

JSC INTERVIEW ROUND: APRIL 2023

CANDIDATE: MR MANDLENKOSI PERCIVAL MOTHA

COURT FOR WHICH CANDIDATE APPLIES: GAUTENG DIVISION

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

1.1. Degrees candidate holds the following qualifications:

1.1.1. BA (majoring in law) – University of the Witwatersrand (1990); and

1.1.2. LLB – University of the Witwatersrand (1992).

1.2. The candidate was admitted as an attorney in 1995.

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 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 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. Since 2013, the candidate was placed in charge of the Soweto Small Claims Court. The candidate explains that since the inception of the

Soweto Small Claims Court he, together with his secretary, Joan Nong, have been responsible for the preparation of the roster for the Soweto Small Claims Court and that he has also been actively involved in recruiting new commissioners and assisting with the induction process.

- 5.2. The candidate also sits on various advisory boards for the Small Claims Courts that advise the Minister on suitable candidates to be appointed and trained as commissioners. These advisory boards also deal with various operational and administrative issues like lighting and safety concerns during court sessions. The candidate advises that these meetings take place after business hours.

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

- 6.1. The candidate wrote the judgment in *Marirawahn and Others v The State* (a judgment marked "reportable" under Gauteng Division, Pretoria case number A365/2019, dated 10 December 2020). The matter concerned an appeal against the sentences imposed on the appellants by a Regional Court after the appellants had been found guilty of, *inter alia*, robbery with aggravating circumstances:

- 6.1.1. The candidate demonstrated a thorough knowledge of the law relating to appeals against sentence.

- 6.1.2. At paragraph 50 of the judgment the candidate held that "[t]he fact that no one was injured was simply fortuitous and had the complainant resisted he would most likely had been shot." The candidate made this finding in the absence of any evidence that the complainant would most likely have been shot had he resisted. To the contrary, the complainant's

evidence (as summed up by the candidate at paragraph 9 of his judgment) was that –

“the first Appellant is the one who came to the driver’s side and was armed with a firearm. He told him that they did not want to kill him, but were only interested in the truck and the load.”

6.2. In *Laat Waai Slaghuis (Pty) Ltd v Dinner With Me (Pty) Ltd* (an unreported judgment of the candidate under Gauteng Division, Pretoria case number 10175/2020, dated 9 March 2021) the candidate presided over an application for leave to appeal against his judgment handed down on 18 January 2021. (See: paragraph 1 of the judgment in the application for leave to appeal.) Two aspects of the candidate’s judgment in the application for leave to appeal deserve mentioning.

6.2.1. The candidate applied the incorrect test as to when leave to appeal may be given under section 17(1)(a)(i) of the Superior Courts Act 10 of 2013. The candidate wrote at paragraph 2 of his judgment that he *“came to the conclusion that there are reasonable prospects that another Court might come to a different decision to that reached by this Court.”* Section 17(1)(a)(i) of the Superior Courts Act states that the test is whether *“the appeal would have a reasonable prospect of success”*. This is at odds with what was held by the Supreme Court of Appeal in *MEC Health, Eastern Cape v Mkhitha* (1221/15) [2016] ZASCA 176 (25 November 2016):

“[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted

unless there truly is a reasonable prospect of success. Section 17(1)(a) of Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

6.2.2. The candidate did not provide any reasons in his judgment. He also did not deal with any of the contentions raised by either of the parties. The candidate merely stated at paragraph 1 (of only two paragraphs) of his judgment:

“The Application is premised on the reasons set out in the notice of motion for leave to appeal. It would be idle of me to repeat them. The Applicant’s Counsel contended that there is a likelihood that a different Court will come to a different conclusion. The Respondent’s Counsel submitted that this Application is without merit as there is a bona fide dispute of fact.”

6.3. *Manamele and Another v Pudikabekwa* (an unreported judgment of the candidate under Gauteng Division, Pretoria case number

41557/2018, dated 9 March 2021) was another matter in which the candidate presided over an application for leave to appeal against his judgment handed down on 18 January 2021. (See: paragraph 1 of the judgment in the application for leave to appeal.) Three aspects of the candidate's judgment in the application for leave to appeal deserve mentioning.

6.3.1. As in *Laat Waai Slaghuis*, the candidate applied the incorrect test as to when leave to appeal may be given under section 17(1)(a)(i) of the Superior Courts Act 10 of 2013. The candidate wrote at paragraph 5 of his judgment that “*there is no reasonable prospect that another Court might arrive at a different conclusion*”. This is at odds with what was held by the Supreme Court of Appeal in *MEC Health, Eastern Cape v Mkhitha* (1221/15) [2016] ZASCA 176 (25 November 2016) at paragraphs [16] and [17], quoted above.

6.3.2. The applicants for leave to appeal in *Manamele* applied for condonation for the late filing of the application. (See: paragraph 2 of the judgment.) The candidate held at paragraph 2 of his judgment that “[i]t is trite that the standard for considering an application for condonation is the interest of justice. Vide *Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC)*.” Without providing any reasons the candidate then held:

“Accordingly, it will not be in the interest of justice to refuse condonation under these circumstances. Therefore condonation is granted for the late filing of this Application.”

6.3.3. Again as in *Laat Waai Slaghuis*, the candidate did not provide any reasons in his judgment. He also did not deal with any of the contentions raised by the parties. The candidate merely stated at paragraphs 1 and 3 (of only five paragraphs) of his judgment:

“... The Application is premised on the reasons set out in the Application for leave to appeal. There is little point in yet again traversing the reasons of this Application.

...

The Applicants contend that there are reasonable prospects that another Court will come to a different conclusion. However, the Respondent submits that this Application is without merit.”

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

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

“An appeal, in the matter of PEG HR Solutions (Pty) Ltd and Ephraim Mbuso Dlamini v First Rand Bank Limited under Case Number: 41440/18, appeared before us and I wrote the Judgment of the full Court. Unhappy with our judgment, the Appellant approached the SCA for leave to appeal. The SCA dismissed the Appellants’ leave to appeal our

Judgment presently the matter is before the Constitutional Court.”

7.2. The candidate’s judgment in *Laat Waai Slaghuis* was taken on appeal and overturned by a full court of the Gauteng Division, Pretoria. The matter related to a liquidation application. The candidate held that the applicant had not proven that the respondent was indebted to the applicant and dismissed the application. On appeal, the full court held that the respondent had admitted to being indebted to the applicant.

7.3. The reviewing team was unable to find any other 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 been an attorney for 27 years. He started his own firm in 1995, dealing mainly with criminal law, divorces, maintenance, labour law, motor vehicle accidents, Legal Aid work, debt collection, wills, and estates. The candidate states at paragraph 10 of the Questionnaire for Candidates for Judicial Appointment that he *“soon gravitated towards the most common legal fields in the community, which were criminal law and motor vehicle accident claims.”*

8.2. It is apparent from the candidate’s answers contained in the Questionnaire for Candidates for Judicial Appointment that he has appeared for clients in criminal matters and claims against the Road Accident Fund.

8.3. The candidate has been a Commissioner of the Small Claims Court since 2012.

8.4. The candidate lectured negotiable instruments and labour law at Vista University from 1995 to 2000. He also lectured law of succession and labour law at the North West University in 2019 and 2020.

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

8.5.1. 9 November 2020 to 11 December 2020;

8.5.2. 12 April 2021 to 14 May 2021;

8.5.3. 8 November 2021 to 3 December 2021;

8.5.4. 11 April 2022 to 17 June 2022;

8.5.5. 3 October 2022 to 28 October 2022; and

8.5.6. 27 February 2023 to 17 March 2023.

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

8.6.1. criminal law: 20%;

8.6.2. administrative law: 0%;

8.6.3. constitutional law: 5%;

8.6.4. labour law: 5%;

8.6.5. personal injury: 40%;

- 8.6.6. divorce: 5%;
- 8.6.7. correspondent work: 10%;
- 8.6.8. wills and estates: 5%;
- 8.6.9. commercial: 5%; and
- 8.6.10. debt collection: 5%.

9. The candidate's linguistic and communication skills:

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

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

- 10.1. No instance was found where it took the candidate longer than three months to produce a judgment.

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. None of the judgments reviewed reveal any bias or lack of independence on behalf of the candidate.

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

13.1. 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:

14.1.1. The candidate applied the incorrect test (in *Laat Waai Slaghuis* and *Manamele*) as to when leave to appeal may be given under section 17(1)(a)(i) of the Superior Courts Act 10 of 2013.

14.1.2. The candidate made findings in the absence of any supporting evidence. (See: *Marirawahn*.)

14.1.3. In two of the candidate's judgments he did not provide any reasons and also did not deal with any of the contentions raised by the parties. (See: *Laat Waai Slaghuis* and *Manamele*.)

14.1.4. The candidate applied the requirements for an interdict in a matter where interdictory relief was not sought. (See: *Stoch*.)

14.1.5. The language employed by the candidate in *Stoch* causes confusion as to what was held regarding costs.

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

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

1.1. None

2. Unreported judgments:

2.1. *S v Marirawahn* 2020 JDR 2760 (GP)

2.2. *Laat Waai Slaghuis (Pty) Ltd v Dinner With Me (Pty) Ltd* (10175/2020) [2021] ZAGPPHC 175 (9 March 2021)

2.3. *Manamele v Pudikabekwa* 2021 JDR 0468 (GP)

2.4. *S v Monyeki* 2021 JDR 0132 (GP)

2.5. *South African Legal Practice Council v Cheune* 2021 JDR 0233 (GP)

2.6. *Moditi Consulting Engineers (CC) v Tectura International (Pty) Ltd* 2022 JDR 0166 (GP)

2.7. *Nsibande v The Road Accident Fund* 2022 JDR 0009 (GP)

2.8. *Stoch and Another v Mntambo NO. and others* [2022] JOL 54923 (GJ)

2.9. *Pillay v S* [2022] JOL 57160 (GP)

2.10. *Tshavhungwe v Fast Issuer Spy (RF) Ltd* 2022 JDR 0312 (GP)

2.11. *Thusi v Road Accident Fund* (88459/19) [2022] ZAGPPHC 11 (10 January 2022)

2.12. *Underberg Dairy (Pty) Ltd v Dairy Boys (Pty) Ltd and Others* 2022 JDR 3509 (GP)

2.13. *Unitrans Automotive (Pty) Ltd t/a McDulings Volkswagen v Naidoo* 2022 JDR 0318 (GP)

2.14. *PEG HR Solutions (Pty) Ltd v Dlamini and First Rand Bank Limited* 41440/18 (GJ) 22 June 2021

2.15. *Motihibe v Seleke and Others* 21/13716 (GJ) 25 July 2022

3. Judgments upheld on appeal:

3.1. None

4. Judgments overturned on appeal:

4.1. *Laat Waai Slaghuis (Pty) Ltd v Dinner With Me (Pty) Ltd* (10175/2020) [2021] ZAGPPHC 175 (9 March 2021)