

JSC INTERVIEW ROUND: OCTOBER 2023

CANDIDATE: ADV MZUNGULU ROY MTHOMBENI

COURT FOR WHICH CANDIDATE APPLIES: LABOUR COURT

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

1.1. The candidate is appropriately qualified.

1.2. The candidate holds the following qualifications:

1.2.1. BProc (University of Zululand) 1982;

1.2.2. LLB (University of KwaZulu-Natal) 1984;

1.2.3. LLM (University of London) 1986;

1.2.4. LLM (Columbia University) 1987; and

1.2.5. Post Graduate Diploma in Labour Law (University of Johannesburg) 1994.

1.3. Professional career:

1.3.1. Viljoen Du Toit and Krog (Candidate Attorney) 1984 to 1985;

1.3.2. Chennels Albertyn (Candidate Attorney) 1987;

1.3.3. Cheadle Thompson and Hayson (Candidate Attorney) 1988 to 1989;

1.3.4. admitted as an attorney of the High Court 1989;

- 1.3.5. University of South Africa (Senior Researcher) 1990 to 1991;
- 1.3.6. IMSSA accredited mediator, facilitator, trainer and arbitrator 1993 to 1999;
- 1.3.7. Vista University (Associate Professor) 1992 to 1996;
- 1.3.8. International Labour Organisation accredited trainer 1996;
- 1.3.9. CCMA (National Senior Commissioner) 1997 to 1999;
- 1.3.10. part-time senior commissioner CCMA 2000 to 2003; and
- 1.3.11. practicing advocate at the KZN Society of advocates 2012 to present.

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 12 judges permanently appointed to the Labour Court. Based on the names listed on the judiciary's website, the Labour Court's racial and gender composition appears to be:
 - 3.1.1. 5 black women (4 African, 1 coloured);
 - 3.1.2. 2 white women;
 - 3.1.3. 3 black men (2 African, 1 coloured); and
 - 3.1.4. 2 white men.

3.2. The candidate is a black (African) 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 turn 65 on 22 October 2023.

4.5. If appointed, the candidate could serve for a period of approximately 10 years.

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

5.1. From the candidate’s application it is clear that the candidate is committed to transformation initiatives. The candidate has been a member of the Black Lawyers Association since 1991, and a member of Advocates for Transformation since 2012.

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

6.1. From the judgments authored by the candidate and considered by the review team, it is clear that the candidate has vast experience in labour law and procedural court practice.

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

7.1. *Jansen v Legal Aid South Africa* (JA121/2014) [2018] ZALCCT 17; (2018) 39 ILJ 2024 (LC) (16 May 2018) went on appeal before three judges in the Labour Appeal Court, *Legal Aid South Africa v Jansen* (CA3/2019) [2020] ZALAC 37; (2020) 41 ILJ 2580 (LAC); [2020] 11 BLLR 1103 (LAC); 2021 (1) SA 245 (LAC) (21 July 2020). The candidate's judgment was overturned on appeal.

7.1.1. The Labour Appeal Court indicated that the candidate's procedural ruling that the party that did not bear the onus of proof had the duty to begin was incorrect, albeit that it did not have any effect on the outcome of the appeal. Whilst this did not have a negative impact on the case in question, this is an error regarding what ought to be considered a rather elementary procedural issue.

7.1.2. Secondly, the Labour Appeal Court held that the main consideration in this matter was the legal causation between the employee's mental health issues and his dismissal. The candidate did not apply this test.

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

- 8.1. The candidate indicates in his application that he has been extensively involved in labour law litigation during his articles and when he practiced as an attorney.
- 8.2. The candidate further indicates that he lectured labour law and commercial law.
- 8.3. He further indicates that he dealt with labour disputes as a senior commissioner at the CCMA.
- 8.4. He has acted as a judge in the Labour Court on several occasions.
- 8.5. He has represented employees and employers in disciplinary enquiries.
- 8.6. The candidate further indicates in his application that he has appeared in the Labour Court, High Court and, on occasion, in the Labour Appeal Court.
- 8.7. He further indicates that his practice is 80% labour law.
- 8.8. He has acted as an arbitrator in labour and commercial disputes and as a chairperson of disciplinary enquiries. He is a member of the disciplinary committee for the KZN Legal Practice Council and has acted as the chairperson for the Department of Health's Appeals Committee.

9. The candidate's linguistic and communication skills:

- 9.1. The candidate's judgments are well-written and well-reasoned. The candidate's writing skills are of a high standard, and his judgments are easy to understand. There are a few typographical errors in the

candidate's judgments, but none of them result in the judgment being misunderstood or having a different meaning to the one intended.

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

10.1. Of the eleven judgments considered by the review team, five were delivered more than three months after the hearing date. The longest period taken to hand down judgment was eleven months, which is a considerable delay.

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

11.1. No adverse comments were received by the review team.

12. The candidate's independent mindedness:

12.1. The candidate's judgments indicate that the candidate is independent minded, considers the facts of each matter, and applies the law fairly.

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

13.1. It appears from the candidate's application that he has sufficient administrative abilities.

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

14.1. The candidate has extensive experience in the legal profession, specifically pertaining to labour law.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *Afrisix (Pty) Ltd t/a Afri Services v Wabile NO and Others* (JR3155/11) [2013] ZALCJHB 320; (2014) 35 ILJ 668 (LC) (22 August 2013)
- 1.2. *Minister of Social Development v Mabuza and Others* (JR297/11) [2014] ZALCJHB 90; [2014] 11 BLLR 1142 (LC) (26 March 2014)
- 1.3. *Sedibeng District Municipality v Petlane and Others* (J898/14) [2015] ZALCJHB 142; (2015) 36 ILJ 2364 (LC) (6 May 2015)
- 1.4. *Botha v Gauteng Department of Education and Another* (JS719/14) [2016] ZALCJHB 109; (2016) 37 ILJ 1695 (LC) (22 November 2016)
- 1.5. *Impala Platinum Refineries Limited v National Union of Mineworkers obo Retselisitsoe and Others* (JR822/15, JR769/15, JR974/15) [2017] ZALCJHB 150; [2017] 10 BLLR 1032 (LC) (10 May 2017)
- 1.6. *Jansen v Legal Aid South Africa* (JA121/2014) [2018] ZALCCT 17; (2018) 39 ILJ 2024 (LC) (16 May 2018)
- 1.7. *Legal Aid South Africa v Jansen* (CA3/2019) [2020] ZALAC 37; (2020) 41 ILJ 2580 (LAC); [2020] 11 BLLR 1103 (LAC); 2021 (1) SA 245 (LAC) (21 July 2020)

2. Unreported judgments:

- 2.1. *Nkabinde v Commission for Conciliation Mediation and Arbitration and Others* (J1812/12) [2013] ZALCJHB 161 (30 July 2013)

- 2.2. *NUMSA obo Masipa v Go Suspensions And Axles (Pty) Ltd* (JR3349/09) [2014] ZALCJHB 91 (26 March 2014)
- 2.3. *NUMSA obo Masipa v Go Suspensions and Axles (Pty) Ltd and Others* (JR3349/09) [2014] ZALCJHB 515 (12 December 2014)
- 2.4. *Msiza and Another v South African Local Government Bargaining Council and Others* (JR1263/12) [2015] ZALCJHB 133 (22 April 2015)
- 2.5. *Makaringe v Ledwaba and Others* (JR2726/12) [2015] ZALCJHB 432 (11 December 2015)
- 2.6. *SATAWU obo Nkabinde v UTI South Africa (Pty) Ltd and Others* (JR3050/12) [2015] ZALCJHB 433 (11 December 2015)
- 2.7. *Thobejane v Buthelezi Ems (Pty) Ltd and Others* (JR1652/15) [2016] ZALCJHB 556 (30 November 2016)
- 2.8. *Rapid Dawn 1123 CC t/a Bessenger Associates Labour Hire and Others v Motor Industry Bargaining Council (MIBCO) and Another* (JR2435/15) [2016] ZALCJHB 557 (8 December 2016)
- 2.9. *Msiza and Another v South African Local Government Bargaining Council and Others* (JR1263/12) [2017] ZALCJHB 99 (24 March 2017)
- 2.10. *Bold Moves 1991 v Mdluli and Others* (JR610/2015) [2017] ZALCJHB 238 (20 April 2017)
- 2.11. *Ndlela and Others v Smith and Others* (JR935/15) [2017] ZALCJHB 315 (29 August 2017)

2.12. *Taole v Impala Platinum Ltd and Others* (JR 822/15) [2021]
ZALCJHB 222 (10 August 2021)

3. Judgments upheld on appeal:

3.1. None

4. Judgments overturned on appeal:

4.1. *Legal Aid South Africa v Jansen* (CA3/2019) [2020] ZALAC 37;
(2020) 41 ILJ 2580 (LAC); [2020] 11 BLLR 1103 (LAC); 2021 (1)
SA 245 (LAC) (21 July 2020)

4.2. *Jansen v Legal Aid South Africa* (JA121/2014) [2018] ZALCCT 17;
(2018) 39 ILJ 2024 (LC) (16 May 2018)