

JSC INTERVIEW ROUND: OCTOBER 2023

CANDIDATE: JUDGE NAMHLA THINA YVONNE SIWENDU

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. Bachelor of Social Science – (B.Soc. Sc.) (1987) University of Cape Town;

1.2.2. Social Work Honours (SW) (Hons) (1988) University of Cape Town;

1.2.3. LLB (1991) University of KwaZulu-Natal;

1.2.4. An accredited arbitrator by the Independent Mediation Services of South Africa (IMSSA) (1997); and

1.2.5. Global Faculty Development Certificate (GFD) Wharton Business School, University of Pennsylvania (2010).

1.3. The candidate was admitted as an attorney in 1995.

1.4. The candidate was permanently appointed as a judge of the High Court (to the Gauteng Division) on 20 January 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 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 20 January 2017. She will turn 70 on 25 July 2036, 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 13 years.

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

5.1. The candidate is and has been a member of various organisations within the legal community throughout her professional career, both as an attorney and judge. The candidate's service and commitment to the legal community is exemplified in her position as an examiner for the attorneys' admissions examination at the commencement of her legal career, a member of the KwaZulu-Natal Law Society disciplinary committee, as well as a member of the rules, governance and transformation committees of the National Forum, prior to the introduction of the Legal Practice Act.

5.2. The candidate is involved in the judicial training both in South Africa in the training of aspirant judges with SAJEI and regionally as a member of the judicial education subcommittee for the African Regional Judges Forum, where she also serves on the HIV/TB and Human Rights committees.

5.3. These activities reflect the candidate's commitment to the rule of law, through her service to civil society.

5.4. The candidate is a trustee of the Yivani Mbali Foundation, whose mission is to transform the way society views and deals with mental health by developing programmes to increase awareness to break the social stigma and advocating for policy change. This shows the candidate's commitment to the right to health.

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

6.1. The candidate has written judgments covering all aspects of matters that come before the courts. The candidate's judgments do reflect a knowledge of the law. The manner in which the candidate sets out legal principles and applies them to the facts, however, is sometimes unclear.

6.2. The candidate's application of the constitutional principles in her judgments is less clear. For example:

6.2.1. The candidate's approach to matters which affect vulnerable groups is apparent from her judgment in *Living Hands (Pty) Ltd & Others v Old Mutual Unit Trust Managers Ltd and Others* 42728/2010 (12/07/2022). The candidate alluded to the interests of the beneficiaries of the trust fund who had been affected by the negligent actions she found the first defendant had committed. These beneficiaries were widows and orphans of deceased mine workers who had been their breadwinners. The beneficiaries thus qualified as vulnerable members of our society.

6.2.2. In her dissenting judgment in *BF v RD* 2019 (4) SA 145 (GJ), the candidate alludes to her “*preference for a wide definition of assets rather than mere tangible assets to recognise human capital contribution to the growth of another’s estate.*” This preference points to a recognition of the need to protect those who contribute to the wealth of the other spouse in the form of “*human capital*” rather than financially. Since the majority of spouses who contribute in this manner are women, it demonstrates the candidate’s appreciation that the interests of women in this position require protection.

6.3. The difficulty with the approach taken by the candidate in these judgments, is that the candidate’s reasoning stops at the recognition of the vulnerable group. As this is the limit of the candidate’s reasoning it is not clear what right the candidate sought to protect or whether the candidate sought to develop the common law to achieve such protection.

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

7.1. Judgments overturned:

7.1.1. The candidate’s decision in *Dlwathi v Minister of Police* 2016 JDR 0391 (GJ) was overturned in *Minister of Police v Dlwathi* (20604/14) [2016] ZASCA 6. The respondent had instituted a damages claim against the appellant for unlawful arrest and detention. On appeal, the Supreme Court iterated the legal principle that general damages are awarded for bodily injury, including injury to personality. The Supreme Court held that the candidate had misdirected herself by introducing a

punitive element in general damages by making an excessive award to deter this kind of unlawful conduct. The objective in awarding general damages, the Supreme Court held, was to compensate loss, not punish the wrongdoer. The candidate records this judgment as been *partially upheld*, without recognition of the legal misdirection, as identified by the Supreme Court.

7.1.2. *Jansen v S* (236/2015) [2016] ZASCA 133 (29 August 2016), Jansen had been convicted on two counts of contravening certain sections of the Criminal Law Amendment (Sexual offences and related matters) Act in the Regional Court. The candidate sitting as an Acting Judge with Tshabalala J confirmed the convictions and sentences (10 years and life imprisonment) as a court of appeal (*Jansen v State* A030/2014 (27 November 2017)). On further appeal, the Supreme Court overturned both the convictions and sentences holding that the appeal court was incorrect to accept the evidence of a single uncorroborated witness (the minor victim), as the evidence was untrustworthy, less credible and unreliable. The Supreme Court held that there was no reliable evidence led at the trial that could sustain the conviction of the appellant on both counts.

7.1.3. *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* 2017 JDR 1655 (SCA) overturned the candidate's judgment in *Hassim Hardware v Fab Tanks* (1129/2016) [2017] ZASCA 145 (13 October 2017). The candidate had refused the appellant's application for rescission of judgment. The candidate acknowledged that the appellant had raised a triable issue

against the respondent's claim but held that this was not germane to the judgment it sought to rescind. The Supreme Court restated the legal principles relating to rescission and stated that where a party raises as a defence, a counterclaim (in terms of Rule 22(4)) forms part of the good cause shown. The Supreme Court had in previous decisions held that a counterclaim was a defence for summary judgment and the same should apply to rescission applications. In contrast to the candidate's finding, the Supreme Court held there was an interconnectedness between the respondent's claim and the appellants' counter claim.

7.1.4. *Imbuko Wines (Pty)Ltd v Reference Audio* [2022] JOL 54563 (SCA) overturned the candidate's judgment in *Reference Audio CC v Imbuko Wines (Pty) Ltd*. The Supreme Court found on an analysis of the evidence led at trial that the appellant had proved a cession and that there was merit in the candidate's finding that the appellant had not done so.

7.1.5. *Southern Sun Group Retirement Fund v Registrar of Pension Funds & other* 2020 JDR 2250 (SCA) the Supreme Court overturned the candidate's judgment holding that the Pension Fund Regulation 35(4) was declared invalid and unenforceable as it exceeded the Minister's powers under the Act.

7.2. Judgments upheld:

7.2.1. *Khammissa and Others v Master, Gauteng High Court, and Others* 2021 (1) SA 421 (GJ). The joint liquidators had sought to review and set aside the decision of the Master in

appointing the respondents as joint liquidators after initialling refusing to do so. The liquidators argued that the Master was *functus officio* and bound by her initial decision. The candidate determined that the Master was *functus officio* by application of section 150 of the Insolvency Act and section 370 of the Companies Act. On appeal the Supreme Court in *De Wet and Another v Khammissa and Others* (358/2020) [2021] ZASCA 70 (4 June 2021), stated that the court *a quo* had failed to properly identify the issue for determination, namely administrative law. The issue for determination did not engage insolvency or company law. The candidate's decision was upheld but not the candidate's reasoning.

- 7.3. The candidate records in her application her refusal to grant the applicants leave to appeal in *Rahm & Another v Standard Bank of SA Limited, In Re The Standard Bank of South Africa v Rahm & another* [2021] ZAGPJHC 401 as a judgment which was unsuccessfully appealed against.
- 7.4. The review committee were not able to locate the decision of *Mackay v Bidcorp Food Africa (Pty) Ltd & others* Case No 40557/2017 (28 June 2018) that the candidate also records as a judgment unsuccessfully appealed against.

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

- 8.1. The candidate has had a long professional career, 22 years as a practicing attorney and 6 years as a judge. In addition, the candidate was, while a practising attorney, a research fellow at the Centre of Corporate Governance, Stellenbosch University, a member of the

United Nations Global Compact Advisory Committee University and a member of the United Nations Global Compact Advisory Committee. In these capacities the candidate was involved in researching and working on sustainable corporate governance initiatives.

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

9.1. The candidate writes in clear and understandable language. However, some of the judgments authored by the candidate during her tenure in the High Court suggest that the candidate's skills in presenting a clear analysis of the relevant evidence before her, application of the relevant legal principles to that evidence and her reasoning in coming to conclusions she reaches can benefit from further development. The absence of a reasoned application of the principles of law to the facts conveys the impression to the reviewer that the candidate's understanding of the facts or the law is elementary. The candidate's ability to identify the issues which fall to be determined is not immediately apparent from these judgments. This is an issue the Supreme Court identified in the *Khammissa* matter.

9.2. For example:

9.2.1. *Living Hands (Pty) Ltd & Others v Old Mutual Unit Trust Managers Ltd and Others* 42728/2010 (12/07/2022), is a decision the candidate lists among those she considers to be the most significant. The judgment does not distil the issues arising for determination. Although the candidate sets out a comprehensive analysis of the evidence, the application of the legal principles to the facts is largely left to the reader to

ascertain with reference to the authorities quoted in the footnotes to the judgment.

9.2.2. *Ex Parte KAF and Others* (2018/5329) [2018] ZAGPJHC 529; 2019 (2) SA 510 (GJ) (28 June 2018). The reasoning in this judgment concerning an application to confirm a Surrogate Motherhood Agreement, is difficult to follow. The candidate refers to individuals in this judgment without stating what role they play in the proceedings. The candidate sets out conclusions with reference to legislative provisions in the absence of an explanation of the relevance or application of these provisions to evidence at hand. The applicable legislative provisions are quoted verbatim in footnotes. The candidate's judgment calls for supposition on the part of the reader in order for it to be construed in a sensible manner.

9.3. The judgments authored by the candidate while she was acting in the Supreme Court of Appeal display a higher standard of linguistic and communication skills than those handed down during her tenure in the Gauteng Division of the High Court, including the Special Investigation Unit Tribunal and Tax Court, and the Competition Appeal Court.

9.4. This marked improvement in the candidate's judgments shows judicial maturity.

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

10.1. The majority of the judgments were delivered within the 3-month period.

10.2. The review committee noted that at the time of the candidate's October 2016 interview there were 2 criminal appeal judgments outstanding, where the candidate had sat with Judge Mailula. The 2 judgments had been outstanding from October 2015. The matter was elevated to the Judge President for assistance. Within the first few months of the candidate being appointed permanently in 2017, the candidate wrote the 2 judgments herself.

10.3. No such issue was noted by the review committee of the judgments considered. No matters were brought to the attention of the review committee where a judgment had been delayed unreasonably.

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

11.1. The candidate's judicial temperament has benefitted from her time on the bench.

12. The candidate's independent mindedness:

12.1. The candidate displays an independent-minded approach in her judgments. Two dissenting judgments from which this is apparent are:

12.1.1. *Gaone Jack Siamisang Montshiwa (Ex Parte Application)* (Case no 672/2021) [2023] ZASCA 19 (3 March 2023). Van der Merwe JA concurred with the candidate's dissenting judgment, striking the matter from the roll as the appeal was not properly before the court. This was so, as the court considering the application for leave to appeal was not properly constituted. The appeal concerned the applicant's admission as an attorney. The majority decision approached

the issues differently and reached a conclusion which disposed of the issues on the merits by employing the power afforded to the Court in terms of section 173 of the Constitution. The candidate's reasoning is superficial, and whilst the principles are correctly stated, there is no engagement with the majority's reliance on section 173 of the Constitution. The more nuanced application by the majority of the Court resulted in an outcome which in the words of Dambuza JA, "*avoided an injustice*".

- 12.1.2. *BF v RD* 2019 (4) SA 145 (GJ). The candidate delivered a dissenting judgment in a full bench appeal. The appeal concerns the interpretation of an ante-nuptial contract which by agreement between the parties to the litigation was to be determined by way of a stated case. The candidate came to the conclusion that the court ought to have declined to deal with the matter on this basis, as the facts recorded in the stated case were inadequate for the determination the parties sought the court to make. The candidate held that the matter ought to have been referred back to the court *a quo* for "*determination against the backdrop of the factual matrix and background referred to in the judgment.*" One of the conclusions reached by the candidate was that by virtue of the provisions of the Matrimonial Property Act, 1984 considerations of fairness arose. The Court is therefore required to "*peer beyond the literal meaning of the words used*" in the ante-nuptial contract. Whilst there could be merit in the result aimed at by the candidate, the superficial analysis of the authorities relied

upon raises a concern about the manner in which the candidate seeks to apply the principles of law to achieve this.

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

13.1. The candidate has, during her professional career, served on numerous committees both in the legal profession, as well as being a member of the transitional committee finalising the Legal Practice Act. She also served on corporate committees in her capacity as a non-executive director of companies. These positions reflect the candidate's administrative ability.

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

14.1. This candidate's appointment would send a message to the public at large that the judiciary is invested in elevating capable and accomplished women to the appeal court. It would send a message of reassurance to women, in particular those of colour, that their contribution to the legal field is recognised and rewarded.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED1. Reported judgments:

- 1.1. *Living Hands (Pty) Ltd & Others v Old Mutual Unit Trust Managers & Others* 2023 (1) SA 164(GJ); [2022] JOL 55615 (GJ)
- 1.2. *Brannon Jonathan Petersen v The State* Case No 295/2020 (WCC) (21/02/2023) 2023 (1) SACR 567 (SCA); [2023] JOL 58263 (SCA); [2023] ZASCA 26
- 1.3. *Minister of Police v Vuyani Goodman Gqamane*, 2023 JDR 1386 (SCA); [2023] JOL 58827 (SCA); [2023] ZASCA 61
- 1.4. *Govender Prenashan v The State* Case 2023 JDR 1383 (SCA); [2023] JOL 58826] (SCA); [2023] ZSCA 60
- 1.5. *Competition Commission v Coca-Cola Beverages Africa (Pty) Ltd* (2022) 43 *ILJ* 1971 (CAC); [2022] 2 CPLR 22 (CAC); (2022) ZACAC 4
- 1.6. *Competition Commission v Interaction Market Services Holdings (Pty) Ltd In re: Interaction Market Services v Competition Commission* Case 2022 JDR 1913 (CAC); [2022] 1 CPLR 1 (CAC); [2022] ZACAC 2
- 1.7. *VDB v VDB* 2022 (5) SA 633 (GJ); [2022] JOL 53068 (GJ); [2022] ZAGPJHC 271
- 1.8. *Coetzer v Wesbank, t/a Firstrand Bank Limited* 2022 (2) SA 178 (GJ); [2021] JOL 51615 (GJ)
- 1.9. *Khammissa & others v Master, Gauteng High Court & Two Others* 2021 (1) SA 421 (GJ); (2020) JOL 48082 (GJ)

- 1.10. *LW v DB* 2020 (1) SA 169 (GJ)
 - 1.11. *Ex Parte KAF and Others* 2019 (2) SA 510 (GJ)
 - 1.12. *BF v RF* 2019 (4) SA 145 (GJ)
 - 1.13. *Chamber of Mines v Minister of Mineral Resources and Another* 2018 (4) SA 581 (GP); [2018] 2 ALL SA 391 (GJ)
 - 1.14. *Sheriff, Johannesburg North & Another v Yellow DOT Property Investments & Another* 2016 (5) SA 107 (GJ); [2016] JOL 35774 (GJ); [2016] 2 All SA 927 (GJ)
 - 1.15. *Retmil Financial Services (Pty) Ltd v Sanlam Life Insurance Company Ltd and others* [2013] 3 All SA 337 (WCC)
2. Unreported judgments:
- 2.1. *East Rand Member District of Chartered Accountants v Independent Regulatory Board for Auditors & Others* 2023 JDR 1840 (SCA)
 - 2.2. *Smith NO and others v Master of the High Court Free State Division Bloemfontein and another* 2023 JDR 0683 (SCA)
 - 2.3. *Special Investigation Unit (SIU) v Mazibuko and Others* (GP010/2021) [2021] ZAST 9 (4 October 2021) and [2022] ZAST 3 (17 January 2022)
 - 2.4. *Astek Property Group (Pty) Ltd v Crypton Properties CC and Another* (2020/23712) [2021] ZAGPJHC 113 (25 May 2021)
 - 2.5. *T-Systems (Pty) Ltd v BDM Technology Services (Pty) Ltd and Others; In re BDM Technology Services (Pty) Ltd and Others v T-*

Systems (Pty) Ltd (2019/39986) [2020] ZAGPJHC 243 (7 October 2020)

- 2.6. *Special Investigation Unit v Lekabe [2021] ZAST 9*
- 2.7. *Special Investigation Unit v Lekalakala & another [2020] ZAST 1*
- 2.8. *Mr X v Commissioner SARS 84 SATC 311*
- 2.9. *Rahm & Another v Standard Bank of SA Limited, In Re The Standard Bank of South Africa v Rahm & another [2021] ZAGPJHC 401*

3. Judgments upheld on appeal:

- 3.1. *De Wet and Another v Khammissa and Others (358/2020) [2021] ZASCA 70 (4 June 2021)* upheld the candidate's order in *Khammissa & others v Master, Gauteng High Court & Two Others 2021 (1) SA 421 (GJ) (2020)* but held that the candidate had failed to identify the real matter for determination

4. Judgments overturned on appeal:

- 4.1. *Imbuko Wines (Pty) Ltd v Reference Audio [2022] JOL 54563 (SCA)* overturned the candidate's decision in *Reference Audio CC v Imbuko Wines (Pty) Ltd 5027/2019 (18 January 2021)*
- 4.2. *Southern Sun Group Retirement Fund v Registrar of Pension Funds and others Case no 215/2019) [2020] ZASCA 142 (2 November 2020)* overturned the candidate's decision in *Southern Sun Group Retirement Fund v Registrar of Pension Funds and others*
- 4.3. *Minister of Police v Dlwathi (20604/14) [2016] ZASCA 6* overturned the candidate's decision in *Dlwathi v Minister of Police 2016 JDR 0391 (GJ)*

- 4.4. *EH Hassim Hardware (Pty)Ltd v Fab tanks CC 2017 JDR 1655 (SCA)* overturned the candidate's decision in *Hassim Hardware v Fab Tanks* (1129/2016) [2017] ZASCA 145 (13 October 2017)
- 4.5. *Jansen v S (236/2015) [2016] ZASCA 133 (29 August 2016)*, overturned the candidate's decision in *Jansen v State A030/2014* (27 November 2017)