

# **JSC INTERVIEW ROUND: OCTOBER 2024**

## **VACANCY: JUDGE PRESIDENT, WESTERN CAPE DIVISION OF THE HIGH COURT**

### **JUDGE DANIEL MAFELEU THULARE**

Note: The review of this candidate was updated on 12 September 2024 following a comment bringing to the reviewers' attention a judgment of the Full Court, delivered on 3 September 2024, upholding an appeal against the candidate's judgment.

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

1.1. The candidate holds the following tertiary qualifications:

- 1.1.1. B Iuris (UNISA, 1996)
- 1.1.2. Bachelor of Laws (LLB) (UNISA, 1998)
- 1.1.3. Master of Laws (LLM) (UNISA, 2002).

1.2. The candidate holds the following professional admissions and honours:

- 1.2.1. public prosecutor in 1993.

1.3. The candidate has held the following judicial roles:

- 1.3.1. Magistrate, from 2000
- 1.3.2. Senior Magistrate, from 2005
- 1.3.3. Head of Family Law Court, Johannesburg, from 2007
- 1.3.4. Head of Court, Benoni, from 2013
- 1.3.5. Chief Magistrate, Cape Town, from 2016
- 1.3.6. Judge of the Western Cape Division of the High Court, from 2022.

## **2. The candidate's integrity and ethics**

- 2.1. No circumstances are known to the reviewers 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. We refer, however, to section 12 below.

## **3. The racial and gender composition of the bench**

- 3.1. As far as could be ascertained, there are 27 permanent judges of the Western Cape Division of the High Court:
  - 3.1.1. 10 black women (4 African, 6 Coloured)
  - 3.1.2. 12 black men (5 African, 5 Coloured, 2 Indian)
  - 3.1.3. 2 white women
  - 3.1.4. 3 white men
- 3.2. According to the questionnaire, the candidate is an African man.

## **4. The maximum period the candidate could serve if appointed**

- 4.1. At the time of the interviews, the candidate will be approximately 54 years and 3 months old and will have completed a period of approximately 2 years and 9 months of active service.
- 4.2. If appointed, the candidate would be eligible to complete a period of approximately 15 years and 8 months' active service as Judge President.

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

- 5.1. The candidate has indicated that he led a project to extend family and civil law services to townships through the Magistrates' Courts historically only providing criminal law services.
- 5.2. The candidate has also indicated that he was involved in training traditional leaders in the law.
- 5.3. The candidate has recorded that he facilitated moot court competitions at school and university level.

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

- 6.1. The candidate was never in private practice, so much of his experience before judicial appointment was limited to criminal law (as a prosecutor). Nonetheless, as a

Magistrate, the candidate was exposed to civil law and gained experience in that regard. As a judge, he has shown himself competent in civil law. The candidate does have, at least, a basic understanding of constitutional law.

- 6.2. The candidate has over 25 reported High Court judgments (mostly in criminal law) and a number of unreported judgments.
- 6.3. Most matters dealt with in the candidate's reported judgments entailed criminal trials.
- 6.4. The candidate considered constitutional law principles in certain of his judgments on immigration, equality, and criminal matters. As referred to in paragraph 6.2 below, one of these judgments has been criticised and not followed in this court.
- 6.5. It appears that the candidate's knowledge of the law and his experience on the bench, either in the Magistrate's court or as an acting judge, are mostly confined to criminal, equality, and immigration law. There is no reason to doubt the candidate's commitment to the values of the Constitution. His experience on the bench in the field of Constitutional Law, however, appears to be limited.
- 6.6. Constitutional considerations were mentioned in, or were central to, two of his judgments. These are:
  - 6.6.1. *Inzinga Ranch CC v Mashiyi* 2018 JDR 1456 (WCC) (a judgment wherein the question of racial discrimination in the workplace was discussed).
  - 6.6.2. *Nandutu v The Minister of Home Affairs* [2018] 3 ALL SA 259 (WCC), (a judgment in which the candidate considered whether the prohibition against a foreign spouse of a South African citizen or permanent resident holding a visitor's visa applying for change of status while in South Africa, infringes the constitutional right to dignity). As noted, this judgment of the candidate was overturned on appeal (see: *Nandutu and Others v Minister of Home Affairs and Others* (CCT 114/18) [2019] ZACC 24; 2019 (8) BCLR 938 (CC); 2019 (5) SA 325 (CC) (28 June 2019).
- 6.7. Though unreported, the candidate's judgments regarding issues of racial discrimination and immigration demonstrate his commitment to human rights and to enhancing the community's values and needs. The candidate is also committed to a transformative approach to the adjudication of matters – one that infuses African values into our civil law.

- 6.8. In a recently handed down judgment of the Full Court overturning the candidate's order on appeal, the candidate's understanding of the law was held to be lacking. The judgment of the Full Court is cited as *Executive Mayor of the City of Cape Town v Director of Public Prosecutions Western Cape and Another* (A117/2024) [2024] ZAWCHC 236 (3 September 2024). The candidate's judgment is cited as *S v Ntamehlo* (CC60/2021) [2023] ZAWCHC 181; 2023 (2) SACR 518 (WCC) (2 August 2023).
- 6.8.1. In sentencing proceedings before the candidate in the case of a man who had been convicted of murdering his wife, the candidate handed down orders directing, *inter alia*, that the man's "*patrimonial benefits*" arising from the marriage (specifically an RDP house) be forfeited to his minor son; that a curator *ad litem* be appointed for the child; that the Mayor of the City of Cape Town establish a trust for the benefit of the child; that the Premier of the Province of the Eastern Cape "*trace the remains of the deceased*" and take all steps necessary to "*ensure*" that the minor child and the deceased's family "*visit such grave as part of their emotional and psycho-social therapy*"; and that the Director-General of the Department of Social Development "*provide all the necessary resources, human and otherwise*" to assist the social worker appointed to assist the child.
- 6.8.2. None of the public officials described in the order were joined in the proceedings before the candidate
- 6.9. The findings of the Full Court in the appeal included the following:
- 6.9.1. Section 300 of the Criminal Procedure Act, providing for the payment of compensation by a person convicted of an offence, did not apply *in casu* (paras 55-58). It must be noted that the candidate did not rely on this section in his judgment.
- 6.9.2. In relation to the part of the order aimed at the deceased's share of the RDP house, that the candidate needlessly purported to develop the common law, as the law of intestate succession already prevented the murderer from benefiting from his crime and ensured that the child would inherit his mother's share (paras 59-67) and that it was "*not clear whether the court a quo was alive to the principle and maxim what already exists in the common law*" (para 64).
- 6.9.3. The Full Court held that the court's finding that the child suffered from an

identity crisis caused by doubts about the identity of his maternal and paternal grandfathers – it is unclear from the appeal judgment in what context the candidate made this finding and what its relevance was – “*regrettably*” “*appears to evince a patriarchal understanding of identity*” that “*is not harmonious with a Constitutional democracy where family relations are not limited to paternal relatives of the mother or of the father or the child*” and “*harks back to the offensive and thankfully, now repealed, Black Administration Act 38 of 1927*” (para 78).

- 6.9.4. The court found that the candidate implemented section 28(2) of the Constitution without examining and making a finding on whether sentencing proceedings “*designed specifically for the punishment of the accused, could be properly considered to be a matter relating to the child*” (para 93).
- 6.9.5. The court ultimately held that the court *a quo* “*had no jurisdiction to make the following orders that the court a quo said were made in the interests of justice*” (para 114) and “*exceeded the bounds of its powers and failed to apply the rule of law and the principle of legality, therefore the orders fall to be set aside on the basis that they are wrong in law and constitute a nullity*” (para 115).
- 6.10. Paragraphs 49 to 55, highlighted the requirements of the Code of Judicial Conduct, incorporating the Bangalore Principles of Judicial Conduct, the requirement of independence in terms of section 165(2) of the Constitution, and the subjugation of judicial power to the Constitution and the law. It is in this context that the Full Court’s treatment of the candidate’s judgment and the findings it makes cast doubts on the candidate’s understanding of constitutional law and administrative law, particularly in relation to the jurisdictions and powers of the courts.

## **7. Judgments of the candidate that have been take on appeal**

- 7.1. Three of the candidate’s reported judgments were overturned on appeal; and three of his unreported judgments were reversed on appeal.
- 7.2. As far as the reviewers have been able to ascertain, five of the candidate’s judgments were overturned on appeal. The unreported judgments in which the candidate’s judgments were overturned are *S v Cooper* 2019 JDR 0645 (SCA), *NC v The State* (285/2018) [2019] ZASCA 50 (1 April 2019), *Uniting Presbyterian Church in SA and Another v Reformed Presbyterian Church in Southern Africa and Others*

(1438/2018) [2019] ZASCA 129 (30 September 2019). The reported judgment of the candidate which was overturned is: *Nandutu and Others v Minister of Home Affairs* [2018] 3 ALL SA 259 (WCC).

- 7.3. It has further come to the reviewers' knowledge that the Western Cape High Court, in the decision of *Hano Mong v The Director of Public Prosecutions and the Minister of Police, Case Number 17593/2018* (dated 23 August 2019) found that the decision of the candidate (with which Dolamo, J concurred) in *S v Madhina* 2018 JDR 2142 (WCC) was manifestly wrong (para [82] and [83]) and should not be followed because it is in conflict with a long line of decisions.
- 7.4. *Media24 (Pty) Ltd v Nhleko* [2021] ZAWCHC 186 – *Media24 (Pty) Ltd v Nhleko* [2023] 77 (29 May 2023). This appeal concerned the dismissal of an application to amend a plea. The appeal was upheld after the High Court refused to allow the amendment.
- 7.5. *Cape Estate Properties (Pty) Ltd v George Local Municipality* – overturned in *Cape Estate Properties (Pty) Ltd v George Local Municipality* ZAWCHC (16 May 2023).
- 7.6. In *Executive Mayor of the City of Cape Town v Director of Public Prosecutions Western Cape and Another* (A117/2024) [2024] ZAWCHC 236 (3 September 2024), the candidate's orders that did not relate to sentencing in *S v Ntamehlo* (CC60/2021) [2023] ZAWCHC 181; 2023 (2) SACR 518 (WCC) (2 August 2023) were overturned.

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

- 8.1. The candidate worked as an interpreter with the Department of Justice from 1991 to 1997. From 1996 to 1999, the candidate was a prosecutor with the Department of Justice. During 1999, the candidate was a candidate attorney with Du Preez & Nkozi Inc. From 1999 to 2005, the candidate was a Magistrate. From 2005 to 2016, the candidate was a senior Magistrate. Since 2016, the candidate has been the Chief Magistrate of Cape Town.
- 8.2. The candidate's extensive experience as a prosecutor, Magistrate, and acting judge exposed him to many years of law. He focused particularly on criminal and immigration law.
- 8.3. About two-thirds of the candidate's High Court trial experience is focused on criminal trials and appeals.

8.4. The candidate held the position as a member (from 2000-2003), provincial chairperson (from 2004-2006), member (from 2005-2017) and president (from 2017 to date) of The Judicial Officers Association of South Africa (JOASA). The candidate has been a member since 1993 to date of the National Union of Public Service and Allied Workers (NUPSAW).

**9. The candidate's linguistic and communication skills**

9.1. The candidate's judgments are written in English.

9.2. Nothing in the judgments and other writings considered by the reviewers indicates that the candidate's linguistic and communication skills are not adequate.

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

10.1. There is no indication that the candidate is unable to produce judgments promptly.

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

11.1. From paragraphs 103-107, of the judgment of the Full Court in *Executive Mayor of the City of Cape Town v Director of Public Prosecutions Western Cape and Another* (A117/2024) [2024] ZAWCHC 236 (3 September 2024), discussed above, it appears that the candidate on at least one occasion issued a court order against parties, including public officials, who were not joined in the proceedings over which the candidate presided and who were not given notice of the candidate's intention to impose any obligations on them, in violation of the principle of *audi alteram partem*.

11.2. The order also purported to impose on some officials obligations that fell outside of their administrative powers. At para 111, the Full Court held that the order against the appellant "*compels the mayor to act ultra vires or to be in contempt of court by not complying with the order*".

**12. The candidate's independent-mindedness**

12.1. The candidate occasionally strays outside the bounds of judicial power in a way that has the potential to affect public perceptions of his independence.

12.2. In the judgment of the Full Court in *Executive Mayor of the City of Cape Town v Director of Public Prosecutions Western Cape and Another* (A117/2024) [2024]

ZAWCHC 236 (3 September 2024), discussed above, the Full Court made the following comments at paragraphs 68 to 72:

*“In considering the reasoning in the judgment of the court a quo, it is necessary to make a few remarks concerning the need for judicial officers not to stray into the arena of making comments or statements that have the effect of attracting populist rhetoric.”*

*“Judges must not only be independent and impartial and adjudicate without fear and favour and prejudice, but they must also be seen and be perceived to be thus, in order to maintain the legitimacy of the judiciary and respect for the rule of law.”*

*“The judgment a quo, is peppered with references to popular protest songs and slogans like: ‘Senzeni na? (What have we done?) Wathint’ Abafazi ! (You strike a woman) Siyaya e Pitoli (We are marching to Pretoria) Sefikile e Pitoli (We have arrived in Pretoria) Amandla Ngawethu! (The power is ours)’”*

*“While the history and import of the above-named protest slogans and songs are fully understood and appreciated by this Court, it is necessary in the exercise of judicial power, to remind ourselves that courts are meant to uphold the law and apply it without playing to a public gallery or the court of public opinion.”*

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

13.1. There is no indication that the candidate has poor administrative ability.

**14. The message that the candidate’s appointment would send to the community at large**

14.1. The candidate’s appointment would send the message that demonstrated leadership skills in the Magistracy are transferable to the High Court and that inexperience as a judge in the High Court is not a deciding factor in the appointment of Judge President.



## **ANNEXURE: LIST OF JUDGMENTS CONSIDERED**

### Reported judgments

1. Not completed by reviewers

### Unreported judgments

1. Not completed by reviewers

### Judgments upheld on appeal

2. Not completed by reviewers

### Judgments overturned on appeal

3. Not completed by reviewers