

JSC INTERVIEW ROUND: OCTOBER 2023

CANDIDATE: JUDGE EDWIN MOGOMOTSI MOLAHLEHI

**COURT FOR WHICH CANDIDATE APPLIES: DEPUTY JUDGE
PRESIDENT OF THE LABOUR APPEAL COURT AND 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. BA Law – University of Lesotho (1983);

1.2.2. LLB – University of the Witwatersrand (1986); and

1.2.3. LLM – Georgetown University (1990).

1.3. The candidate was permanently appointed as a judge of the Labour Court on 1 May 2007 and as a judge of the High Court in April 2017.

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 6 judges permanently appointed to the Labour Appeal Court. Based on the names listed on the judiciary's website, the Labour Appeal Court's racial and gender composition appears to be:

3.1.1. 1 black (African) woman;

3.1.2. 4 black men (1 African, 3 coloured); and

3.1.3. 1 white man.

3.2. 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:

3.2.1. 5 black women (4 African, 1 coloured);

3.2.2. 2 white women;

3.2.3. 3 black men (2 African, 1 coloured); and

3.2.4. 2 white men.

3.3. 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 was appointed as a judge on 1 May 2007. He is 66 years old. He will turn 70 on 25 October 2026, at which point he will have served as a judge for more than 15 years.
- 4.5. If appointed, the candidate could serve a further three years.
5. **The candidate's personal commitment to the values of the constitution:**
 - 5.1. The candidate is committed to the values of the Constitution.
 - 5.2. The candidate records in his questionnaire and *curriculum vitae* that he participated in the conclusion of the National Peace Accord as a trainer, facilitator, and mediator from January to June 1992.
 - 5.3. The candidate sat on the board of directors for Legal Aid South Africa for approximately eight years.
 - 5.4. The GCB prepared a review for this candidate in February 2019 when he applied to the same position. The interviews were cancelled by the JSC.

5.5. In the 2019 review, the following appeared about the candidate's commitment to the values of the Constitution, though this experience is not apparent from the questionnaire completed by the candidate on 19 June 2023:

5.5.1. The candidate has in his career dedicated himself to the community by being a trainer and facilitator at Cosatu's winter and summer schools.

5.5.2. He has been a facilitator and mediator at the Land Claims Commission.

5.5.3. The candidate has sat on various commissions of inquiry.

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

6.1. The candidate presently sits as a Judge of the Gauteng Local Division of the High Court and has done so since 2017. Prior to this, the candidate was a Judge of the Labour Court for ten years.

6.2. The candidate's application demonstrates over 30 years' experience in labour law.

6.3. The candidate is a previous Director and Senior Commissioner of the Commission for Conciliation, Mediation, and Arbitration. He chaired the Public Service Sectoral Bargaining Council for approximately 10 years. He has experience in private dispute resolution.

6.4. The candidate was a lecturer at Vista University and a director of the Research Offices and Community Dispute Resolution Trust at the Centre for Applied Legal Studies.

- 6.5. Further, the candidate co-authored an academic publication, *The Conciliation and Arbitration Handbook: A Comprehensive Guide to Labour Dispute Resolution Procedure*.
- 6.6. The candidate's judgments show a good understanding of both procedural and substantive law.
- 6.7. In the matter of *Hlabangwane v MEC for Public Works, Roads, Transport, Mpumalanga Provincial Government and Others* (J2170/11) [2011] ZALCJHB 151 (24 October 2011) the principle of legality was applied by the candidate in the context of it being implicit in the Constitution.
- 6.8. Further, in the matter of *Nongena v Ali NO and Others* (JR231/09) [2010] ZALC 281 (8 December 2010), the candidate considered the constitutionality of sections of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) impugned by the applicant. The candidate held that discrimination disputes related to workplace are not covered by PEPUDA.
- 6.9. In *Food and Allied Workers Union and Others v Chauke and Others* (C122/16) ZALCJHB 246 (12 July 2016) the candidate relied on Constitutional Court judgments which upheld the jurisprudence that emerged from the Supreme Court of Appeal regarding the approach to adopt when dealing with appeals against interim orders.
- 6.10. The case of *KS v AM* 2018 (1) SACR 240 (GJ) (24 October 2017), the candidate heard an appeal against the decision of a Magistrate to refuse to grant additional conditions to an interdict made in terms of section 7(1) of the Domestic Violence Act. The candidate dealt with the constitutional principles extensively and emphasised the

imperative of protecting the constitutional rights domestic violence victims. From this judgment, the candidate appears to be comfortable with this specific area of the law.

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

7.1. *SA Football Association v Mangope* (2013) 34 ILJ 311 (LAC). The matter was an application in terms of s77(3) of the Basic Conditions of Employment Act, 1997 for damages for the premature cancellation of a fixed term employment contract. The candidate awarded damages for future loss of earnings without having heard any evidence as to the amount thereof. The Labour Appeal Court reversed this.

7.2. *Standard Bank of South Africa Ltd v Letsoalo* (J18/2014) [2016] ZALAC 43 (27 July 2016). The sole issue before the court was whether the dismissal of the employee had been procedurally unfair. The candidate found that it had been on the basis that the employer had not responded to a communication by the employee, in which she had rejected an offer made by the employer. He found that the offer had not been unequivocally rejected by the employee and that the employer should have responded to it. The Labour Appeal Court found that, in doing so, the Labour Court placed form above substance.

7.3. *Academic and Professional Staff Association v City of Tshwane Metropolitan Municipality* (JA 61/14) [2016] ZALAC 70 (16 February 2016). This matter concerned an application for condonation by the union against UNISA and Tshwane. The latter did not oppose the application but the candidate refused it. The

Labour Appeal Court found that the Labour Court ought to have considered and evaluated the union's prospects of success against Tshwane in addition to the factors it considered in the application against UNISA.

- 7.4. *Renaissance BJM Securities v Grup* (JA60/2014) [2015] ZALAC 107 (17 November 2015). The question in this matter was whether an amount of money paid by the employer to the employee was a sign-on bonus (which could be retained when he resigned) or a stay-on bonus. The Labour Appeal Court found that the candidate had correctly determined that the right of the employee to receive the sign-on incentive accrued prior to the termination of the employment agreement and survived its termination.
- 7.5. *Bargaining Council for the Furniture Manufacturing Industry, Kwazulu- Natal v UKD Marketing CC and Others* (DA 2/11) [2012] ZALAC 24; [2013] 2 BLLR 119 (LAC); (2013) 34 ILJ 96 (LAC) (20 August 2012). The candidate had dismissed an application by the bargaining council to compel the respondent to register with it in terms of the provisions of its main collective agreement. The Labour Appeal Court agreed with the Labour Court that the bargaining council had failed to make out a case and held that there was no basis to disturb the punitive costs order made by the Labour Court.
- 7.6. In the 2019 review, it is recorded that the candidate provided an extensive number of judgments in his application, of which he raised ten decisions which had been overturned on appeal. The additional decisions considered in 2019 are listed below.

- 7.7. *Tulwana and Another v The City of Johannesburg* (JA 59/15) [2016] ZALAC 85 (26 July 2016), in which the appeal court made no specific reference to the candidate.
- 7.8. *Rustenburg Platinum Mines Ltd (Amandelbult Section) v NUM on behalf of Manageng and Others* (JA 12/2015) [2016] ZALAC 21 (26 May 2016).
- 7.8.1. This case concerned a review application. The candidate subjected the reviewing of the award to an appeal standard, thereby failing to correctly apply the review test.
- 7.8.2. The candidate failed to assess whether the decision of the commissioner is one that a reasonable decision-maker could make.
- 7.8.3. The Labour Appeal Court held that the candidate had misconstrued both the nature of the enquiry and the facts before the commissioner.
- 7.9. *Registrar of the Labour Court v Consolidation Association of Employers of South African Region* (JA 5/13) [2014] ZALAC 45, in which the appeal court made no specific reference to the candidate.
- 7.10. *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd v Lebogate* (JA 104/13) [2014] ZALAC 55.
- 7.10.1. This matter also concerned a review application. Here, the Labour Appeal Court found that the candidate failed to appreciate the review test and the distinction between appeals and reviews.

- 7.10.2. A review test is a two-stage enquiry. The candidate failed to deal with the second leg of the enquiry as to whether the commissioner failed to apply his mind, which affected the outcome of the proceedings, thus rendering the award unreasonable.
- 7.11. *Woolworths (Pty) Ltd / CCMA & Others* (LAC) [2011] ZALAC 15.
- 7.11.1. This matter also concerned a review application. The Labour Appeal Court held that the candidate concentrated on the commissioner's reasons and omitted to deal exhaustively with the fundamental grounds of the review presented and therefore failed to deal with the reasonableness of the award.
- 7.12. *Department of Finance & Economic Development (The Province of Gauteng) v Mesame & Others* (JA1/2013) [2014] ZALAC (19 September 2014).
- 7.12.1. In this matter the candidate misconstrued a review judgment and the issue with which he needed to deal.
- 7.13. *Professional Transport Workers Union v Malema & Others* (JA67/12) [2014] ZALAC 53 (7 October 2014).
- 7.13.1. This matter concerned a review by the court *a quo* of a rescission ruling. The Labour Appeal Court found that the candidate correctly set aside the ruling, however, he did not remit the matter for arbitration but considered the matter. However, he only considered the explanation for the delay and not the merits, which he should have done.

7.14. *Grootboom v National Prosecuting Authority and Another* (CA 7/11) [2012] ZALAC 28; (2013) 34 ILJ 282 (LAC); [2013] 5 BLLR 452 (LAC) (21 September 2012).

7.14.1. The Labour Appeal Court upheld the candidate's judgment.

7.14.2. In *Grootboom v National Prosecuting Authority and Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013), the majority of the Constitutional Court per Bosielo AJ, upheld an appeal against the decision of the Labour Appeal Court, but commented that neither the Labour Court nor Labour Appeal court could be faulted.

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

8.1. The candidate has served as a judge for sixteen years. He has extensive experience both in the Labour Court and the High Court, in addition to his experience before being elevated to the bench.

8.2. The candidate's judgments reflect his knowledge in various principles of labour law and show that he is independent in his thinking. He reflects and refers to case law and legislation extensively in his judgments and always makes it a point to distinctly apply the law to the set of facts before him.

8.3. His judgments reflect his fairness in his application of the law.

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

9.1. The judgments of the candidate in the Labour Court are normally easy to read and well reasoned.

9.2. The candidate's style of writing has remained consistent. However, the candidate's judgments reflect some spelling and grammatical errors.

9.3. The candidate's judgments are well written, succinct, and well structured. The judgments show an understanding of the legal principles dealt with, that enables him to express his findings in a way that is easily understood.

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

10.1. In the Labour Court, the candidate generally produced judgments promptly.

10.2. In the 2019 review prepared by the GCB, the review team commented that:

10.2.1. The judgments reviewed reflected that the candidate mostly hands down judgments within three months of the hearing of the matter.

10.2.2. The candidate appears to delay in handing down judgments in urgent applications.

10.2.3. Overall, the review team is satisfied that the candidate hands down judgments within a reasonable time.

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

11.1. The candidate is a courteous judge and has the ability to conduct proceedings fairly, efficiently, and effectively.

- 11.2. The candidate displays a sense of impartiality, fairness and justice in his reviewed judgments.
- 11.3. None of his judgments reviewed have displayed a trait of bias or undue favour. This has been the case in both his Labour Court and High Court judgments.
- 11.4. The candidate demonstrates an impressive understanding and application of the rules of court and rules of evidence and is able to apply such knowledge fairly and correctly in his judgments.
- 11.5. The candidate has a calm and even-tempered judicial temperament. This excellent attribute not only demands respect but also contributes to, enhances and upholds the dignity of the court.

12. The candidate's independent mindedness:

- 12.1. There is nothing to suggest that the candidate is not independent minded.

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

- 13.1. The candidate has occupied positions which required administrative capabilities in the past and there is no reason to doubt that he has the administrative ability to fill the position of Deputy Judge President.
- 13.2. The candidate has been acting in this position since March 2023.

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

- 14.1. The applicant is a black man. He has, amongst other things, worked as a taxi driver and supermarket cashier before becoming a legal

practitioner. His appointment would send a positive message, not only to the community that he comes from, but to the country.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:
 - 1.1. None
2. Unreported judgments:
 - 2.1. None
3. Judgments upheld on appeal:
 - 3.1. *Bargaining Council for the Furniture Manufacturing Industry, Kwazulu- Natal v UKD Marketing CC and Others* (DA 2/11) [2012] ZALAC 24; [2013] 2 BLLR 119 (LAC); (2013) 34 ILJ 96 (LAC) (20 August 2012) (The candidate's judgment could not be located)
 - 3.2. *Renaissance BJM Securities v Grup* (JA60/2014) [2015] ZALAC 107 (17 November 2015) - *Grup v Renaissance BJM Securities (Pty) Ltd* (2014) 35 ILJ 3400 (LC)
 - 3.3. *Grootboom v National Prosecuting Authority and Another* (CA 7/11) [2012] ZALAC 28; (2013) 34 ILJ 282 (LAC); [2013] 5 BLLR 452 (LAC) (21 September 2012) upheld the candidate's judgment in *Grootboom v National Prosecuting Authority and Another* (C696/08) [2009] ZALC 143; (2010) 31 ILJ 1875 (LC) ; [2010] 9 BLLR 949 (LC) (18 December 2009). An appeal against the Labour Appeal Court's judgment was upheld by the Constitutional Court in *Grootboom v National Prosecuting Authority and Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013)

4. Judgments overturned on appeal:

- 4.1. *Standard Bank of South Africa Ltd v Letsoalo* (J18/2014) [2016] ZALAC 43 (27 July 2016) (The candidate's judgment could not be located)
- 4.2. *Tulwana and Another v The City of Johannesburg* (JA 59/15) [2016] ZALAC 85 (26 July 2016)
- 4.3. *Rustenburg Platinum Mines Ltd (Amandelbult Section) v NUM on behalf of Manageng and Others* (JA 12/2015) [2016] ZALAC 21 (26 May 2016)
- 4.4. *Academic and Professional Staff Association v City of Tshwane Metropolitan Municipality* (JA 61/14) [2016] ZALAC 70 (16 February 2016)
- 4.5. *Registrar of the Labour Court v Consolidation Association of Employers of South African Region* JA (5/13) [2014] ZALAC 45
- 4.6. *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd v Lebogate* (JA 104/13) [2014] ZALAC 55
- 4.7. *SA Football Association v Mangope* (2013) 34 ILJ 311 (LAC) – *Mangope v SA Football Association* (2011) 32 ILJ 1132 (LC)
- 4.8. *Woolworths (Pty) Ltd / CCMA & Others* (LAC) [2011] ZALAC 15
- 4.9. *Department of Finance & Economic Development (The Province of Gauteng) v Mesame & Others* (JA1/2013) [2014] ZALAC (19 September 2014)

- 4.10. *Professional Transport Workers Union v Malema & Others*
(JA67/12) [2014] ZALAC 53 (7 October 2014).