 JDR 0288 (GP)

2.14. *S v Serake* 2022 JDR 0476 (GP)

2.15. *S v Kgobane* 2022 JDR 0878 (GP)

2.16. *S v JC* 2022 JDR 0949 (GP)

2.17. *S v Mbele* 2022 JDR 1075 (GP)

2.18. *S v Knight* 2022 JDR 2264 (GP)

2.19. *Thusanyo Investments (Pty) Ltd v Maduo Supply & Projects CC* 2022 JDR 0425 (GP)

2.20. *Top Lay Egg Co-Op Limited and Others v Minister of Agriculture Forestry and Fisheries and Others* 2022 JDR 0311 (GP)

2.21. *The South African Legal Practice Council v Teffo* (10991/21) [2022] ZAGPPHC 666 (16 September 2022)

2.22. *The Legal Practice Council of South Africa v Mamabolo* 2022 JDR 2025 (GP)

2.23. *South African Legal Practice Council v Mdiyata* 2022 JDR 0507 (GP)

2.24. *South African Legal Practice Council v Ntsie* 2022 JDR 0505 (GP)

2.25. *South African Legal Practice Council v Tshakafa* 2022 JDR 0503 (GP)

3. Judgments upheld on appeal:

3.1. None

4. Judgments overturned on appeal:

4.1. None