

JSC INTERVIEW ROUND: OCTOBER 2023

CANDIDATE: ADV OMPHEMETSE MOOKI SC

**COURT FOR WHICH CANDIDATE APPLIES: GAUTENG DIVISION
OF THE HIGH COURT**

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

1.1. The candidate is appropriately qualified.

1.2. The candidate holds the following qualifications:

1.2.1. Bachelor of Science, Immunology & Microbiology, Leland Stanford Junior University (1992);

1.2.2. Master of Science, Physiology, University of Oxford (1995);
and

1.2.3. LLB, University of Cape Town (1998).

1.3. The candidate's professional admissions and honours:

1.3.1. Advocate (2003); and

1.3.2. Senior Counsel (2018).

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

3.1.1. 23 black women (17 African, 4 Indian, 2 coloured);

3.1.2. 25 black men (19 African, 3 Indian, 3 coloured);

3.1.3. 15 white women; and

3.1.4. 16 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 is 55 years old.
- 4.5. If appointed, the candidate could serve up to 20 years actively in office.
5. **The candidate's personal commitment to the values of the Constitution:**
- 5.1. The candidate is committed to the values of the Constitution. He had already, for instance, in 1997, used his vast scientific knowledge to link DNA typing with civil liberties in his article "DNA Typing as a Forensic Tool: Applications and Implications for Civil Liberties."
- 5.2. He has been an executive member of organisations that are committed to human rights.
- 5.3. The candidate's conduct demonstrates a strong commitment to the achievement of dignity, equality, and freedom for all, and human rights generally, through public service and civil society and community involvement.
6. **The candidate's knowledge of the law, including constitutional law:**
- 6.1. The candidate has extensive knowledge of labour, competition, commercial, public, and constitutional law.
- 6.2. He acted as judge in the Labour Court extensively in the period 2013 to 2016, penning at least 20 judgments in that forum.
- 6.3. More recently, his acting stints in the High Court show exposure to a broad field of subjects, including delictual damages, PIE evictions, opposed motions, Road Accident Fund claims and spoliation applications.

6.4. With regard to constitutional law, he, for instance, acted for the amicus curiae in the Constitutional Court matter of *J Van der Merwe v RAF and another* 2006 (4) SA 230 (CC) where the issue was whether spouses in community of property can claim patrimonial damages from each other.

6.5. He has also appeared in constitutional and public law matters in Botswana. In *Sithabile Mathe & Others v Attorney General & 3 Others* Case No: MAHGB-000321-20, he was lead counsel for the Attorney General in a constitutional challenge brought against the Ministry regarding provisions of the Citizen Act which forced citizens with dual citizenship to renounce one citizenship. The Court found the provisions to be unconstitutional. Despite being initially appealed against, the applicant's attorneys have confirmed that the Attorney General has now abandoned the appeal.

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

7.1. *GTFOH (Pty) Ltd v Kyostax and Others:*

7.1.1. *A quo:* Unreported: Case no 6795/2022, High Court of South Africa, Gauteng Division, Pretoria delivered on 29 July 2022

7.1.2. Full bench judgment: Not found

7.1.3. Remittal judgment: (Attached to application) *GTFOH (Pty) v KYOSTAX (Pty) Ltd and Others* (6795/2022) [2022] ZAGPJHC 1004 (6 December 2022)

7.1.4. The applicant had leased business premises in a building that the respondent bought. The respondent ("landlord") locked

the applicant out of the premises and leased it to two other parties (“the new tenants”) who took possession. The applicant brought a spoliation application against its landlord after the landlord deprived the applicant of possession and gave possession to two other parties. The candidate granted the spoliation application.

7.1.5. The landlord applied for leave to appeal, which triggered the applicant to make an application in terms of section 18(3) of the Superior Courts Act, 10 of 2013. The candidate heard both applications on the 28th of July 2022. The candidate refused leave to appeal and granted the section 18(3) order.

7.1.6. The matter found its way to the full bench. We have not been able to trace the written judgment of the full bench, but the candidate quoted the finding in his subsequent judgment (below). The full bench set aside the section 18(3) order. It remitted the matter back to the candidate and ordered that the new tenants be joined and afforded an opportunity to file affidavits.

7.1.7. On the 11th of November 2022, the candidate heard the matter and on the 6th of December 2022 ordered that the section 18(3) application be granted.

7.2. *UASA – The Union and Others v Western Platinum (Pty) Ltd and Others* (2021) 42 ILJ 371:

7.2.1. The reviewers have been unable to find the candidate’s judgment *a quo* or in the application for leave to appeal.

7.2.2. The candidate, whilst acting in the Labour Court in, 2019, dismissed an application to compel compliance with an arbitration award. He awarded costs against the Applicant.

7.2.3. On appeal, the Labour Appeal Court set aside the cost order, holding that: “[15] [...] *The Labour Court’s explanation, as set out in its reasons for refusing leave to appeal its judgment, that it is a common attribute for a Court to grant costs without providing reasons is unacceptable specifically in the Labour Court, where costs orders are not only governed by the law – but also by the requirements of fairness. In my view, the failure of the Labour Court to provide reasons supports the inference that the Labour Court failed to take into consideration all the relevant facts and circumstances, as well as the requirements of law and fairness, when it ordered the appellants to pay the costs.*”

7.3. *TDF Network Africa (Pty) Ltd v Faris* (2019) 40 ILJ 326 (LAC):

7.3.1. The reviewers have been unable to find the candidate’s judgment *a quo* or in the application for leave to appeal.

7.3.2. Ms Faris had been dismissed due to incapacity following her refusal to work on Saturdays in view of her religion. The candidate determined the fairness of the incapacity dismissal and held that it was both procedurally and substantively unfair. He further held that Ms Faris's dismissal was automatically unfair and awarded Ms Faris 12 months' compensation and R60 000 in respect of unfair discrimination

7.3.3. The Labour Appeal Court found that this approach by the Labour Court was incorrect because, once the Labour Court found that the dismissal was automatically unfair, it should not have concerned itself with whether the dismissal was procedurally and substantively unfair as well.

7.3.4. The Labour Appeal Court found that the award of R60 000 in respect of unfair discrimination was incorrect as the Labour Court did not sufficiently set out its reasoning regarding this. It, however, agreed with the Labour Court's order of 12 months' compensation and confirmed this part of the order.

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

8.1. The candidate's professional experience is extensive and broad.

8.2. The candidate has listed 15 judgments in his application. Of these, 5 were reported judgments. In addition to the listed judgments, the reviewers also considered a further 13 unreported judgments (12 of which were in the Labour Court).

8.3. As counsel, the candidate lists two reported appearances in the Constitutional Court, as well as one reported case in the Supreme Court of Appeal. He further lists two cases heard before the Competition Appeal Court.

8.4. The candidate, during 2005 and 2006, chaired the Water Tribunal in three cases and delivered rulings in all three.

8.5. The candidate has participated in at least one sub-committee of the Johannesburg Bar Council.

- 8.6. The candidate has published articles on the relationship between law and technology, intellectual property, and the TRC's role in the investigation of socio-economic rights violations. The candidate has also published articles that have been referenced by other authors.

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

- 9.1. The candidate writes impeccably, and this makes his judgments accessible to academics, practitioners, fellow judges, and the general public. The candidate is well-spoken and erudite.

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

- 10.1. The candidate has always produced judgments promptly.
- 10.2. The candidate indicates that he had no outstanding judgments at the time of his application.

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

- 11.1. The candidate is reputed to be fair and impartial with colleagues and practitioners during court proceedings.
- 11.2. From an assessment of his judgments and observations of colleagues who have appeared before him, the candidate conducts proceedings efficiently and effectively.
- 11.3. The candidate has always displayed punctuality, is well-prepared when hearing matters, and treats practitioners with extreme courtesy.
- 11.4. According to reports received from members of the Bar, the candidate is friendly, polite, and engaging.

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

- 12.1. The conspectus of the candidate's academic writings, judgments, and appearances as counsel revealed that he has been unbiased, objective, and fair in his views, findings and submissions to court, regardless of the subject matter, the parties appearing before him, or the party he represents.

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

- 13.1. The candidate has a reputation for diligence and administrative capability, evidenced by his judgments, and in the experience of those who have appeared before him as a judge.

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

- 14.1. The appointment of the candidate would demonstrate the JSC's commitment to appointing excellent jurists, especially those who have served with distinction thus far and are widely respected, both by the public and their peers.
- 14.2. The candidate is a respected legal practitioner. His appointment would add to the credence and respect held amongst the public and the profession, for the Division.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *Motor Industry Bargaining Council v Suliman* (JS2561/10, J29/14, J304/14) [2015] ZALCJHB 165; (2015) 36 ILJ 2644 (LC) (29 May 2015)
- 1.2. *Reddi v University of KwaZulu-Natal* (D827/13) [2015] ZALCD 14; [2015] 6 BLLR 625 (LC); (2015) 36 ILJ 1915 (LC) (4 February 2015)
- 1.3. *Motor Industry Bargaining Council v Suliman* (JS2561/10) [2014] ZALCJHB 386; (2015) 36 ILJ 727 (LC) (10 October 2014)
- 1.4. *Passenger Rail Authority of South Africa v Commission For Conciliation, Mediation and Arbitration of South Africa and Others* (JR2399/12) [2014] ZALCJHB 156; (2014) 35 ILJ 1609 (LC) (9 May 2014)
- 1.5. *Molepo v Passenger Rail Authority of South Africa* (JR 3010/12) [2014] ZALCJHB 167; (2014) 35 ILJ 1605 (LC) (17 January 2014)

2. Unreported cases:

- 2.1. *GTFOH (Pty) v KYOSTAX (Pty) Ltd and Others* (6795/2022) [2022] ZAGPJHC 1004 (6 December 2022)
- 2.2. *Mohlala and Another v Road Accident Fund ; Swart v Road Accident Fund* (2018/32706; 2016/0042569) [2022] ZAGPJHC 849 (28 October 2022)
- 2.3. *Fellinger v Cox and Others* (2020/12597) [2021] ZAGPJHC 470 (27 September 2021)

- 2.4. *Firststrand Bank Limited v Madigage and Another* (2017/23569) [2021] ZAGPJHC 467 (27 September 2021)
- 2.5. *Kgoadi v First Rand Bank Limited and Others* (2020/15557) [2021] ZAGPJHC 471 (27 September 2021)
- 2.6. *Wessie v Twala Attorneys and Others* (2019/32449) [2021] ZAGPJHC 468 (27 September 2021)
- 2.7. *Raphala v Baloyi* (Case 31304/2021) JHB HC (12 August 2022)
- 2.8. *Agliotti v Agliotti and Others* (2019/37944) [2021] ZAGPJHC 469 (27 September 2021)
- 2.9. *Umjwara and Others v Tiger Brands (Pty) Ltd t/a Albany Bakeries* (JS696/14) [2016] ZALCJHB 483 (2 December 2016)
- 2.10. *IMATU obo De Lange v City of Matlosana Local Municipality and Others* (J1661/12) [2014] ZALCJHB 373 (3 October 2014)
3. Judgments upheld on appeal:
 - 3.1. *PLSMIDTH Buffalo (Pty) Ltd v Hlakola* (DA13/17) [2018] ZALAC 40; (2019) 40 ILJ 527 (LAC); [2019] 4 BLLR 363 (LAC) (29 November 2018) dismissed an appeal against the candidate's judgment (judgment *a quo* could not be located)
4. Judgments overturned on appeal:
 - 4.1. *GTFOH (Pty) v KYOSTAX (Pty) Ltd and Others* (6795/2022) [2022] ZAGPJHC 1004 (6 December 2022) (judgment in appeal could not be located)

- 4.2. *TDF Network Africa (Pty) Ltd v Faris* (CA 4/17) [2018] ZALAC 30; [2019] 2 BLLR 127 (LAC); (2019) 40 ILJ 326 (LAC) (5 November 2018) partially overturned a judgment by the candidate (judgment *a quo* could not be located).
- 4.3. *UASA - The Union and Others v Western Platinum (Pty) Ltd and Others* (JA61/2019) [2020] ZALAC 65; (2021) 42 ILJ 371 (LAC) (13 November 2020) overturned a costs order granted by the candidate (judgment *a quo* could not be located)