

JSC INTERVIEW ROUND: OCTOBER 2023

CANDIDATE: JUDGE MOKGERE BUSISIWE SHAREEN MASIPA

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 (University of the North, now Limpopo) (1996);

1.2.2. LLB (University of Natal, now UKZN) (1998); and

1.2.3. LLM (UKZN) (Labour Studies) (2015).

1.3. The candidate holds the following certificates:

1.3.1. Law Society of South Africa (Conveyancing Practice) (1998);

1.3.2. Organisation for Social and Scientific Research in Eastern and Southern Africa (OSSREA) (Research Methodology) (2002);

1.3.3. CCMA (Commissioner's Training and Accreditation) (2005);

1.3.4. Law Society of South Africa (Certificate in Practice Management) (2005);

1.3.5. Mediatori SA (Certificate in Mediation Master Class – Predictable Irrationality) (2013);

- 1.3.6. CCMA (Specialist Commissioner: Organisational Rights and Section 198 of the LRA (2012 Amendments) (July 2015); and
- 1.3.7. SAJEI (Aspirant Judges Training) (Jan 2016).
- 1.4. The candidate was permanently appointed as a Judge of the High Court (to the KwaZulu-Natal Local Division, Durban) on 1 July 2016.

2. The candidate's integrity and ethics:

- 2.1. When the candidate previously appeared before the JSC to interview for her appointment as a judge in KZN, she disclosed that the then KwaZulu-Natal Law Society (LPC) had found her guilty of misconduct during her time as a member of the side-bar and had issued a fine. The candidate explained in her interview that the finding was the subject of a pending appeal before the High Court.
- 2.2. Subsequent to the candidate's appointment, the appeal was prosecuted before an independent panel of judges appointed from the Eastern Cape. The candidate was exonerated, and the Law Society's findings were overturned.

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 of active service.

4.4. The candidate was appointed as a judge on 1 July 2016. She will turn 70 on 1 March 2044, 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 20 years.

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

5.1. The candidate has shown a commitment to the values of the Constitution while serving as a judge of the High Court. In particular, reference should be made to one of her judgments, namely *NFM v John Wesley School & Another* 2019 (2) SA 557 (KZD); [2018] ZAKZDHC 64.

5.2. In addition, the candidate has taken the initiative to make a concerted effort to assist with continuing legal education at the Universities of Limpopo and Zululand, respectively.

5.3. The candidate also devoted time to do *pro bono* work to assist indigent litigants with access to justice. She was a member of the South African Women Lawyers Association in her time at the sidebar prior to her appointment as a permanent judge.

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

6.1. The candidate demonstrates a broad knowledge of the law, including constitutional law, through the various judgments which she has handed down, including a number of reported judgements, the most significant of which are as follows:

6.1.1. *NFM v John Wesley School & Another*, in which she held that although private schools are autonomous, they remain bound by the provisions of the South African Schools Act and the Constitution. The case involved a learner who had been excluded from sitting for his end-of-year examinations as a result of his parents' failure to pay his school fees. The candidate found it was necessary for the court to intervene and

protect the rights of the learner, in conformity with section 28 of the Constitution. The candidate invited an *amicus curiae* to represent the interests of the learner. The candidate found that the school had contravened its own policies, provisions of the Schools Act, and section 29 of the Constitution. The case set a precedent in respect of private schools and how they deal with learners when their parents default in the payment of school fees.

- 6.1.2. The candidate also handed down a reported judgment, which she has not included in her application, which dealt with the potential development of the common law in respect of the transmissibility of a general damages claim to the estate of a deceased litigant, who died prior to *litis contestatio* in the context of a Road Accident Fund claim. That judgment has been reported as: *Nortje v Road Accident Fund 2022 (4) SA 287 (KZD)*, in which the candidate declined to develop the common law on the grounds that legislative intervention was the more appropriate route and that the executor failed to adduce sufficient evidence in support of such development. That judgment was discussed and approved and followed in *Olivier N.O. v MEC for Health, Western Cape & Another 2023 (2) SA 551 (WCC)* at para 18.

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

- 7.1. *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd 2020 (2) SA 61 (SCA)* was a decision on appeal from a full court judgment overturning the candidate's judgment *a quo*. The SCA

dismissed the appeal of the full court's judgment. The SCA commented on the reasoning of the candidate in the judgment of the court *a quo* at paras 20 and 21 of the SCA judgment.

- 7.2. In *Derby Downs Management Association v Assegaai River Properties (Pty) & Another* to 2022 (2) SA 71 (KZP) by the full court. The case involved an office park management company which had passed a special resolution to alter its articles of association to allow for levies owing by property owners to be calculated on a different basis than was the case before. The litigation related to the implementation of the resolution to that effect. The candidate held that the 2007 special resolution had lapsed and was void because it was not registered as required by section 202 of the Companies Act 71 of 2008. Thereafter, the association passed two further resolutions in 2017, which sought to ratify the 2007 resolution, the second of which was to the effect that levies so calculated and charged would be calculated and recovered according to the new calculation. The summary of the essence of the candidate's judgment in the court *a quo* can be found at paras 16 to 18 of the appeal. The full court disagreed with the candidate's reasoning at paras 27 and 45 of the appeal.

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

- 8.1. The candidate qualified as an attorney on 17 May 2002 and practised as such until her elevation to the bench on 1 July 2016. Her practice during that period appears to have been confined to a labour practice which included litigation in the CCMA, bargaining councils, the Labour Court, and Labour Appeal Court. In addition, the candidate

served as a commissioner in the South African Local Government Bargaining Council.

8.2. The candidate also acted as a judge in the Labour Court (for various terms between July 2013 and September 2015).

8.3. The candidate has also served as an Acting Judge of Appeal in the Competition Appeal Court (January 2022 to date).

9. The candidate's linguistic and communication skills:

9.1. The candidate's judgments are well written and well reasoned. There appear to be only two instances in which her judgments were successfully overturned on appeal.

9.2. The candidate engages with counsel and communicates well in respect of any matter that is allocated to her for hearing.

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

10.1. We know of no instance where the candidate's judgment has been delayed for more than three months after the hearing, save for those specifically disclosed by the candidate in her application.

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

11.1. The candidate has always been well prepared, punctual, and fair in her dealings with counsel. The candidate has an engaging style and interacts well with counsel who appear before her. The candidate has displayed an efficient use of court time and resources and has taken on management functions, particularly in matters that fall to be dealt with under the judicial case management provisions under Rule 37A

or otherwise where necessary. KZN does not currently use CaseLines.

- 11.2. We know of no instance in which there has been a complaint about the candidate's ability to conduct court proceedings clearly, efficiently, and effectively.

12. The candidate's independent mindedness:

- 12.1. The candidate's independent mindedness was evident in the two judgments of *Nortje v Road Accident Fund* and *NFM v John Wesley School and Another*, respectively, in that:

12.1.1. In *Nortje* the candidate considered the full court judgment in *Nkala and Others v Harmony Gold Mining Co. Limited and Others* 2016 (5) SA 240 (GJ) and distinguished it, preferring to call for legislative amendments to give effect to the development of the common law in regard to the transmissibility of a general damages claim to the estate of a deceased victim, rather than developing the common law as was the case in *Nkala*.

12.1.2. In *John Wesley School*, the candidate found that private schools, whilst autonomous, remained bound by the provisions of the South African Schools Act and the Constitution and required the school to allow the learner to sit for his end of year examinations. The candidate's protection of the learner and principles underpinning sections 28 and 29 of the Constitution were subsequently considered by the Constitutional Court in *AB & Another Pridwin Proprietary School and Others* 2020 (5) SA 327 (CC), in which the

Constitutional Court similarly protected the learner's right to basic education and the best interests of the child in the context of a private school.

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

13.1. We know of no other instance, other than in relation to court proceedings, where the GCB can comment on the candidate's 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 field of labour law, as well as experience acting in the Competition Appeal Court. She would make a valuable addition to the Supreme Court of Appeal's bench in those areas of law.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED1. Reported judgments:

- 1.1. *Road Accident Fund and Others v Mabunda Incorporated and Others; Minister of Transport v Road Accident Fund and Others* [2023] 1 All SA 595 (SCA)
- 1.2. *Nortje v Road Accident Fund* 2022 (4) SA 287 (KZD)
- 1.3. *KV v WV* 2020 (1) SACR 89 (KZP)
- 1.4. *SD v S* 2020 (1) SACR 78 (KZP)
- 1.5. *Dlamini v S* 2019 (1) SACR 467 (KZP)
- 1.6. *NFM v John Wesley School and Another* 2019 (2) SA 557 (KZD)

2. Unreported judgments:

- 2.1. *Discovery Insure Limited v Masindi* [2023] ZASCA 101 (14 June 2023)
- 2.2. *MEC: Police, Roads and Transport, Free State Provincial Government v Bovicon Consulting Engineers CC & Another* [2023] ZASCA 99 (14 June 2023)
- 2.3. *Louw v Patel* [2023] ZASCA 22 (9 March 2023)
- 2.4. *MEC: Education, North West Province v Foster and Others* [2023] ZASCA 11 (13 February 2023)
- 2.5. *Kwafel CC v KwaDukuza Municipality and Others* [2020] ZAKZDHC 48 (16 October 2020)

3. Judgments upheld on appeal:

3.1. None

4. Judgments overturned on appeal:

4.1. *Derby Downs Management Association v Assegaai River Properties (Pty) & Another* 2022 (2) SA 71 (KZP)

4.2. *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd* 2020 (2) SA 61 (SCA)