

JSC INTERVIEW ROUND: MAY 2024

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 holds the following qualifications:

1.1.1. B. Proc (University of the North (now Limpopo) (1996);

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

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

1.2. The candidate has also obtained the following certificates:

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

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

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

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

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

- 1.2.6. CCMA (Specialist Commissioner: Organisational Rights and Section 198 of the LRA (2012 Amendments) (July 2015); and
- 1.2.7. SAJEI (Aspirant Judges Training) (Jan 2016).
- 1.3. The candidate has the following judicial experience:
 - 1.3.1. Judge of the High Court (KwaZulu-Natal Local Division, Durban) (1 July 2016 to date);
 - 1.3.2. Acting Judge of Appeal (Competition Appeals Court) (January 2022 to date);
 - 1.3.3. Acting Judge of Appeal (Supreme Court of Appeal) (1 June to 30 November 2022, 1 April to 31 May 2023 and 1 October to 30 November 2023); and
 - 1.3.4. Acting Deputy Judge President (KZN High Court) (1 January to 31 March 2024).

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 the 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 and 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. 11 black women (8 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. 2 white men.

3.2. The candidate is an 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 is 50 and has completed a period of 7 years and 10 months of active service as a judge.
- 4.5. If appointed, the candidate could serve up to 20 years in office.

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 in taking the initiative to make a concerted effort to assist with continuing legal education at the Universities of Limpopo and UNIZULU, respectively.
- 5.2. The candidate has also devoted time to do *pro bono* work to assist indigent litigants with access to justice. She was also a member of the South African Women Lawyers Association in her time at the side bar prior to her appointment as a permanent judge.

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

- 6.1. The candidate has shown a broad knowledge of the law, including constitutional law, and the various judgments that she has handed down, which include a number of reported judgments, the most significant of which are as follows:
- 6.2. *NFM v John Wesley School & Another*, in which she held that although private schools were autonomous, they remained bound by the provisions of the South African Schools Act and the Constitution. The case involved a learner who was 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, the provisions of the Schools Act and section 29 of the Constitution. The case set a precedent in respect of private schools and how they should deal with learners when their parents default in the payment of school fees.

- 6.3. The candidate also handed down a reported judgment, 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 [18].

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

Judgments upheld on appeal

- 7.1. *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd 2020 (2) SA 61 (SCA)*, which involved an appeal from a Full Court judgment, which overturned the candidate's judgment on appeal. 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 paragraphs [20] and [21] of the SCA judgment.

Judgments overturned on appeal

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 owed 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 paragraphs [16] to [18] of the appeal. The Full Court disagreed with the candidate's reasoning at paragraphs [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 Appeals Court (January 2022 to date).
- 8.4. The candidate has also acted extensively in the Supreme Court of Appeal for the periods: 1 June to 30 November 2022, 1 April to 31 May 2023 and 1 October to 30 November 2023.
- 8.5. The candidate has acted as the Acting Deputy Judge President for the KwaZulu-Natal High Court for the period 1 January to 31 March 2024.

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 she is allocated to hear.

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

- 10.1. The reviewers came across 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. 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 judgments of *Nortje v Road Accident Fund*, *NFM v John Wesley School and Another*, *Freedom Under Law v Judicial Service Commission and Another* and the two judgments in *Maughan and Another v Zuma*, in that:
- 12.2. 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*.
- 12.3. In *John Wesley School*, the candidate found that private schools, whilst

autonomous, remained bound by the provisions of 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.

- 12.4. In *Freedom Under Law v Judicial Service Commission and Another* [2023] ZASCA 103, the candidate co-authored a dissenting judgment in a high-profile appeal involving the impeachment of a judge, which judgment recommended the remittal of the matter to the JSC. The dissenting judgment differed in regard to the scope of the reconsideration hearing by the JSC.
- 12.5. In *Maughan and Another v Zuma* 2023 (5) SA 467 (KZP), the candidate presided as one of the members of the Full Court that considered an application to set aside the summons initiating the private prosecution of the applicants. The court, *inter alia*, found that the private prosecution constituted a strategic litigation against public participation (“*SLAPP*”) suit and set aside the summons. This judgment was upheld on appeal by the Supreme Court of Appeal (*vide Zuma v Downer and Another* 2024 (2) SA 356 (SCA)).
- 12.6. In *Maughan v Zuma and Another; Downer v Zuma and Another* [2023] ZAKZPHC 75, the candidate presided as one of the members of the Full Court that considered an application to implement the order pending the appeal, in terms of section 18 (3) of the Superior Courts Act 10 of 2013. The

Full Court granted the order directing that the judgment would not be suspended pending the determination of the final determination of the application for leave to appeal or any appeal(s).

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

13.1. The candidate has recently completed a session as the Acting Deputy Judge President, which would have entailed significant administrative work as the Senior Judge for that particular division (KwaZulu-Natal Division, Pietermaritzburg).

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, has presided as a permanent judge for almost eight years involving a variety of matters, including challenging high-profile cases. The candidate also has experience in presiding in the Competition Appeals Court and would contribute to those areas of law on the SCA bench.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *Maughan and Another v Zuma* 2023 (5) SA 467 (KZP)
- 1.2. *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)
- 1.3. *Nortje v Road Accident Fund* 2022 (4) SA 287 (KZD)
- 1.4. *KV v WV* 2020 (1) SACR 89 (KZP)
- 1.5. *SD v S* 2020 (1) SACR 78 (KZP)
- 1.6. *Dlamini v S* 2019 (1) SACR 467 (KZP)
- 1.7. *NFM v John Wesley School and Another* 2019 (2) SA 557 (KZD)

2. Unreported judgments:

- 2.1. *Maughan v Zuma and Another; Downer v Zuma and Another* [2023] ZAKZPHC 75 (3 August 2023)
- 2.2. *Freedom Under Law v Judicial Service Commission and Another* [2023] ZASCA 103 (22 June 2023)
- 2.3. *Discovery Insure Limited v Masindi* [2023] ZASCA 101 (14 June 2023)
- 2.4. *MEC: Police, Roads and Transport, Free State Provincial Government v Bovicon Consulting Engineers CC & Another* [2023] ZASCA 99 (14 June 2023)
- 2.5. *Louw v Patel* [2023] ZASCA 22 (9 March 2023)

2.6. *MEC: Education, North West Province v Foster and Others* [2023] ZASCA 11 (13 February 2023)

2.7. *Kwafel CC v KwaDukuza Municipality and Others* [2020] ZAKZDHC 48 (16 October 2020)

3. Judgments upheld on appeal:

3.1. *Maughan and Another v Zuma* 2023 (5) SA 467 (KZP) was upheld on appeal by the SCA in *Zuma v Downer and Another* 2024 (2) SA 356 (SCA)

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)