

JSC INTERVIEW ROUND: OCTOBER 2023

CANDIDATE: JUDGE MMATHEBE VIOLET PHATSHOANE

COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL

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. B Proc (1995) University of the North, Limpopo;

1.2.2. LLB (1997) University of the Free State, Bloemfontein; and

1.2.3. LLM (1999) University of the Free State, Bloemfontein.

1.3. The candidate's professional admissions and honours:

1.3.1. admitted as an attorney (1999);

1.3.2. enrolled as a notary and conveyancer (2009); and

1.3.3. recipient of Alumni "Extraordinary Achiever" award, *cum laude* (2012) University of the Free State.

1.4. The candidate was permanently appointed as a judge of the High Court (to the Northern Cape Division) on 10 May 2011.

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.

2.2. On the contrary, she has served in a number of positions that emphasise her integrity. The candidate has a reputation for objectivity, and ethical standards and behaviour, making her 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 22 judges permanently appointed to the SCA. Based on the names listed on the SCA website, the SCA's racial and gender composition appears to be:

3.1.1. 10 black women (7 African, 1 Indian, 2 coloured);

3.1.2. 2 white women;

3.1.3. 7 black men (5 African, 1 Indian, 1 coloured); and

3.1.4. 3 white men.

3.2. The candidate is a black (African) woman.

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 10 May 2011. She will turn 70 on 20 November 2042, at which point she will have served as a judge for more than 15 years.
- 4.5. If appointed, the candidate could serve a further 19 years.

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

- 5.1. The candidate has been on the bench of the Northern Cape Division as a permanent judge since 2011 and is well known to members of the Northern Cape Society of Advocates. She is and has always been committed to the Constitution and the values enshrined therein. This is evidenced by her judgments as well as the cases undertaken by her.
- 5.2. The candidate's personal commitment to the values of the Constitution is evident not only from the manner in which she

interacts with practitioners, but also with litigants, witnesses, and accused persons. She epitomises what is expected of a judge namely, to act without fear, favour, or prejudice.

- 5.3. The candidate is committed to transformation and contributes to the community and civil society through public service and community involvement. She served as a member of the South African Chapter of International Association of Women Judges from 2014 to date and served in its executive committee as the Vice-President for Programs from August 2012 to August 2014. She has also served as a member of the council of Sol Plaatje University (Kimberley) from 28 June 2014 to date. She has participated actively in community outreach programmes, addressing the community and learners on several occasions on Women's Day outreach events.

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

- 6.1. The candidate has a broad range of knowledge of the law as a result of her background, which includes:
- 6.1.1. practicing as an attorney, conveyancer and notary public;
- 6.1.2. serving as a judge, acting as Deputy Judge President in the Northern Cape Division, Labour Court, and Labour Appeal Court, and acting as a judge of appeal in the Supreme Court of Appeal.
- 6.2. Other fields of expertise and contributions to the law include, inter alia;
- 6.2.1. contributions to Chapters 6 and 7 of Butterworths *Employment Equity Law* (2001), titled "*Racial, ethnic and*

national origin harassment” and “*Reasonable accommodation of religion*”, respectively;

- 6.2.2. part-time arbitrator and conciliator at the Commission for Conciliation, Mediation and Arbitration (CCMA);
- 6.2.3. serving in the Education Labour Relations Council; Public Health Welfare Sectoral Bargaining Council; and the South African Local Government Bargaining Council; and
- 6.2.4. part-time lecturer, and external moderator for the senior certificate/diploma in Labour Law and an External Examiner for LLM students (Department of Constitutional Law) of the University of the Free State.

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

- 7.1. *S v Botha* Case no 449/11 (NCHC) (10 December 2015) partly overturned in *Botha v S* (901/2016) [2017] ZASCA 148 in that the sentence was set aside and the matter remitted to the court *a quo* for it to take the steps set out in s 276A(1) (a) of the Criminal Procedure Act 51 of 1977 and to thereafter impose sentence afresh.
- 7.2. *MBS Transport CC v Commission for Conciliation, Mediation & Arbitration and Others Bheka Management Services (Pty) Ltd v Kekana & Others* (2016) 37 ILJ 684 (LC) overturned and reported as *Commission for Conciliation, Mediation & Arbitration v Bheka Management Services (Pty) Ltd & Others* (2016) 37 ILJ 2793 (LAC). The issue was whether the Labour Court had the jurisdiction to stay writs of execution of arbitration awards made by the CCMA pending review, and if not, what parties could do to vindicate their

rights pending review. Phatshoane J held that, in general, the court had a wide discretion to stay the writs of execution of its own orders but that as the CCMA had lacked jurisdiction to issue the writs, the writs could be set aside as a nullity. On appeal before the Labour Appeal Court, in para 41, the court *a quo*'s decision was criticised. The appeal was upheld.

- 7.3. *Van Schalkwyk v S* (CA&R 119/14) [2015] ZANCHC 5 the decision to uphold the appeal against the conviction on a charge of murder was overturned by the majority in the SCA and replaced with a conviction on a charge of culpable homicide in *Van Schalkwyk v S* 2016 (2) SACR 334 (SCA). Baartman AJA and Willis JA dissented and would have upheld the conviction for murder.

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

- 8.1. The candidate is an experienced judge and administrator. She has a long professional career which started in 1999 when she was admitted as an attorney. She is also experienced in labour law, having acted in the Labour Court and Labour Appeal Court. Her judgments demonstrate concomitant knowledge of the law, and her good communication skills.
- 8.2. Her qualifications and professional career are indicative of her commitment to lifelong learning. She provided guidance and training to Magistrates on judgment writing and participated in the training of aspirant judges.
- 8.3. Her community involvement is illustrated by her participation in, *inter alia*, community outreach projects, service to SAC-IAWJ and serving of the board of the Sol Plaatje University.

9. The candidate's linguistic and communication skills:

9.1. The candidate is fluent in English, Setswana, and Afrikaans. Her command of the English language is excellent, as appears from her judgments.

9.2. She is always willing to assist acting judges in the Northern Cape by providing advice and guidance in judgment writing, without any attempt at influencing the outcome of a case.

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

10.1. The candidate has a reputation for handing down judgments promptly. The reviewers are not aware of instances where she has taken longer than three months after the last hearing to hand down a judgment.

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

11.1. The candidate manages her Court expertly.

11.2. Although strict in protecting the decorum of the court and adherence to procedural rules, she is experienced as being courteous, objective, fair, punctual, and always fully prepared. She strives to use court time and resources optimally.

11.3. The candidate is approachable and responsive in addressing and performing administrative functions. She performs her judicial case management functions well.

12. The candidate's independent mindedness:

- 12.1. The candidate has a reputation for being independent minded.
- 12.2. Her independent mindedness is illustrated in her minority judgment in *Canton Trading 17 (Pty) Ltd T/A Cube Architects V Fanti Bekker Hattingh No 2022(4) SA 420 (SCA)* from para 45.

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

- 13.1. The candidate practised as attorney and was a director of her firm.
- 13.2. She acted in the position of Deputy Judge President and was finally appointed to the position in 2021. Her administrative and time management skills are exceptional.

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

- 14.1. In view of the facts as set out above, the candidate is not only a fit and proper candidate to be appointed to the bench, but her appointment would also be an asset to the bench of the Supreme Court of Appeal.

ANNEXURE A: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *Bayport Securitisation Ltd and Another v University of Stellenbosch Law Clinic & Others* 2022 (2) SA 343 (SCA)
- 1.2. *Canton Trading 117 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh* NO 2022 (4) SA 420 (SCA)
- 1.3. *Director of Public Prosecutions, Free State v Mokati* 2022 (2) SACR 1 (SCA)
- 1.4. *SA Airways (SOC) Ltd (In business rescue) & Others v National Union of Metalworkers of SA obo Members & Others* 2021 (2) SA 260 (LAC)
- 1.5. *SA Airways SOC Ltd (In business rescue) v NUMSA* 2020 41 ILJ 2113 (LAC)
- 1.6. *Minister of Higher Education & Training v Business Unity* SA (2018) 39 ILJ 160 (LAC)
- 1.7. *National Director of Public Prosecutions v Scholtz & Others* 2017 (1) SACR 483 (NCK)
- 1.8. *S v Setholo* 2017 (1) SACR 544 (NCK)

2. Unreported judgments:

There are approximately 190 judgments of the candidate reported on SAFLII, of which we mention a few:

- 2.1. *Jobe and Others v Minister of Police* (2228/2016) [2020] ZANCHC 50 (24 July 2020)

- 2.2. *Star Internet Café v Vukani Gaming Northern Cape (Pty) Ltd* (254/2018) [2020] ZANCHC 23 (5 June 2020)
- 2.3. *Tshepe and Another v Rustia Feed (Pty) Ltd* (90/2020) [2021] ZASCA 104 (23 July 2021) (majority judgment and Petse DP dissenting)
- 2.4. *Nel v Construction Education and Training Authority and Others* (PA3/17) [2018] ZALAC 16 (10 July 2018)
- 2.5. *Noosi v Exxaro Matla Coal* (JA62/2015) [2017] ZALAC 3 (10 January 2017)
3. Judgments upheld on appeal:
 - 3.1. *S v Scholtz* (K/S 20/2013) [2016] ZANCHC 90 (6 December 2016) upheld and reported as *Scholtz and Others v S* [2018] 4 All SA 14 (SCA); 2018 (2) SACR 526 (SCA) (21 August 2018)
 - 3.2. *Awendgloed Boerdery Ltd v Elsiesdrift Plase (Pty) Ltd* Case no. 449/10 upheld in *Elsiesdrift Plase (Pty) Ltd v Awendgloed Boedery (Pty) Ltd* (449/11) [2016] ZANCHC 19
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 - 4.2. *MBS Transport CC v Commission for Conciliation, Mediation & Arbitration and Others Bheka Management Services (Pty) Ltd v*

Kekana & Others (2016) 37 ILJ 684 (LC) overturned and reported as *Commission for Conciliation, Mediation & Arbitration v Bheka Management Services (Pty) Ltd & Others* (2016) 37 ILJ 2793 (LAC)

- 4.3. *Van Schalkwyk v S* (CA&R 119/14) [2015] ZANHC 5 overturned by the majority of the SCA in *Van Schalkwyk v S* 2016 (2) SACR 334 (SCA)