

JSC INTERVIEW ROUND: OCTOBER 2023

CANDIDATE: JUDGE NELISA PHIWOKAZI MALI

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 from Walter Sisulu University:
 - 1.2.1. DIP IURIS (1988);
 - 1.2.2. BIURIS (1992);
 - 1.2.3. LLB (1994); and
 - 1.2.4. LLM (Tax) University of Cape Town (1996).
- 1.3. The candidate was a public prosecutor from 1988 to 1995, but has not indicated when she was admitted as an attorney.
- 1.4. The candidate was permanently appointed to the High Court on 1 January 2016, serving in both the Gauteng and Mpumalanga Divisions.

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 1 January 2016. She will turn 70 on 11 February 2039, 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 15 and a half years.

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

5.1. We have not been able to find any judgments by the candidate suggesting any particular commitment to constitutional values. However, little may be read into this – the candidate does not select the cases that she has heard.

5.2. In a previous application (for transfer from Mpumalanga to Gauteng), the candidate referred to *Vermeulen v Marx* 2016 JDR 1435 (GP) as a judgment that asserts the rights of women in live-in relationships. The decision was made on the basis of uncontroversial facts and settled law. There is no engagement in the judgment of questions of constitutional law or legal policy or philosophy.

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

6.1. The candidate prodigiously produced written judgments across a diverse range of areas in matters in which the law was settled in the period 2016 – 2017. This, however, appears to have stopped abruptly towards the end of 2017 when the number of judgments appearing on SAFLII suddenly decreased dramatically. The reasons for this are not known.

6.2. From the time of her transfer back to Gauteng, however, the candidate has resumed her production of written judgments, producing a substantial number of judgments in 2021 and 2022. In her time as an acting judge at the SCA, the candidate appears to have penned two judgments (*Stay at South Point Properties (Pty) Ltd v Mqulwana and others* 2023 JDR 2330 (SCA); and *Mapolisa NO v Phetoe NO and others* [2022] ZASCA 168 (30 November 2022)).

6.3. The candidate appears to have only one reported judgment but her unreported judgments evidence knowledge of the law in diverse areas.

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

7.1. The candidate has not provided any information regarding her judgments that are the subject of appeal. This has hampered the reviewer team in their review.

7.2. Searches on Jutastat and SAFLII revealed several decisions of the candidate that have been overturned on appeal. Two of these decisions criticise the candidate for making findings regarding the honesty of witnesses and parties for which there was no basis. The

candidate's decisions also appear to have been overturned on appeal more often than upheld. These judgments are of concern.

- 7.3. In *Sasol Oil Proprietary Limited v The Commissioner for the South African Revenue Service* 2018 JDR 1953 (SCA), the candidate, sitting in the tax court, found that the evidence of the taxpayer (Sasol) was not credible and that certain transactions were simulated. On appeal the majority of the SCA (per Lewis JA) observed that this was a “*serious finding*” but that “*there is not a shred of evidence that this was the case ... [t]he evaluation of [the] witnesses as untruthful and unreliable is simply not fair*”. Ponnann JA, in a concurring judgment expressed himself about the candidate's judgment in the following strong terms:

“It is unclear to me why the Tax Court took the view that the evidence of Sasol Oil's witnesses fell to be rejected. The criticism of their evidence was not only unduly generalized, but also rather severe. The rejection of the evidence of senior employees, two of whom were retired, absent any countervailing evidence, is disquieting. They had no motive to lie in order to save tax for Sasol Oil. No ready answer presents itself as to why these professional persons would perjure themselves. There thus appears to be no reason to question the reliability of their evidence (either individually or collectively), much less their integrity or to brand them untruthful or evasive witnesses.”

- 7.4. On the other hand, a minority of two SCA judges (Makgoka JA and Mothle AJA) found in a dissent that they were “unable to find any misdirection by the Tax Court in regard to the finding of credibility and contradictions”.

- 7.5. In *Commissioner for the South African Revenue Service v Amewele Joint Venture* CC 2017 JDR 0188 (GP), a full bench dismissed the appellant’s appeal against a judgment of the candidate but granted the respondent’s cross-appeal on the basis that she had erroneously ordered that interest was to run from the date of the order rather than the date set in the relevant tax legislation. The full bench also noted that “in addition, the rate of interest was incorrectly calculated by the court *a quo* and this too amounts to an error on the part of the court *a quo*”. In granting the cross appeal, the full bench ordered each party to pay their own costs “*as the error was not of any one of the parties’ doing but rather that of the court a quo*”.
- 7.6. The criticism of the candidate by the full bench and the candidate’s apparently elementary error in an area of expertise is concerning.
- 7.7. A similar basic arithmetical error was made in *Phewa v Member of the Executive Council for Health Mpumalanga*, resulting in a further application to vary the order, which was granted by the candidate – see 2022 JDR 3414 (GP).
- 7.8. A further concern arises from *The Road Traffic Management Corporation v De Villiers* 2020 JDR 1170 (MN) in which the candidate granted an order on an unopposed basis that “*any and all pending ‘overspeeding’ prosecutions in the Mpumalanga Province, wherein the ProLaser 4 equipment is or was used, be stayed permanently*” despite the fact that neither the Road Traffic Management Corporation nor any of the Provincial Departments responsible for roads and safety, in particular the Mpumalanga Department of Community Safety Security and Liaison, were cited in the application. The order was rescinded. In our view, this is a

further concerning instance of what is (at best) a lack of attention to detail.

- 7.9. In *Masenya v S* 2018 (1) SACR 407 (GP), Fabricius J criticised the candidate's decision in *Magabara v S* (A800/2015) [2017] ZAGPPHC 117 (21 March 2017) as follows:

“The argument adopted by the trial Court, and accepted on appeal, was that (amongst others), ... when an accused has been convicted on 2 counts of rape, but not yet sentenced, when there are three or more counts of rape in issue, the provisions of ... paragraph (a)(iii) of Part 1 to Schedule 2 apply. As said, this approach is not justified by a proper interpretative exercise, and it is clearly wrong and should not be followed.”

- 7.10. Finally, in *De Kooker NO. and Others v Snyman* 2022 JDR 2830 (GJ), the appeal court (per Crutchfield J) described the order granted by the candidate (at the instance of the respondent) as being “*prejudicial in the extreme*” to the respondent, who was the victim of a car accident and whose affairs were being managed by the appellant (trustees). The candidate had also ordered the trustees to pay the costs of suit “*de bonis propriis*”, which order was reversed; and the respondent ordered to pay the costs on an ordinary scale on appeal. Crutchfield J held:

“Nothing stated by the respondent however justified the finding a quo that the appellants, all professionals, were dishonest, grossly inefficient or untrustworthy. Nor did the respondent submit facts based on her founding papers that the appellants' conduct might expose the Trust or the respondent beneficiary's

interests to actual loss. Furthermore, no basis existed in my view, for an order of costs de bonis propriis against the appellant.”

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

8.1. The candidate has wide experience as, inter alia, a:

8.1.1. prosecutor;

8.1.2. tax consultant;

8.1.3. assistant manager at SARS;

8.1.4. attorney (including director at a major firm for one year); and

8.1.5. judge.

9. The candidate’s linguistic and communication skills:

9.1. It is apparent from the candidate’s written judgments that her linguistic and communication skills are very good.

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

10.1. The candidate has three outstanding judgments, each of which have been reserved for a year or more. One of the judgments is said to have been delayed by the assessors. However, they provided their input in April 2023, and no explanation is tendered as to why the judgment remains outstanding. These delays are of concern.

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

11.1. A majority of the SCA found that the candidate’s conclusions as to the reliability of evidence was “simply not fair”, “*unduly*

generalised”, “*rather severe*”, and “*disquieting*”. The appeal court in *Kooker NO* was similarly critical of findings made by the candidate in respect of the trustees in that matter and the costs order made against those trustees in their personal capacities.

11.2. The candidate granted a far-reaching order on an unopposed basis in the matter of *The Road Traffic Management Corporation v De Villiers* 2020 JDR 1170 (MN), which may also suggest that the candidate did not conduct the court proceedings in that matter appropriately.

11.3. On the other hand, the applicant went out of her way to seek a fair solution in the *Joemath* matter, granting costs in favour of an unsuccessful applicant for review in circumstances where, although the application was not yet ripe, the approach of the respondent “*was open to considerable criticism*” which justified the launch of the application in the view of the candidate.

11.4. There is no evidence to indicate that the candidate lacks impartiality.

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

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

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

13.1. The candidate is a former director at Rooth & Wessels and manager at SARS. She was also a councillor of the Law Society of the Northern Provinces, which indicates administrative experience.

13.2. There is nothing to indicate that the candidate does not possess the requisite administrative ability.

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

14.1. The candidate is 54 years old and has been a permanent judge since 2016. She appears to have only one reported judgment; and there may therefore be a concern that appointment to the Supreme Court of Appeal is premature.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *Association of Test Publishers of SA v President of the RSA and others* [2017] 8 BLLR 850 (GP); (2017) 38 ILJ 2253 (GP)

2. Unreported judgments:

- 2.1. *Pine Glow Investments (Pty) Ltd v Brick-On Brick Property Investments 23 (Pty) Ltd* 2019 JDR 1681 (MN)
- 2.2. *S v Masombuka (MN)* (referred to in application)
- 2.3. *XYZ (Pty) Ltd v The Commissioner for the South African Revenue Service* 2019 JDR 0142
- 2.4. *Van Vuuren v Road Accident Fund* 2017 JDR 0611 (GP)
- 2.5. *Commissioner of the South African Revenue Service v Tloubatla* 2017 JDR 0612 (GP)
- 2.6. *H v H* (4897/2007) [2017] ZAGPPHC 1200 (30 October 2017)
- 2.7. *Mokobaki v S* (A708/16) [2017] ZAGPPHC 1069 (19 September 2017)
- 2.8. *Government Employees Pension Fund v Phala* (50819/14) [2017] ZAGPPHC 961 (19 September 2017)
- 2.9. *Visser v Dinokeng Lofts (Pty) Limited* 2017 JDR 0613 (GP)
- 2.10. *Harvest Bopp Bags Manufacturing (Pty) Ltd v Liberated Metal Workers' Union of South Africa* 2017 JDR 0931 (GP)
- 2.11. *Ngomane v Road Accident Fund* 2017 JDR 0932 (GP)

- 2.12. *Varachia v The MEC Department of Local Government & Housing Gauteng* 2017 JDR 0938 (GP)
- 2.13. *Masuku v Road Accident Fund* 2017 JDR 1856 (GP)
- 2.14. *Joemath v Minister of Justice* June 2017
- 2.15. *V v Road Accident Fund* (2069/2016) [2017] ZAGPPHC 882 (31 March 2017)
- 2.16. *Cele v S* (A933/2015) [2017] ZAGPPHC 118 (24 March 2017)
- 2.17. *Magabara v S* (A800/2015) [2017] ZAGPPHC 117 (21 March 2017)
- 2.18. *Yunus v Da Mata* (A465/2016) [2016] ZAGPPHC 1031 (15 December 2016)
- 2.19. *Ramoraswi and Others v Hlongwane and Others; Matlala and Another v Hlongwane and Others* (37227/2011; 14614/2009) [2016] ZAGPPHC 1009 (2 December 2016)
- 2.20. *Slabbert v Schutte* 2016 JDR 1336 (GP)
- 2.21. *Vermeulen v Marx* 2016 JDR 1435 (GP)
- 2.22. *Superway Construction (Pty) Ltd v City of Tshwane Metropolitan Municipality* (46599/2015) [2016] ZAGPPHC 1184 (29 November 2016)
- 2.23. *Ritchie NO v Ritchie NO and Others* (75467/15) [2016] ZAGPPHC 1235 (11 November 2016)
- 2.24. *Mphosi v S* (A614/2011) [2016] ZAGPPHC 965 (28 October 2016)

- 2.25. *Gianni v Road Accident Fund* (54221/2014) [2016] ZAGPPHC 1186 (27 October 2016)
- 2.26. *Viljoen and Another v Cornelius and Others* (48446/14) [2016] ZAGPPHC 1185 (27 October 2016)
- 2.27. *Ngxongwana v Road Accident Fund* (1273/2015) [2016] ZAGPPHC 985 (27 October 2016)
- 2.28. *Ajooda v Minister of Safety and Security* 2016 JDR 1915 (GJ)
- 2.29. *Mboni Shatsane Joint Venture (Pty) Ltd v Khawuyeza Trading (Pty) Ltd* 2016 JDR 2275 (GP)
- 2.30. *Sibara v Minister of Safety and Security* (31416/2012) [2016] ZAGPPHC 904 (13 October 2016)
- 2.31. *Mnisi and Another v Mahlare and Others* (56247/2013) [2016] ZAGPPHC 794 (9 September 2016)
- 2.32. *De Wee v Road Accident Fund* (71326/2013) [2016] ZAGPPHC 822 (2 September 2016)
- 2.33. *Focus Mining Services CC v Joubert* (A158/2016) [2016] ZAGPPHC 792 (2 September 2016)
- 2.34. *Muller v Lawrence* (15279/2015) [2016] ZAGPPHC 744 (24 August 2016)
- 2.35. *Maluleke v Mashaba* 2016 JDR 1447 (GP)
- 2.36. *Sibara v Minister of Safety and Security* 2016 JDR 1878 (GP)
- 2.37. *Van Der Burgh v Moosa and Another* (37238/2014) [2016] ZAGPPHC 664 (29 July 2016)

- 2.38. *Anglo American Platinum Ltd and Others v Pienaar and Others* (89567/2014) [2016] ZAGPPHC 656 (29 July 2016)
- 2.39. *Mafrika v Magongwa* (28553/2016) [2016] ZAGPPHC 647 (29 July 2016)
- 2.40. *Nedbank Limited v Kloppers* (66933/2015) [2016] ZAGPPHC 642 (29 July 2016)
- 2.41. *Reunert v The Commissioner for the South African Revenue Service*, July 2016 (attached to application)
- 2.42. *Tlam and Others v Tladi and Another* (11384/2015) [2016] ZAGPPHC 339 (1 March 2016)
- 2.43. *Mothoa v Road Accident Fund* (48272/2014) [2016] ZAGPPHC 567 (13 May 2016) (Quantum of damages: loss of income)
- 2.44. *Sithole v Minister of Police and Another* (63897/2011) [2016] ZAGPPHC 393 (27 May 2016) (Quantum of damages: general damages for unlawful arrest)
- 2.45. *Stay at South Point Properties (Pty) Ltd v Mqulwana and others* 2023 JDR 2330 (SCA)
- 2.46. *Mapolisa NO v Phetoe N O and others* [2022] ZASCA 168 (30 November 2022)
- 2.47. *Kanga Coal (Pty) Ltd v Greyling and others* (Case 1975/2020 in Mpumalanga Division – attached to application)
- 2.48. *Moyo v The State* (A208/2020; Gauteng Division, Pretoria – attached to application)

- 2.49. *Bechir v Malik* (A58472/2020; Gauteng Division, Pretoria – attached to application)
- 2.50. *Lukhele v Minister of Police* (Case 1064/2018; Mpumalanga Division – attached to application)
- 2.51. *ArcelorMittal South Africa Limited v Commissioner for the South African Revenue Service* (Case 13433: Tax Court, 2018 – attached to application)
- 2.52. *ABC Trading v Commissioner for the South African Revenue Service* (Case IT 25242: Tax Court, 2021 – attached to application)
- 2.53. *XY Mining v Commissioner for the South African Revenue Service* (Case 13433: Tax Court, 2018 – attached to application) 2016 Tax Court Case 32 2018 JDR 2252 (TC)
- 2.54. *Kholina v Health Professions Council of South Africa* 2021 JDR 1314 (GP)
- 2.55. *Phewa v The Member of the Executive Council for Health Mpumalanga* 2022 JDR 2820 (GP) – attached to application
- 2.56. *Phewa v Member of the Executive Council for Health Mpumalanga* (Judgment Variation Order) 2022 JDR 3414 (GP)
- 2.57. *South African Breweries (Pty) Ltd v The Commissioner for the South African Revenue Service and Another* 2022 JDR 3022 (GP) (attached to application)
- 2.58. *Matthews and Others v Ithuba Holdings (RF) (Pty) Ltd and Others* 2022 JDR 2518 (GP)
- 2.59. *Makole Resources (Pty) Ltd v Wessels* 2022 JDR 2510 (GP)

- 2.60. *Donaldson v Donaldson* 2022 JDR 2351 (GP)
- 2.61. *Masemola v Masemola and Others* 2022 JDR 2106 (GP)
- 2.62. *Kulagin v Director General of Home Affairs* 2022 JDR 1515 (GP)
- 2.63. *Barnard v Zeda Car Leasing (Pty) Ltd* 2021 JDR 2481 (GP)
- 2.64. *Kholina v Health Professions Council of South Africa* 2021 JDR 1314 (GP)
3. Judgments upheld on appeal:
- 3.1. *The Commissioner for the South African Revenue Service v Reunert Ltd* 2017 JDR 1868 (SCA)
4. Judgments overturned on appeal:
- 4.1. *Commissioner for the South African Revenue Service v Executor of the Estate late Lot Maduke Ndlovu* (A395/2016) [2020] ZAGPPHC 601 (12 October 2020)
- 4.2. *Sasol Oil Proprietary Limited v The Commissioner for the South African Revenue Service* 2018 JDR 1953 (SCA)
- 4.3. *Commissioner for the South African Revenue Service v Amewele Joint Venture CC* 2017 JDR 0188 (GP) (Cross Appeal successful)
- 4.4. *De Kooker NO and Others v Snyman* 2022 JDR 2830 (GJ)