

JSC INTERVIEW ROUND: APRIL 2024

CANDIDATE: JUDGE TATI MOFFAT MAKGOKA

COURT FOR WHICH APPLICANT APPLIES: CONSTITUTIONAL COURT

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

1.1 The candidate holds the following academic qualifications:

1.1.1 B PROC (University of the North), 1992; and

1.1.2 LLB (University of South Africa), 2021.

1.2 The candidate's was admitted as an attorney in 1994.

1.3 The candidate was appointed as a Judge to the Gauteng Division in 2009, a position he held until his elevation to the Supreme Court of the Appeal in 2018, a position he still holds.

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 10 permanent Judges on the Constitutional Court bench, comprising:

- 3.1.1 4 black women (3 African, 1 Coloured);
- 3.1.2 5 black men (3 African, 1 Indian, 1 Coloured); and
- 3.1.3 1 white man.

3.2 The candidate is a black man.

4 The maximum time period the candidate could serve if appointed:

4.1 Section 176(1) of the Constitution provides that a Constitutional Court Judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever is the earlier, unless extended by an Act of Parliament.

4.2 Section 4(1) of the Judges Remuneration and Conditions of Employment Act 47 of 2001 provides that a Constitutional Court Judge whose 12-year term of office as a Constitutional Court Judge expires before he or she has completed 15 years' active service as a Judge must, subject to subsection (2), continue to perform active service as a Constitutional Court Judge to the date on which he or she completes a period of 15 years' active service, whereupon he or she must be discharged as a Constitutional Court Judge.

4.3 Section 4(2) of the Act provides that a Constitutional Court Judge who, on attaining the age of 70 years, has not yet completed 15 years' active service as a Judge, must continue to perform active service as a Constitutional Court Judge to the date on which he or she completes a period of 15 years' active service as a Judge or attains the age of 75 years, whichever occurs first, whereupon he or she must be discharged as a Constitutional Court Judge.

4.4 At the time of the interviews, the candidate will be approximately 56 years and 2 months old and will have completed a period of approximately 14 years and 6 months of active service.).

4.5 If appointed, the candidate would be eligible to complete a period of 12 years' active service as a Judge of the Constitutional Court.

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

5.1 Nothing has been brought to the attention of the reviewers that indicates that the candidate is not committed to the values of the Constitution.

5.2 The candidate's participation in legal and community organizations has tended to focus on education, as evidenced by his position as lecturer for LEAD, Pretoria for the period 2006 to 2018, the BLA Legal Education Centre, for the period 2010 to date, the aspirant Judges Programme 2014 to 2018 and SAJEI 2018 to date.

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

6.1 The judgments considered cover a wide variety of areas of law. The candidate's judgments show an understanding and application of legal principles. The judgments reflect the development and maturity of the candidate as a Judge.

6.2 The candidate's judgments, prior to his elevation to the Supreme Court, display a sound knowledge of the application of constitutional values in matters that do not engage directly with the Constitution per se, for example:

- 6.2.1 *Magidiwana and Other Injured and Arrested Persons v President of the Republic of South Africa and Others (No 2)* [2014] 1 All SA 76 (GNP), where the candidate held that arrested and injured persons (comprising of mostly indigent workers) were entitled to legal representation, at state expense, to facilitate their participation in the Marikana Commission of Inquiry; and
- 6.2.2 *Standard Bank of South Africa v Caster Transport CC and Others and related cases* (13700/2012, 444/2014 [2014] ZAGPPHC 314 (4 June 2014), where the candidate remarked that returns of service referencing black women solely by their first name and as “domestics”, were unacceptable, and that courts should not accept returns of service couched in such terms, which were reminiscent of a painful history, in which black individuals were treated with indignity.
- 6.3 The judgments the candidate wrote in the Supreme Court of Appeal and as an Acting Judge in the Constitutional Court reflect that the candidate conducts a sound interpretative analysis of the context of the purpose of the legislative provisions and constitutional principles espoused in previous Constitutional Court jurisprudence. In this careful analysis the issues before the court are set out in a logical fashion.
- 6.4 This is apparent in the judgments in *National Commissioner for Correctional Services & another v Democratic Alliance and others* [2022] ZASCA 159 and *Clicks Group Limited & others v The Independent Community Pharmacy Association & others* [2021]

ZASCA 167. Both these judgments were unanimously concurred with.

6.5 The reviewers received comments on the case of *Rand Water v Wykwet 31 (Pty) Ltd and Others* (28033) 2016 (GD), which were critical of the judgment, in that it was internally inconsistent and came to a problematic conclusion. It was also drawn to the reviewers' attention that Sonnekus has criticised the judgment in an article entitled “(On)Geregistreeede Diensbaarheid van Pypleiding en tog eie Reg Tot Sloping van Onskuldige Eienaars se Wonings”.

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

7.1 The candidate has listed ten judgments that have been overturned on appeal. The reviewers discuss below a number of these judgments.

7.2 *SARS v Terraplas South Africa (Pty) Ltd* [2014] 2 All SA 11 (SCA): The reviewers could not locate the candidate's judgment in this matter. The case dealt with SARS's tariff determination of tiles imported by Terraplas in terms of the Customs and Excise Act. The SCA overturned the candidate's decision in which he determined that SARS's interpretation of the classification was too restrictive. The SCA did so by approval of existing precedents, which applied the General Rules for Interpretation of the Harmonised System and tariff determination.

7.3 *Mantella Trading 310 (Pty)Ltd v Kusile Mining (Pty)Ltd* (191/2014) [2015] ZASCA 10 (12 March 2015): The reviewers could not locate the candidate's judgment presiding as the Commissioner of

Patents. At issue was whether Kusile Mining had infringed a patent held by Mantella Trading and whether Mantella Trading's patent should be revoked for lack of clarity. The candidate had found that Kusile Mining had infringed certain of Mantella Trading claims. The candidate found in addition that Mantella Trading's patent fell to be revoked given the simplicity of the design.

7.4 The SCA agreed that there had been an infringement of Mantella Trading's patent but held that there were no grounds for the revocation of the patent. The candidate had failed to consider the established case authority that there was a distinction between the concepts of obviousness and novelty. Kusile Mining had conceded that the design was novel. The SCA held that on a consideration of the expert evidence the challenge to the patent on the grounds of obviousness failed as the patent involved creative ingenuity.

7.5 *Chetty v Italtile* (668/2011) [2012] ZASCA 170 (28 November 2012) overturned the candidate's judgment in *Italtile Ceramics Ltd v Dhayalan Chockanathan Chetty and Another* (34660/2009) [2011] ZAGPPHC 126 (13 July 2011): This was an action based on the *condictio furtiva*, conduct constituting theft at civil law. The candidate found for the plaintiff. On appeal, the SCA found that the candidate had addressed the wrong issue. The conduct complained of was not the use of the property, but whether the conduct was calculated to conceal the unlawful taking of property.

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

8.1 The candidate has nearly 30 years legal experience, the last 15 years as a Judge of both the Gauteng Division and the Supreme Court of Appeal.

9 The candidate’s linguistic and communication skills:

9.1 The candidate writes in a clear and accessible manner.

10 The candidate’s ability to produce judgments promptly:

10.1 The candidate appears to deliver judgments expeditiously. At the time of his application (November 2023) the candidate had 4 outstanding reserved judgments. As at the date of this review, the decisions remain outstanding.

10.2 Given that the Supreme Court of Appeal is a multi-member court, it is not clear that these delays as reported are attributable to him alone.

10.3 The reviewers are satisfied that, from the evidence available, the candidate can produce judgments on time.

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

11.1 The candidate’s judgments reflect that the candidate is fair and impartial.

12 The candidate’s independent mindedness:

12.1 The candidate’s independent mindedness is reflected in dissenting judgments that the candidate has penned in the Supreme Court of Appeal.

12.2 The candidate’s wrote a minority judgment in *Clicks Group Ltd & others v The independent Community Pharmacy Association* [2021] ZASCA 167, was upheld by the majority decision in *Independent*

Community Pharmacy Association v Clicks Group Ltd & others 2023 (6) BCLR 617 (CC).

- 12.3 In *Lotter NO & another Minister of Water & Sanitation* [2021] ZASCA 159, the candidate, invoking the aspirational provisions of the Water Act as progressive legislation, wrote a dissenting judgment, holding that the surrender by a holder of water rights and the application (to the water management institution) for the transfer of those water rights to another, excludes compensation to the initial holder of the water right entitlement.
- 12.4 In *United Democratic Movement v Lebashe Investment Group (Pty) Ltd* 2021 JDR 0027 (SCA), the candidate gave a dissenting judgment finding that an interim interdict is appealable, reasoning that the interests of justice are of paramount importance in deciding whether a judgment including interim orders is appealable. The candidate set out specific factors that, in his view, would need to be considered to answer that question. On appeal the Constitutional Court held that the test of appealability for an interim order was the interests of justice. While the Constitutional Court finding aligns with the candidate's minority judgment, the Court did not deal with the factors set out by the candidate.
- 12.5 In writing for the court in respect of a politically charged matter in *National Commissioner for Correctional Services & another v Democratic Alliance and others* [2022] ZASCA 159, the candidate took a balanced and legally-sound approach. The judgment showed no preference to any side of the political spectrum.

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

13.1 The reviewers found no evidence that the candidate does not have the necessary administrative ability. The candidate has and continues to serve in leadership positions.

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

14.1 The candidate has served the legal community in various roles for the past 30 years, particularly in the area of legal education, training, and development.

14.2 The candidate's commitment to education in his professional life has in recent years included his own education. While serving as an Appellate Judge, the candidate was admitted to an LLB degree in 2021. The candidate is currently enrolled for a Masters in Constitutional Law.

14.3 The candidate's appointment would send a positive message to the community at large.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported decisions:

- 1.1. *African Bank Ltd v Myambo NO 2010 (6) SA 298 (GNP)*
- 1.2. *CB and Another v HB 2021 (6) SA 332 (SCA)*
- 1.3. *Dart Industries Inc and Another v Botle Buhle Brands (Pty) Ltd 2023 SA 48 (SCA)*
- 1.4. *Clicks Group Limited & others v the Independent Community Pharmacy Association & others [2022] 1 All SA 297 (SCA)*
- 1.5. *Commissioner, South African Revenue Service v Marshall NO and Others 2017 SA 114 (SCA)*
- 1.6. *Democratic Alliance v Ministers of International Relations and Cooperation and Others 2017 (3) SA 212 (GP)*
- 1.7. *Edwards v Firstrand Bank Ltd t/a Wesbank 2017 (1) SA 316 (SCA)*
- 1.8. *Eskom Holdings Ltd v Halstead – Cleak 2017 (1) SA 333 (SCA)*
- 1.9. *Fluxmans Inc v Levenson 2017 (2) SA 520 (SCA)*
- 1.10. *GN v JN 2017 (1) SA 342 (SCA)*
- 1.11. *Joint Venture Aveng (Africa) (Pty) Ltd_ Strabag International GmbH v South African National Roads Agency SOC Ltd 2021 (2) SA 137 (SCA)*
- 1.12. *JW v SW 2011 (1) SA 545 (GNP)*
- 1.13. *Liberty Group Ltd v Illman 2020 (5) SA 397 (SCA)*
- 1.14. *M and Another v Murray NO and Others 2020 (6) SA 55 (SCA)*

- 1.15. *Mubake and Others v Minister of Home Affairs and Others* 2016 (2) SA 220 (GP)
 - 1.16. *National Commissioner of Correctional Services and Another v Democratic Alliance and Others (with South African Institute of Race Relations intervening as Amicus Curiae)* 2023 SA 530 (SCA)
 - 1.17. *Nyathaza v Johannesburg Metropolitan Bus Service SOC Ltd t/a Metrobus* 2016 (3) SA 74 (LAC)
 - 1.18. *Transnet SOC Ltd v Total South Africa (Pty) Ltd and Another* 2017 (1) SA 526 (SCA)
 - 1.19. *The Asphalt Venture Windrush Intercontinental SA and Another v UACC Bergshav Tankers AS* 2017 (3) SA 1 (SCA)
 - 1.20. *Wishart NO and Others v BHP Billiton Energy Coal South Africa (Pty) Ltd and Others* 2017 (4) SA 152 (SCA)
2. Unreported decisions:
- 2.1. *Afgri Corporation Limited v Eloff* 2016 JDR 1815 (SCA)
 - 2.2. *Burden & Swart Attorneys v Govender* 2016 JDR 1245 (GP)
 - 2.3. *Burmeister v Spitskop Village Properties Ltd (Commissioner for the South African Revenue Service Intervening Party)* 2015 JDR 1983 (GP)
 - 2.4. *Central African Services (Pty) Ltd v Minister of Transport* 2013 JDR 0407 (GNP)
 - 2.5. *Cloete v Van Den Heever NO* 2013 JDR 1075(GNP)
 - 2.6. *Ex Parte Application: Barratt* 2008 JDR 0643 (T)

- 2.7. *Fletcher v McNair* 2021 JDR 2331 (SCA)
- 2.8. *Harmony Gold Mining Company Limited v Regional Director: Free State, Department of Water Affairs* 2012 JDR 1110 (GNP)
- 2.9. *Head of Department Western Cape Education Department v Saffer (Woman's Legal Centre Amicus Curiae)* 2017 JDR 2018 (SCA)
- 2.10. *Jiyana v Absa Bank Limited* 2020 JDR 0650 (SCA)
- 2.11. *Mandarijn Limited v Connectivity Dynamics (Pty) Ltd* 2013 JDR 1222 (GNP)
- 2.12. *Mathekga And Another v S* (Case no 717/2019) [2020] ZASCA 77 (30 June 2020)
- 2.13. *Moosa v Phumelela Gaming and Leisure Limited* 2014 JDR 1553 (GP)
- 2.14. *Maswanganye v Baloyi NO* 2015 JDR 1967 (GP)
- 2.15. *Marynco Motors BK* 2011 JDR 1200 (GNP)
- 2.16. *Payne v Minister of Safety and Security* 2010 JDR 0130 (GNP)
- 2.17. *Petropulos and Another v Dias* 2020 (5) SA 63 (SCA)
- 2.18. *Phadziri & Sons (Pty) Ltd v Do Light Transport (Pty) Ltd & Another* [2023] ZASCA
- 2.19. *Phetla v Tendaupenju NO* 2017 JDR 0918 (GP)
- 2.20. *Pioneer Foods (Pty) Ltd v Eskorm Holdings SOC Ltd* (325/2021) [2022] ZASCA 171
- 2.21. *Phetla v Tendaupenju NO* 2017 JDR 0918 (GP)

- 2.22. *Rand Water v Wykwet 31 (Pty) Ltd and Others* (28033) 2016 (GD)
- 2.23. *Research & Development (Pty) Ltd v Dougall (Pty) Ltd* 2008 JDR 0898 (T).
- 2.24. *S v Mahlangu* 2015 JDR 0834 (GP)
- 2.25. *S v Dakalo* 2015 JDR 0760 (GP)
- 2.26. *S v Mokwele* 2015 JDR 0159 (GP)
- 2.27. *Sampo v Ivan Davies Theunissen Inc* 2007 JDR 0907 (T)
- 2.28. *Signature Real Estate (Pty) Ltd v Charles Edwards Properties and Others* 2020 (6) SA 397 (SCA)
- 2.29. *Tshwane Switchboards (Pty) Ltd v BHL Construction Services Group (Pty) Ltd* 2008 JDR 0897 (T)
- 2.30. *Tiry and Others v The State* (52/2018 and 149/2018) [2020] ZASCA 137 (29 October 2020)
- 2.31. *Tjaard v Du Plessis Ingelyf v SJP Joubert* 2010 JDR 1586 (GNP)

3. Judgments upheld on appeal:

- 3.1. *The Clicks Group Ltd & others v The Independent Community Pharmacy Association & others* [2022] 1 All SA 297 (SCA) the candidate's minority decision was upheld in *Independent Community Pharmacy Association V The Clicks Group Ltd & others* 2023 (6) BCLR 617 (CC)
- 3.2. *Legal Aid South Africa v Magidiwana and Others* 2015 (6) SA 494 (CC) upheld the candidate's judgment in *Magidiwana and Another*

v President of the Republic of South Africa and Others [2014] 1 All SA 76 (GNP)

- 3.3. *African Information Technology Bridge 1 v The MEC for Infrastructure Development Gauteng Province* (134/2014) [2015] ZASCA 104 (2 July 2015) upheld the candidate's judgment in *African Information Technology Bridge 1 (Pty) Ltd v MEC for Infrastructure, Gauteng Province* 2013 JDR 1710 (GNP)
- 3.4. *Piater v S* (743/13) [2014] ZASCA 134 (25 September 2014) the SCA dismissed the appeal against Makgoka J's order in *Piater v S* (A411/2011) [2012] ZAGPPHC 366 (7 December 2012)
- 3.5. The candidate's decision in *Esofranki Pipelines v Mopani District Municipality and Others* (56730/12) [2018] ZAGPPHC 547 (17 January 2018) was upheld by the SCA in *Esofranki Pipelines (Pty) Ltd v Mopani District Municipality* (916/2018) [2021] ZASCA 89; 2022 (2 SA 335 SCA). A further appeal was dismissed by the Constitutional Court and was subsequently dismissed in *Esofranki Pipelines (Pty)Ltd v Mopani District Municipality* 2023 (2) SA 31 (CC)
- 3.6. *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs & others* 2014 (3) SA 149 (SCA) upheld the candidate's judgment in *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs and Others* (68161/2008) [2012] ZAGPPHC 127 (29 June 2012)
- 3.7. *Kubyai v S* (829/2014) [2015] ZAGPPHC 985 (15 December 2015)

- 3.8. *Tarspray CC v Asphalt Services CC* (A5061) [2017] ZAGPJHC (8 November 2017)
- 3.9. The candidate's minority decision in *United Democratic Movement v Lebashe Investment Group (Pty) Ltd* 2021 JDR 0027 (SCA), was confirmed by the Constitutional Court, but for different reasons in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* 2023 (1) SA 353 (CC)
- 3.10. *Atkin v Botes* 2011 (6) SA 231 (SCA)
- 3.11. *Maroi Boerdery CC v Rabie and Others* (A560/2013) [2016] ZAGPPHC 861 (19 September 2016)
- 3.12. *Wilkinson v The Law Society of the Northern Provinces* (783/2016) [2017] ZASCA 69 (31 May 2017)
- 3.13. *Pieterse v Lephalale Local Municipality* 2017 (2) BCLR 233 (CC)
4. Judgments overturned on appeal:
- 4.1. *SARS v Terraplas South Africa (Pty) Ltd* [2014] 2 All SA 11 (SCA) overturned the candidate's decision in *Terraplas SA (Pty) Ltd v Commissioner SARS* Case 71629/2011
- 4.2. *Bengwenyama-ya-Maswazi Community v Minister for Mineral Resources & others* 2015 (1) SA 197 (SCA) overturned the candidate's decision in *Bengwenyama-ya-Maswazi Community v Minister for Mineral Resources & others* Case 27136/2011
- 4.3. *Bengwenyama-ya-Maswazi Community v Genorah Resources (Pty) Ltd and Others* 2015 (1) SA 219 (SCA)

- 4.4. *Mantella Trading v Kusile Mining* (191/2014) [2015] ZASCA 10 (12 March 2015)
- 4.5. *Standard Bank of South Africa Ltd v 3M Future Africa (Pty) Ltd* 2013 JDR 2748 (SCA)
- 4.6. *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 (5) SA 287 (SCA)
- 4.7. *Chetty v Italtile* (668/2011) [2012] ZASCA 170 (28 November 2012) overturned the candidate's judgment in *Italtile Ceramics Ltd v Dhayalan Chockanathan Chetty and Another* (34660/2009) [2011] ZAGPPHC 126 (13 July 2011)
- 4.8. *Neil Harvey & Associates (Pty) Ltd v Medscheme & Others* (621/10) [2011] ZASCA 75 (26 May 2011)
- 4.9. *Gert Thomas Van Der Merwe v Simon Molefe Pitje* (232/11) [2012] ZASCA 50 (March 2012)
- 4.10. *DPP Gauteng Division, Pretoria v Portia Thulisile Tsotetsi* (170/2017) [2017] ZASCA 083 (2 June 2017)
- 4.11. *Sandvik Intellectual Property AB v Oyj & Another* 2020 (4) SA 441 (SCA). The SCA overturned the candidate's decision in *Sandvik Intellectual Property AB v Outokumpu and Another* [2017] ZAGPH 69 (14 December 2017)
- 4.12. The SCA in *Lamprecht v Klipeiland (Pty) Ltd* [2014] JOL 32350 (SCA) overturned the decision of the candidate in *Lamprecht v Klipeiland* case no 55088/10