

JSC INTERVIEW ROUND: APRIL 2023

MPUMALANGA DIVISION OF THE HIGH COURT

CANDIDATE: JUDGE BRIAN AMOS MASHILE

**COURT FOR WHICH CANDIDATE APPLIES: JUDGE PRESIDENT:
MPUMALANGA DIVISION OF THE HIGH COURT OF SOUTH
AFRICA**

1. **The candidate's tertiary qualifications, professional admissions, honours, and permanent judicial appointments:**
 - 1.1. The candidate holds a BA and LLB from the University of Witwatersrand obtained in 1985 and 1988.
 - 1.2. The candidate is widely experienced, having the following work experience:
 - 1.2.1. Candidate attorney at Edward Nathan and Friedland Inc – 1989 to 1990;
 - 1.2.2. Professional Assistant at Edward Nathan and Friedland Inc – January to May 1991;
 - 1.2.3. Director at own firm 1991 to 2013 – firm changed in 2004, and 2009;
 - 1.2.4. Judge of the High Court of South Africa from 2013;
 - 1.2.5. Deputy Chairperson of the National Council for Correctional Services 2019 to 2021; and

1.2.6. Chairperson of the National Council for Correctional Services from 2021 to date.

2. The candidate's integrity and ethics:

2.1. The candidate is highly regarded as a person of impeccable integrity in the legal fraternity in Mpumalanga.

2.2. There are no known circumstances that would suggest that the candidate is not a person of integrity.

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

3.1. There are currently eight full time judges in the division, comprising (as far as could be ascertained):

3.1.1. Four black women (African); and

3.1.2. Four black men (African).

3.2. The candidate is a black man.

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 will be 59 years 10 months at the time of the interview and has completed a period of 10 years of active service as a judge.

4.5. If appointed, the candidate could a further 10 years as Judge President.

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

5.1. The candidate is the Chairperson of the National Council for Correctional Services, where he ensures that appropriate offenders are considered for parole.

5.2. The candidate has trained many attorneys and advocates.

5.3. His judgments suggest that he has a personal commitment to the values of the constitution – see *Engela v RAF* 2016 (1) SA 214 (GJ), where the candidate ruled that unmarried partners should not be discriminated against when it comes to claims for loss of support when they owed each other a duty of support during the lifetime of a deceased partner.

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

6.1. The candidate is well versed in the law. He has presided over a wide spectrum of cases in various areas of law, including constitutional law.

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

7.1. *NK obo ZK v MEC Health Gauteng* (216/17) [2018] ZASCA 13 (15 March 2018) – In this case, although cited in the candidate's lists of matters that were overturned, the legal conclusions of the case were left intact. The only amendment to the candidate's order was the amount of money awarded to the victim, which the SCA increased.

7.2. *Moyo v Old Mutual* [2022] 3 All SA 795 (GJ) – Moyo was accused of misconduct, and there was also an allegation of conflict of interest. This despite the fact that when Moyo was made the CEO of Old Mutual, it was a known fact that he held shares and directorship in the NMT Group, where shares were held both personally and through his family trust. Old Mutual had provided equity and preference share funding to NMT and other entities in the NMT group of companies and was supposed to earn returns as an ordinary and preferred shareholder. The conflict of interest related to the declaration of ordinary dividends in the NMT Group whilst preference share dividends due to Old Mutual were in arrears. Old Mutual terminated the employment contract with Moyo, and Moyo challenged the termination before the candidate who granted an interdict against Old Mutual, holding as follows:

“Apart from being accused of having had a conflict of interest, the Applicant has also been accused of having committed a gross misconduct. Clause 25.1.1 is explicit on what ought to happen once an employee is accused of misconduct. Strangely, instead of dealing with the Applicant’s misconduct as directed in Clause 25.1.1, the Respondents, probably disliking the procedure prescribed in Clause 25.1.1 or Addendum ‘A’, invoked clause 24.1.1. It is nonsensical and of course disingenuous to condemn a person of having a conflict of interest or committing a misconduct only to turn around and state, as the First Respondent’s chairperson did in one of his letters, that same person had done nothing wrong.”

- 7.3. The candidate found that Old Mutual had repudiated the contract.
- 7.4. The appeal court disagreed with the candidate’s conclusion that Mr Moyo had established that Old Mutual repudiated the contract when terminating it by providing him with six months’ written notice to that effect. The appeal court held that a party to a contract repudiates a contract where it *“without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract.”*
- 7.5. Moyo, in his application for an interim interdict, therefore, failed to establish the first requisite for an interim interdict; a *prima facie* right to reinstatement that requires protection pending the finalisation of the action in which he claimed reinstatement as a contractual remedy. The appeal court held that the court a quo

should not have granted the interim interdict reinstating Moyo in the position of Chief Executive of Old Mutual and restraining Old Mutual from appointing any other person to that position.

- 7.6. *Cowin NO v Kyalami Estate Homeowners Association 499/2013) [2014] ZASCA 221 (12 December 2014)* – The candidate dismissed an application for an order declaring that a title condition contained in a deed of transfer prohibiting the transfer of immovable property registered in the name of an insolvent, without a clearance certificate from the association, confirming that all levies and penalties due to the latter had been paid, binds only the insolvent and the association and is not enforceable against the insolvent’s liquidators. The joint liquidators took the view that the association’s stance prejudiced the *concursum creditorum*, particularly the rights of a secured creditor over the property, and that any amounts due to the association could not supersede those of secured creditors who hold mortgage bonds over the immovable property. The association was confined to proving its claim as a concurrent creditor in the insolvent estate. In dismissing the appeal, the SCA agreed with the reasoning and conclusion of the high court except for the declaratory relief which it granted in respect of s 89(5) of the Act – that the moneys due to the association by the insolvent constitute ‘tax’ within the meaning of this section.

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

- 8.1. The candidate has a clear understanding of the law. He was an attorney for many years and has been a Judge for almost 10 years. He has excellent communication skills and manages court proceedings well.

8.2. Considering the position applied for is that of Judge President, the candidate has extensive experience of a more “*managerial*” nature. The candidate had his own law firm where he held a position of a Director. He is currently the Chairperson of the National Council for Correctional Services. The former role required administrative and managerial skills in order to effect the proper running of the council.

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

9.1. The candidate’s judgments are well written. His command of the English language is very good, and he writes clearly and concisely.

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

10.1. The candidate does delay in finalising judgments. It is assumed that his disability (eyesight) may be a contributing factor, in that he has to consider large volumes of documents without the ability to scan through and skip that which is irrelevant. Document readers, no matter how advanced the technology, read the entire document, whether or not relevant; whereas a sighted person would be able to skip large volumes if not applicable to the issue at hand. The candidate has to sit through and listen to large volumes of documents read out by a document reader, which obviously takes time and contributes to a delay in finalising judgments. This major inconvenience to the candidate is equally applicable when he reads papers in preparation for hearings.

10.2. Where judgments are delayed, he does effectively communicate with the legal practitioners involved.

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

11.1. There are no adverse comments received from counsel who appear regularly before the candidate.

11.2. The candidate reads his papers. He is courteous and listens to submissions by those who appear before him.

11.3. He has a reputation for being fair and open-minded.

12. The candidate's independent mindedness:

12.1. There are no concerns in this regard.

12.2. The position of Judge President would involve a more close level of engagement with the legal fraternity in general; the candidate is known to be approachable, engaging but stern. He welcomes criticism and endeavours to give effect to concerns raised with him.

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

13.1. The candidate appears to be proficient in administrative skills. He has successfully acted as a Deputy Judge President of the Mpumalanga Division. The candidate is also the Chairperson of the National Council for Correctional Services, having held the position of a deputy since 2019.

13.2. Some practitioners within the Mpumalanga Division, however, have complained that they are not consulted when the directives are issued.

- 13.3. Practitioners have further complained that many of the provisions of the practice directives are in contravention of legislation and the Uniform Rules of Court to the extent that they impede accessibility, efficiency, and the proper functioning of the Courts. Some of the issues raised had been dealt with by the Supreme Court of Appeal (SCA) which handed down three separate judgements on the practice directives. These judgements are: *National Director of Public Prosecution (ex parte application)* 2018 (2) SACR, *National Director of Public Prosecution (ex parte application)* (905217) 2018 (2) SACR (“*Ramadhani – SCA Judgment*”), *National Director of Public Prosecution (ex parte Application)* (2021) ZASCA 142; 2022 (1) (SCA) (“*Ntusi – SCA Judgment*”) and *Frank Mhlongo and Others v Tryphinah Mokoena N O and Others* (2022) ZASCA 78 (May 2022) (“*Mhlongo – SCA Judgment*”). Some of the issues crystallised in the above judgments are reflected in the most recent practice directive issued in October 2022.
- 13.4. In addition, there are a number other provisions of the practice directive which remain problematic. These are:
- 13.4.1. Paragraph 7.12 provides that all opposed motion matters shall be heard virtually. This provision arguably undermines section 34 of the Constitution. In addition, it prevents young practitioners from learning through observation in open court.
- 13.4.2. Paragraph 7.14 requires the filing of a document called “*oral written argument*” in addition to heads of argument. This is unnecessary as it increases the cost of litigation.

13.4.3. Paragraph 7.17 provides that matters which do not comply with any provision of the practice directives will not be allocated. This provision undermines the powers of a judge to condone any non-compliance with Rules in terms of Rule 27(1) of the Rules of Court. The import of this provision of the practice directives is that even minor non-compliance will prevent a matter being allocated to a Judge who might have condoned the non-compliance had the matter been allocated to him or her. It also undermines section 173 of the Constitution which gives Judges the power to regulate their own processes, as well as section 34 of the Constitution.

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

14.1. The candidate has a visual disability, yet is able to conduct court proceedings well and write good judgments. The appointment of the candidate with a disability would send the message that persons living with disabilities are able to achieve high judicial office.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *NK obo ZK v MEC for Health, Gauteng* (216/17) [2018] ZASCA 13
(15 March 2018)
- 1.2. *Engela v RAF* 2016 (1) SA 214 (GJ)

2. Unreported judgments:

- 2.1. *Tutubala v Road Accident Fund* (2014/34463) [2015] ZAGPJHC
149 (23 July 2015)

3. Judgments upheld on appeal:

- 3.1. *Cowin NO v Kyalami Estate Homeowners Association* (499/2013)
[2014] ZASCA 221 (12 December 2014)

4. Judgments overturned on appeal:

- 4.1. *Moyo v Old Mutual Ltd and Others* [2022] 3 All SA 795 (GJ)