

JSC INTERVIEW ROUND: MAY 2024

**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 holds the following qualifications:

- 1.1.1. Bachelor of Social Science (B.Soc. Sc.) (1987), University of Cape Town;
- 1.1.2. Bachelor of Social Science, with Honours (Social Work) (B.Soc. Sc (Hons.)) (1988), University of Cape Town;
- 1.1.3. Bachelor of Law (LLB) (1991), University of Natal (now University of KwaZulu-Natal);
- 1.1.4. Accredited arbitrator (1997), Independent Mediation Services of South Africa (IMSSA); and
- 1.1.5. Global Faculty Development Certificate (GFD) (2010), Wharton Business School, University of Pennsylvania.

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

1.3. The candidate was permanently appointed as a judge of the High Court (Gauteng Division, Johannesburg) on 20 January 2017.

1.4. The candidate acted in the SCA from 1 June 2022 to 30 September 2023 and in the Competition Appeal Court from February to December 2020, 1 January to 31 December 2022 and 1 January to 31 December 2024.

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. 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’ 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 12 years.

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

- 5.1. The candidate 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 by 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 judicial training both in South Africa and the region. Domestically, the candidate is involved in the training of aspirant judges with the SAJEI; and, regionally, as a member of the Judicial Education Subcommittee (and the HIV/TB and Human Rights committees) with the African Regional Judges Forum.
- 5.3. These activities reflect the candidate's commitment to the rule of law, as does her involvement in civil society.
- 5.4. Notably, the candidate is a trustee of the Yivani Mbali Foundation, whose mission is to transform the way society views, and deals with, mental health challenges by developing programmes to increase awareness, break down social stigma, and advocate policy change.

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

- 6.1. The candidate has written judgments commensurate with the breadth of matters that come before the courts. The candidate's judgments reflect a knowledge of the law.
- 6.2. The candidate states that she has produced eight SCA judgments, including a co-authored dissenting judgment with a colleague. None of these judgments has been revisited.
- 6.3. During the candidate's October 2023 JSC interview, a question was posed as to what is expected of the SCA's judgments and whether she considered herself to possess the technical ability and forensic skills to produce judgments to that standard. The candidate articulated that the SCA is a robust and tough court with long hours of work and a range of competing views. The style of writing judgments for a first court is different from that of the

SCA.

- 6.4. The candidate's writing demonstrates the requisite technical skill and competence expected of a judge.
- 6.5. However, the candidate candidly admitted in her interview that she considers her judicial writing to be a work-in-progress.
- 6.6. As the candidate recognises, she has a tendency to "over write" and that has an impact on the clarity of her judgments. The candidate shows self-awareness and a commitment to ongoing self-improvement.
- 6.7. While the candidate's judgments show a knowledge of constitutional law, as the candidate has not fully articulated her reasoning in these judgments, her application of constitutional principles is less clear. By way of example:
 - 6.7.1. 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 of the first defendant. 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. The candidate indicated that this matter has been appealed against.
 - 6.7.2. In her dissenting judgment in *BF v RD* 2019 (4) SA 145 (GJ), the candidate records 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 their spouse in the form of “*human capital*” rather than merely financial means. 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.

6.8. Whilst these judgments show that the candidate has a deeper understanding of constitutional law (particularly in her ability to extend constitutional protections to vulnerable groups of people beyond the listed categories in the equality clause), her reasoning tends to stop short of fully developing the law regarding the recognition and protection of vulnerable groups.

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

Judgments overturned:

7.1. 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 SCA iterated the legal principle that general damages are awarded for bodily injury, including injury to personality. The SCA 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 SCA held, was to compensate loss, not punish the wrongdoer. The candidate records this judgment as being *partially upheld*, without recognition of the legal misdirection, as identified by the SCA.

- 7.2. In *Jansen v S* (236/2015) [2016] ZASCA 133 (29 August 2016), Jansen had been convicted on two counts of contravening 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 in *Jansen v State* A030/2014 (27 November 2017)). On further appeal, the SCA overturned both the convictions and sentences holding that the Appeal Court had been incorrect to accept the evidence of a single uncorroborated witness (the minor victim), as the evidence was untrustworthy, less credible, and unreliable. The SCA held that there was no reliable evidence led at the trial that could sustain the conviction of the appellant on both counts.
- 7.3. *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* 2017 JDR 1655 (SCA) overturned the candidate's judgment in *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* (2733/2015) [2016] ZAGPPHC 439 (27 May 2016). 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 SCA 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 SCA 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 SCA held there was an interconnectedness between the respondent's claim and the appellants' counter claim.
- 7.4. *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 SCA found on an analysis of the evidence led at trial that the appellant had proved a cession and that there was no merit in the candidate's finding that the appellant had not done so. (The High Court found for the appellant at first instance, which the respondent overturned before the Full Court on appeal (the candidate sitting together with one other), which was then overturned again at the SCA).

- 7.5. In *Southern Sun Group Retirement Fund v Registrar of Pension Funds & other* 2020 JDR 2250 (SCA), the SCA 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.

Judgments upheld:

- 7.6. *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 a decision of the Master in appointing the respondents as joint liquidators after initially 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 SCA in *De Wet and Another v Khammissa and Others* (358/2020) [2021] ZASCA 70 (4 June 2021) held 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.
- 7.7. The candidate records 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.

- 7.8. The review committee was not able to locate the decision of *Mackay v Bidcorp Food Africa (Pty) Ltd & others* Case No 40557/2017 (28 June 2018), which the candidate 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 of 22 years as a practising attorney and 6 years as a judge.
- 8.2. 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 language.
- 9.2. There are some areas of concern regarding the candidate's ability to write fully reasoned judgments. Whilst this was most apparent in the *Khammissa* matter, the candidate herself identifies that her judgment writing requires some development. It does not strike the reviewers that these areas for improvement should serve to block the candidate's elevation but, perhaps, should form part of her ongoing judicial training and education; and serve as

a basis for all serving Judges to openly and frankly identify the need for professional development.

- 9.3. Two judgments reflect the general concern identified by the SCA in *Khammissa*:
- 9.4. *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.
- 9.5. *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 surrogacy 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.
- 9.6. It appears to the reviewers that the candidate's ability to produce sharper judgments is significantly improved by serving on a multi-panel bench in a manner that evidences blending the benefits of the candidate's own independent-mindedness and the collaborative nature of the kind of work

done by the Appeal Court. 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 reviewers noted that at the time of the candidate's October 2016 interview there were two criminal appeal judgments outstanding, where the candidate had sat with Judge Mailula. The judgments had been outstanding from October 2015. The matter was elevated to the Judge President. Within the first few months of the candidate being appointed permanently in 2017, the candidate wrote the judgments herself.

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

- 11.1. The candidate is able to conduct court proceedings fairly, efficiently, and effectively. The candidate's interactions with counsel are good.
- 11.2. 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:
- 12.2. *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 as the application for leave to appeal was not properly constituted. While this conclusion was technically correct, 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. Whilst the candidate correctly states the legal principles, her judgment does not engage with the majority's reliance on section 173. It is not clear whether, had the candidate done so, she would have commanded the majority which, in the words of Dambuza JA, resulted in an outcome that "*avoided an injustice*".

- 12.3. *BF v RD* 2019 (4) SA 145 (GJ). The candidate delivered a dissenting judgment in a full bench appeal. The appeal concerned the interpretation of an antenuptial contract which by agreement between the parties to the litigation was to be determined by way of a stated case. The candidate concluded 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 Matrimonial Property Act, 1984, considerations of fairness arose. The Court was required to "*peer beyond the literal meaning of the words used*" in the antenuptial contract.

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.

14.2. It would send a message of reassurance to women, in particular black women, that their contribution to the legal field is recognised and rewarded.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *Smith NO and others v Master of the High Court Free State Division Bloemfontein and another* 2023 (4) SA 554 (SCA)
- 1.2. *Living Hands (Pty) Ltd & Others v Old Mutual Unit Trust Managers & Others* 2023 (1) SA 164 (GJ); [2022] JOL 55615 (GJ)
- 1.3. *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
- 1.4. *Minister of Police v Vuyani Goodman Gqamane*, 2023 JDR 1386 (SCA); [2023] JOL 58827 (SCA); [2023] ZASCA 61
- 1.5. *Govender Prenashan v The State* Case 2023 JDR 1383 (SCA); [2023] JOL 58826 (SCA); [2023] ZSCA 60
- 1.6. *Competition Commission v Coca-Cola Beverages Africa (Pty) Ltd* (2022) 43 ILJ 1971 (CAC); [2022] 2 CPLR 22 (CAC); (2022) ZACAC 4
- 1.7. *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
- 1.8. *VDB v VDB* 2022 (5) SA 633 (GJ); [2022] JOL 53068 (GJ); [2022] ZAGPJHC 271
- 1.9. *Coetzer v Wesbank, t/a Firstrand Bank Limited* 2022 (2) SA 178 (GJ); [2021] JOL 51615 (GJ)
- 1.10. *Khammissa & others v Master, Gauteng High Court & Two Others* 2021 (1) SA 421 (GJ); (2020) JOL 48082 (GJ)
- 1.11. *LW v DB* 2020 (1) SA 169 (GJ)
- 1.12. *Ex Parte KAF and Others* 2019 (2) SA 510 (GJ)

- 1.13. *BF v RF* 2019 (4) SA 145 (GJ)
- 1.14. *Chamber of Mines v Minister of Mineral Resources and Another* 2018 (4) SA 581 (GP); [2018] 2 ALL SA 391 (GJ)
- 1.15. *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)
- 1.16. *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. *Special Investigation Unit (SIU) v Mazibuko and Others* (GP010/2021) [2021] ZAST 9 (4 October 2021) and [2022] ZAST 3 (17 January 2022)
- 2.3. *Astek Property Group (Pty) Ltd v Crypton Properties CC and Another* (2020/23712) [2021] ZAGPJHC 113 (25 May 2021)
- 2.4. *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)
- 2.5. *Special Investigation Unit v Lekabe* [2021] ZAST 9
- 2.6. *Special Investigation Unit v Lekalakala & another* [2020] ZAST 1
- 2.7. *Mr X v Commissioner SARS* 84 SATC 311
- 2.8. *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)