

JSC INTERVIEW ROUND: OCTOBER 2024

VACANCY: DEPUTY JUDGE PRESIDENT OF THE LAND COURT

JUDGE MUZIKAWAKHELWANA THOMAS NCUBE

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. Juris, University of Zululand (1983)

1.1.2. LLB, University of Zululand (1997)

1.1.3. Post-Graduate Diploma in Environmental Law, University of KwaZulu-Natal (2002)

1.1.4. LLM, University of KwaZulu-Natal (2003).

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

1.2.1. public prosecutor in 1993.

1.3. The candidate was permanently appointed to the following judicial roles:

1.3.1. Magistrate (uMbumbulu Magistrates Court) on 1 June 1986

1.3.2. Assistant Magistrate/Assistant Head of Court (Simdlangentsha Magistrates Court) on 1 June 1990

1.3.3. Assistant Magistrate/Assistant Head of Court (Vulindela Magistrates Court) in April 1991

1.3.4. Chief Magistrate/Head of Office (Vulindlela Magistrates Court) on 1 February 1993

1.3.5. Regional Magistrate on 4 November 2013

1.3.6. Judge of the Land Claims Court (KwaZulu-Natal Division) on 1 January 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.

3. The racial and gender composition on the bench

- 3.1. There are currently 5 permanent judges of the Land Court:
 - 3.1.1. 2 black women (1 African, 1 Coloured)
 - 3.1.2. 1 African man
 - 3.1.3. 1 white woman, and
 - 3.1.4. 1 white man.
- 3.2. The President of the court is a Coloured woman.
- 3.3. 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 66 years and 9 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 8 years and 2 months' active service as Deputy Judge President.

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.
- 5.2. In addition, the candidate's judgment in *Mwelase & Others v Director-General, Department of Rural Development and Land Reform & Others* 2017 (4) SA 422 (LCC) and the Constitutional Court's subsequent judgment in *Mwelase & Others v Director-General, Department of Rural Development and Land Reform & Another* 2019 (6) SA 597 (CC) requires mention in regard to the candidate's commitment to the values of the Constitution.
- 5.3. The candidate is a member of the Black Lawyers Association.
- 5.4. The candidate is a member of the St Gerald Hospice.

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

- 6.1. The candidate lectured constitutional law at the University of Zululand for 5 years.

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 Court through the Land Court Act, with land reform being a constitutional imperative. This is evident from the judgments written by the candidate.

7. Judgments of the candidate that have been taken on appeal

7.1. The candidate has disclosed that 7 judgments have been taken on appeal. On appeal, 5 judgments have been upheld and 2 judgments have been overturned. The reviewers could not find any of the candidate's judgments in which appeals remain to be decided.

7.2. The judgments of the candidate upheld on appeal are:

7.2.1. *Mwelase & Others v Director-General, Department of Rural Development and Land Reform & Another* 2019 (6) SA 597 (CC): The candidate penned a judgment reported as *Mwelase & Others v Director-General, Department of Rural Development and Land Reform & Others* 2017 (4) SA 422 (LCC), which 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. The judgment was overturned by the Supreme Court of Appeal in *Director-General, Department of Rural Development and Land Reform, and Another v Mwelase and Others* 2019 (2) SA 81 (SCA). However, on appeal to the Constitutional Court, the judgment of the SCA was overturned. The Constitutional Court found that the judgment of the Court *a quo* reflected the fact that the Land Claims Court was exercising 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 served before him which demonstrated institutional dysfunctionality of an extensive and sustained degree that called 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.)

7.2.2. *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.

7.2.3. In *Makhuva-Mathebula Community v Regional Land Claims Commissioner, Limpopo* 2019 JDR 2368 (SCA); [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.

7.2.4. In *Gateway Properties (Pty) Ltd v Bright Ideas Projects 249 CC & Another* [2014] 3 All SA 577 (KZP) the full bench of the KwaZulu-Natal Division, Pietermaritzburg upheld the candidate's judgment. The parties concluded a lease that was subject to the fulfilment of a suspensive condition requiring the first respondent to obtain the necessary site and retail licences. The first respondent obtained the site licences but was prevented from starting business due to the refusal of consent by the Fire Department due to inadequate safety installations on the property. During that time, the first respondent did not pay rental, leading to a demand by the appellant for arrear payments. The candidate dismissed an application by the appellant, as landlord, for payment of rental and eviction of the first respondent. The full bench held that the reasoning of the court *a quo* and the conclusion it reached could not be faulted.

7.2.5. In *S v Ngubane* 2016 JDR 1014 (KZP) the full bench of the KwaZulu-Natal Division, Pietermaritzburg upheld the candidate's judgment.

7.3. The judgments of the candidate overturned on appeal are:

7.3.1. In *Skog N.O. & Others v Koos Agullus & Others* 2024 (1) SA 72 (SCA); [2023] 2 All SA 631 (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. In paragraph 24 of the judgment the SCA held that the candidate should have applied the principle set out in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at para 53 and in failing to do so the candidate materially misdirected

himself. See also paragraph 62 of the SCA's judgment.

- 7.3.2. *Selsley Farm Trust v Mhlongo* [2009] ZASCA 124 (28 September 2009) involved the question 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 experience in the Land Court. Even though he has only served two and a half years of active service as a (permanent) judge of the Land Court, the candidate has acted extensively, having been appointed to act in that court from 2006 to 2011, 2014 and 2016.
- 8.2. The candidate has also acted in the High Court (South Gauteng and KZN divisions).
- 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, 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'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. The candidate has displayed clarity in his linguistic and communication skills, which are articulated in his judgments.

10. The candidate's ability to produce judgments promptly

- 10.1. The candidate indicated that no judgments were outstanding at the time of completing the questionnaire.

10.2. As far as could be ascertained at the time of completing this review, no judgments were still outstanding.

10.3. Of the 6 judgments of the candidate considered by the reviewers, 2 were handed down more than three months after hearing.

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

11.1. The reviewers received no adverse comments from colleagues relating to the candidate's ability to conduct court proceedings fairly, efficiently, and effectively.

12. The candidate's independent-mindedness

12.1. The reviewers received no adverse comments from colleagues relating to the candidate's independent-mindedness.

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.

14.2. His appointment would send a positive message.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported judgments

1. *Mwelase & Others v Director-General, Department of Rural Development and Land Reform & Others* 2017 (4) SA 422 (LCC)

Unreported judgments

2. *Tshakuma Community Trust & Another v Regional Land Claims Commissioner for the Province of Limpopo and Others* 2023 JDR 2532 (LCC); [2023] ZALCC 21 (11 July 2023)
3. *Dintsi & Another v Van Breda & Another* 2019 JDR 1567 (LCC); [2019] ZALCC 29 (10 May 2019)
4. *Aquarius Platinum (South Africa) (Pty) Ltd v Bonene & Others* 2018 JDR 0882 (LCC); [2018] ZALCC 23 (15 June 2018)
5. *Makhuva-Mathebula v Regional Land Claims Commissioner, Limpopo & Another* [2017] ZALCC 6 (10 February 2017)
6. *Ramorula Community and another v Regional Land Claims Commissioner Limpopo and others* 2023 JDR 1901 (LCC)
7. *Thuthukani Land Claim Committee* 2024 JDR 0870 (LCC)

Judgments upheld on appeal

8. *Gateway Properties (Pty) Ltd v Bright Ideas Projects 249 CC & Another* [2014] 3 All SA 577 (KZP)
9. *Aquarius Platinum (South Africa) (Pty) Ltd v Bonene & Others* 2020 (5) SA 28 (SCA)
10. *Mwelase & Others v Director-General, Department of Rural Development and Land Reform & Another* 2019 (6) SA 597 (CC)
11. *Makhuva-Mathebula Community v Regional Land Claims Commissioner, Limpopo* [2019] ZASCA 157 (28 November 2019)
12. *S v Ngubane* 2016 JDR 1014 (KZP)

Judgments dismissed on appeal

13. *Skog N.O. & Others v Koos Agullus & Others* 2024 (1) SA 72 (SCA); [2023] 2 All SA 631 (SCA)
14. *Selsley Farm Trust v Mhlongo* [2010] 1 All SA 466 (SCA)