

JSC INTERVIEW ROUND: APRIL 2024

CANDIDATE: JUDGE MUZIKAWUKHELWANA THOMAS NCUBE

COURT FOR WHICH CANDIDATE APPLIES: LAND COURT OF SOUTH AFRICA

1. The candidate's tertiary qualifications, professional admissions, honours, and permanent judicial appointments:

1.1. The candidate was conferred with the following degrees:

1.1.1. B. Juris (University of Zululand) (1983);

1.1.2. LLB (University of Zululand) (1997);

1.1.3. Post-Graduate Diploma in Environmental Law (UKZN) (2002); and

1.1.4. LLM (UKZN) (2003).

1.2. The candidate has acted or been appointed to the following judicial positions:

1.2.1. Magistrate (uMbumbulu Magistrates' Court) (1 June 1986);

1.2.2. Magistrate: Head of Office (Vulindlela Magistrates' Court) (1 February 1993);

1.2.3. Regional Court Magistrate from 4 November 2013; and

1.2.4. Judge: Land Claims Court (KZN) – The candidate was appointed as a Judge of the KZN Division of the High Court

seconded to the Land Claims Court) (1 January 2022 to date).

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 5 full-time Judges on the Land Claims Court comprising (as far as could be ascertained):

3.1.1. 2 black women (1 African and 1 Indian);

3.1.2. 1 black man (1 African);

3.1.3. 1 white woman; and

3.1.4. 1 white man.

3.2. 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 of active service.

4.4. At the time of the interviews, the candidate will be approximately 66 years and 3 months old and will have completed a period of approximately 2 years and 3 months of active service.

4.5. The candidate is eligible to complete a further period of 8 years and 8 months' active service as a judge.

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

5.1. The candidate lectured Constitutional Law at the University of Zululand for 5 years.

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

6.1. The candidate has extensive knowledge of the law and of Constitutional Law having lectured in the subject for 5 years at the University of Zululand.

6.2. The candidate has an in-depth understanding of land reform legislation and land reform, including the envisaged expansion of the mandate of the Land Claims Court through the Land Court Bill, with land reform being a Constitutional imperative.

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

- 7.1. *Mwelase & Others v Director-General, Department of Rural Development and Land Reform & Another* 2019 (6) SA 597 (CC) involved the appointment of a special master to deal with the serious problems that were created due to the many years of disregard and neglect of labour tenant claims. This was a groundbreaking judgment, which was upheld on appeal by the Constitutional Court. The Constitutional Court found that the judgment of the Court *a quo* reflected the fact that the Land Claims Court was exercising the true discretion as a specialist court in assessing its own capacity and expertise to ensure an effective remedy within a field the statute especially entrusted to it. The Constitutional Court found that the candidate had directed himself properly and scrupulously to the facts which served before him which demonstrated institutional functionality of an extensive and sustained degree that cried for a remedy. The remedy that was granted by the candidate was designed to fix persistent institutional failings that repeatedly resulted in non-compliance with court orders. (See in this regard paragraphs 67 to 71 of the judgment.)
- 7.2. *Aquarius Platinum (South Africa) (Pty) Limited v Bonene & Others* 2020 (5) SA 28 (SCA) dealt with land reform and the statutory protection of tenure, in which the candidate's judgment in the Land Claims Court was upheld by the SCA. In particular, the SCA confirmed the candidate's finding that the Extension of Security of Tenure Act 62 of 1997 required two consecutive steps to be taken before the eviction order could be granted and settled the law in that regard.

- 7.3. *In Makhuva-Mathebula Community v Regional Land Claims Commissioner, Limpopo* [2019] ZASCA 157 (28 November 2019) the SCA upheld the candidate's judgment that the Regional Land Claims Commissioner (RLCC) could not supplement the claim by adding more properties than were claimed. The Appellant sought to review the RLCC's decision to publish the claim and the SCA found that the candidate correctly dismissed the review.
- 7.4. *In Skog N.O. & Others v Koos Agullus & Others* 2024 (1) SA 72 (SCA) the candidate's judgment was overturned on appeal and the SCA criticised his failure properly to apply the *Plascon-Evans* rule, in particular the exception to the general rule (see paragraphs 24 and 62 of the SCA judgment).
- 7.5. *Selsley Farm Trust v Mhlongo* [2009] ZASCA 124 (28 September 2009) involved the question of whether the requirements of the definition of "labour tenant" was satisfied under the Land Reform (Labour Tenants) Act 3 of 1996. The SCA overturned the candidate's judgment on appeal and found that the Land Claims Court had misdirected itself in determining whether the respondent was a farm worker and whether the presumption in section 2(5) of the Land Reform (Labour Tenants) Act 3 of 1996 (see paragraph 13 of the SCA judgment) applied.

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

- 8.1. The candidate has extensive experience in the Land Claims Court. Even though he has only served two full years of active service as a (permanent) Judge of the Land Claims Court, the candidate has acted extensively, having been appointed to act in that court from 2006 to 2011 and 2014 and 2016.
- 8.2. The candidate has also acted extensively in the High Court (South Gauteng and KZN High Courts).
- 8.3. The candidate has experience with the administration of running a court. He was the Acting Chief Magistrate and Judicial Head for Region 6 (KZN), comprising 32 magisterial districts, which involved case flow management, courts, quality assurance and preparing judicial circulars and notices. Prior thereto, he also acted as the Judicial Head and Area Cluster Head, which required him to manage six districts.
- 8.4. The candidate has attended the aspirant Judges' training course arranged by the Chief Justice and SAJEI (July 2012).

9. The candidate's linguistic and communication skills:

- 9.1. The candidate has displayed clarity in his linguistic and communication skills, which are articulated in his judgments. He has delivered several seminal judgments, which have been upheld on appeal.

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

10.1. The candidate does not appear to have any outstanding reserved judgments and we know of no complaints about delays in the handing down of his judgments.

10.2. The judgments annexed to the candidate's application have all been delivered within three months of the hearing.

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

11.1. Counsel who have appeared before the candidate have described him as being a leader in this specialist court that deals with emotive issues. He is additionally described as firm but a Judge who acts with humility, kindness and a sense of fairness.

11.2. Furthermore, the candidate's previous experience in running the administration of courts, as set out above, coupled with his extensive experience in the Land Claims Court renders him qualified for the position.

12. The candidate's independent-mindedness:

12.1. The candidate's willingness to develop the law concerning land reform is evinced by his seminal judgments that have been upheld on appeal.

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

13.1. Given the extent of the candidate's professional experience, it would appear that he has well-developed administrative skills.

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

- 14.1. The candidate has a wealth of experience in this specialist court and has the administrative skills and the respect of the legal fraternity that justify his elevation to the position.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *Mwelase & Others v Director-General, Department of Rural Development and Land Reform & Others* 2017 (4) SA 422 (LCC)
- 1.2. *Gateway Properties (Pty) Ltd v Bright Ideas Projects 249 CC & Another* [2014] 3 All SA 577 (KZP)

1. Unreported judgments:

- 1.1. *Tshakuma Community Trust & Another v Regional Land Claims Commissioner for the Province of Limpopo and Others* [2023] ZALCC 21 (11 July 2023)
- 1.2. *Dintsi & Another v Van Breda & Another* [2019] ZALCC 29 (10 May 2019)
- 1.3. *Aquarius Platinum (South Africa) (Pty) Ltd v Bonene & Others* [2018] ZALCC 23 (15 June 2018)
- 1.4. *Makhuva-Mathebula v Regional Land Claims Commissioner, Limpopo & Another* [2017] ZALCC 6 (10 February 2017)

2. Judgments upheld on appeal:

- 2.1. *Aquarius Platinum (South Africa) (Pty) Ltd v Bonene & Others* 2020 (5) SA 28 (SCA)
- 2.2. *Mwelase & Others v Director-General, Department of Rural Development and Land Reform & Another* 2019 (6) SA 597 (CC)
- 2.3. *Makhuva-Mathebula Community v Regional Land Claims Commissioner, Limpopo* [2019] ZASCA 157 (28 November 2019)

3. Judgments overturned on appeal:

3.1. *Skog N.O. & Others v Koos Agullus & Others* 2024 (1) SA 72 (SCA)

3.2. *Selsley Farm Trust v Mhlongo* [2009] ZASCA 124 (28 September 2009)