JSC INTERVIEW ROUND: OCTOBER 2024

VACANCY: JUDGE, GAUTENG DIVISION OF THE HIGH COURT

PROFESSOR MOSES RETSELISITSOE PHOOKO

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. LLB, North West University, Mahikeng (2006)

1.1.2. LLM, University of Notre Dame, USA (2011)

1.1.3. LLD, University of South Africa (2016)

1.2. The candidate indicates that he was admitted as an advocate in 2010. The reviewers were unable to verify the candidate's admission in this regard, as the candidate is not found on the LPC's list of practicing or non-practicing legal practitioners.

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

1.3.1. Judge of the Electoral Court (Bloemfontein), since 1 May 2022.

1.4. The candidate acted as a judge in the Gauteng Division during the following periods:

1.4.1. 17 January 2022 – 15 March 2022

1.4.2. 18 July 2022 – 22 September 2022

1.4.3. 10 April 2023 – 15 June 2023

1.4.4. 19 June 2023 – 14 July 2023

1.4.5. 17 July 2023 – 15 September 2023

1.4.6. 12 January 2024 – 19 January 2024

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. As far as could be ascertained, there are currently 76 permanent judges of the Gauteng Division of the High Court:

3.1.1. 24 black women (19 African, 2 Coloured, 3 Indian)

3.1.2. 23 black men (17 African, 2 Coloured, 4 Indian)

3.1.3. 14 white women

3.1.4. 15 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 42 years and 3 months old and will have completed a period of approximately 9 months of service as an acting judge.

4.2. If appointed, the candidate would be eligible to serve as a judge for approximately 27 years and 8 months until the age of 70.

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

5.1. The candidate has published numerous articles dealing with constitutional issues and has specifically addressed aspects such as gender equality, and individualistic cultures.

5.2. His answer to the questionnaire shows him to be a community-orientated individual with a passion to serve the underprivileged or neglected portions of society.

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

6.1. The candidate admits that he has limited experience in litigating cases in courts as his appearances in court are limited to bail applications and trials relating to "*excessive speeding*". These appearances seem to have been after his admission as an advocate in April 2010 and, per the answer to question 6 of the questionnaire, constitute 10% of his court experience.

6.2. The candidate has not indicated what the remaining 90% of his court experience comprises of.

6.3. The candidate has acted as a judge in the Gauteng High Court for a period of approximately 43 weeks over a period of two years.

6.4. For the most part, the judgments reviewed contained detailed expositions of the applicable law as well as the submissions of the parties involved. The reviewers were however concerned with the loack of reasoning contained in some of these judgments.

6.5. In *Rightplay Business Rehabilitation (Pty) Ltd v Transnet SOC Ltd* (000183/2024) [2024] ZAGPPHC 91 (30 January 2024), an application for restoration of access to the rooftop of the Carlton building was brought in terms of the *mandament van spolie*. The application was ultimately dismissed due to non-joinder of the sub tenants of the rooftop. In paragraph 38 thereof it is stated:

> "*Regarding the spoliation remedy, I need not say more save to refer to clause 14 of the lease agreement which inter alia provides that 'the lessee … and may not sub-let the leased premises or any part thereof without the prior consent of the Lessor…'. In addition, Mr Vusi Magwentshu who is one of the Applicant's representatives when communicating with the Respondent about the release of property, never stated that the said property belongs to third parties. I am thus persuaded by the Respondent's submission in that they only became aware of the fact that the property belongs to third parties during the current proceedings*."

6.5.1. It is unclear why the candidate considered the terms of an agreement and ownership of the property to be relevant in the determination of a spoliation application.

6.5.2. The conclusion of the judgment reads as follows:

> "*For these reasons, it is evident that the Applicants are purporting to act on behalf of the third parties without their consent in these proceedings. It has also become evident that the property under question was never in the possession, use and enjoyment by the Applicants but by third parties. Consequently, I agree with the Respondent's in that the Applicant "relied on an incorrect remedy in law". This is the end of their case. I do not need to venture into the aspects of a lien and/or the merits of the case*."

6.5.3. Having determined that the incorrect remedy was relied upon, it is unclear what the candidate considered to be "*the merits of the case*" which did not need to be dealt with. The *in limine* points related to non-joinder and *locus standi*. Neither of these engage the question of the "*correct remedy in law*." The confusion

emanating from this finding is evident from the discussion of the leave to appeal judgment below.

6.6. From a review of the leave to appeal judgment, *Rightplay Business Rehabilitation (Pty) Ltd v Transnet SOC Ltd - Leave to Appeal* (000183/2024) [2024] ZAGPPHC 176 (28 February 2024), it is evident that the applicant took issue with the fact that the court *a quo "...did not deal with the remedy that was sought relating to an interdict and/or that the court a quo overlooked the interdict sought by the applicant as per the notice of motion*." This issue is addressed in the leave to appeal judgment, in *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A), at page 702 A-B, as follows:

> "*I somehow understand the applicant's concern in that a detailed judgment provides both litigants with a clear picture of how a court arrived at its conclusion. However, I need to point out that the applicant's criticism of the court a quo not to mention every single issue raised before it is thus misplaced. It must be remembered that:*
>
> > *'Indeed, even in a written judgment it is often impossible, without going into the facts at undue length, to refer to all the considerations that arise. Moreover, even the most careful Judge may forget, not to consider, but to mention some of them. In other words, it does not necessarily follow that, because no mention is made of certain points in a judgment – more especially, of course, if that judgment be an oral one and an ex tempore one – they have not been taken into account by the trial Judge in arriving at his decision. No judgment can ever be perfect and all-embracing. It would be most unsafe invariably to conclude that everything that is not mentioned has been overlooked' (own emphasis added).*

6.6.1. Consequently, *"... it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered". In light of the above exposition, I am of the view that the issue related to an interdict was considered*."

6.6.2. Firstly, the passage referenced from *Rex v Dhlumayo* relates to factors considered by a judge in arriving at a decision which might have been omitted from a judgment. The complaint in the leave to appeal was that the court *a quo* failed to engage with the interdict at all; i.e the court failed to make a decision on an issue it was called upon to do so or failed to indicate any factors it

considered in arriving at such a decision.

6.6.3. Secondly, and more crucially, despite the intimation *a quo* that no decision was made on "the merits" of the application, in the leave to appeal judgment, the candidate stated:

> "*[10] I am of the view that the applicant is incorrect to suggest that the court a quo only relied upon non-joinder and locus standi to dismiss the main application. A simple reading of the judgment of the court a quo also reveals otherwise as the application was also dismissed on the basis that the 'applicant relied on an incorrect remedy in law'*."

6.6.4. Assuming the leave to appeal judgment clarified that the application for the interdict was in fact decided, it is unclear why the *a quo* judgment pertinently indicated that it did not venture into the "*merits*" of the application.

6.7. In *Mdibi v Road Accident Fund* (68138/2017) [2023] ZAGPPHC 1820 (24 October 2023), the candidate states that:

> "*My difficulty is that the plaintiff's postulated career progression by her industrial psychologist is in all aspects based on the presumption that the plaintiff's future would have thrived against all the odds. It disregards the current realities such as the astronomic rate of employment and the difficulties faced by countless graduates to secure employment. There is no mention of the effect of the COVID-19 virus on employment possibilities. …*
>
> *Indeed, counsel for the plaintiff also rightly observed through reference to legal authority that this Court has wide discretion when it assesses the quantum of damages due to loss of earnings and it is up to the court to award what it considers right. This in one way or the other involves guesswork that needs one to consider actuarial calculations in light of the totality of evidence presented before this Court.*
>
> *I have carefully considered the actuarial calculations provided by both parties. I am not bound by these calculations because a loss of earning capacity does not easily translate into a precise figure that reflects the actual reduction in income a claimant can in future expect. Furthermore, I do not think that the amount of R 8 192 100.00 claimed by the plaintiff is fair and reasonable. I highlight the reason for my findings below.*

This Court has the discretion to award what it deems as fair and reasonable after considering all the circumstances of this case. The circumstances of this case lead me to one conclusion, a fair and reasonable amount would be an amount of R6 192 100.00. The plaintiff's injuries have not completely rendered her unemployable in the future. She is still employable as per the expert's reports."

6.7.1. No basis for the lowering of the amount is given, save for an oblique reference to "fair and reasonable". Whilst a court has a wide discretion to determine damages, in this matter the candidate had relied on actuarial calculations, which included certain contingency deductions. It was open to the candidate to for instance, apply different contingencies to the postulations he had accepted or to, after calculation, apply a further reduction of the amount based on his assessment of the evidence and probabilities of such a loss occurring. Regardless of the approach chosen, the judicial exercise of a discretion requires that justification for a further reduction of 25% of the claim be provided in the judgment.

6.7.2. The absence of reasons compounds a further problem: Paragraph 68 of the judgment does not sensibly follow paragraph 65. The factors listed in paragraph 65 relate to the earnings postulation had the accident not occurred, whilst paragraph 68 relates to the postulation having regard to the accident. Neither indicate the basis for the deduction.

6.7.3. This is also the only judgment reviewed that was delivered (slightly) out of time. Having been heard on June 2023, it was only delivered on October 2023. This is presumably as a result of the defendant, following a request by the candidate post hearing, only filing its actuarial report in September 2024.

6.8. In *Tegeta Exploration and Resources (Pty) Ltd and Others v Knoop and Others* (035371/2023) [2024] ZAGPPHC 144 (20 February 2024), the candidate granted leave to appeal to the Supreme Court of Appeal. The leave to appeal having been noted against the judgment of a single judge, there is no indication why leave to appeal was not granted to a full bench of the division.

6.9. The candidate's formulation of orders evidences a lack of practical experience. For instance:

6.9.1. In *M.B.M v J.P.M (63162/2020) [2022] ZAGPPHC 912 (23 November 2022),* the parties had agreed to the recommendations made by the family advocate regarding the couple's children. The court was essentially only called upon to decide whether a customary marriage had existed between the parties. Following a reasoned judgment on the issue of customary marriages and having found that customary marriage did exist, the candidate made the following order:

> "*[102] I, therefore, make the following order:*
>
> *(a) A decree of divorce is granted.*
>
> *(b) The recommendations contained in the report of the Family Advocate in respect of the minor children are made an order of court.*
>
> *(c) Division of the joint estate.*
>
> *(d) The issue of the maintenance is referred back to the Maintenance Court*."

6.9.2. Despite it contextually being clear that it was found that a customary marriage did exist, the failure to pertinently declare the existence in the order itself, leads to ambiguity – especially when considering the imprecise formulation of paragraph 102(c) thereof. Likewise, the reference to "*the recommendations contained in the report of the Family Advocate"* being made an order of Court, is vague and liable to subjective interpretation in future disputes between the parties.

6.9.3. In *Body Corporate of SS Country View v City of Johannesburg Metropolitan Municipality and Another* (079326/2023) [2023] ZAGPPHC 710 (22 August 2023), the order reads:

> "*[31] I, therefore, make the following order:*
>
> *(a) The order as prayed for is granted as per the draft marked "X*".

6.9.4. It is noted that the matter was heard on the urgent roll and that the order marked "X" had probably been uploaded to the Caselines platform along with the judgment. However, considering that the matter was heard on an unopposed basis, that a punitive cost order (the body of the judgment does not indicate the exact cost order) had been granted against the absent respondent. Given that the

judgment was typed and delivered 11 days after hearing, the failure to include the exact terms of the order in the judgment does not assist a respondent for whose benefit the judgment is written.

6.9.5. In *C.S.S v O.R (000763/2024)* [2024] ZAGPPHC 37 (26 January 2024), the respondent had, in December 2023, removed her two minor children from the care of their father who they had been residing with for approximately two years prior to such removal. Appearing in person, the respondent stated that she had to remove the children as one of them had threatened to commit suicide should he/she be returned to their father. The applicant raised concerns relating to the respondent's failure to indicate provision for the schooling of the children (one of them having been already enrolled in a certain high school). The application was heard on the day that the schools were set to open (17 January 2024). The father's failure to involve the family advocate was criticised (despite the status quo for two years preceding 18 December 2023, having been that he had primary residence.) His counsel's submission that there was insufficient time to involve the family advocate was also criticised. The father's urgent application for the return of the children to his primary care was refused. The following order was made:

> *"[35] I, therefore, make the following order:*
>
> *(a) ..*
>
> *(b) That the office of the Family Advocate is appointed to urgently investigate the best interests of the two minor children namely; A and B, compile a report for this Court within 3 months and make recommendations with specific reference to the primary residence of the two minor children, as well as the contact towards the minor children by the other parent.*
>
> *(c) That pending the report of the Family Advocate, the two minor children be placed in the care of the Respondent subject to the Applicant's right of contact which contact shall be exercised as follows:*
>
> *(i) The party who is not exercising contact with the two minor children shall have daily telephonic contact and WhatsApp contact with the children between 17h00 and 18h00.*

(d) Pending the investigation by the Family Advocate, the Respondent shall not be entitled to remove the minor children from Gauteng without the Applicant's prior written consent which consent shall not be unreasonably withheld."

6.9.6. The reviewers are concerned with the timeframe imposed on the family advocate. In this instance, given the order made, there were no factors particular to the treatment of the minors that would justify the prioritising by the family advocate of this matter above the multitude of cases its office has to consider in the normal course. The order, whilst undoubtedly made with the best interest of the minors at heart, fails to appreciate the realities of the limited resources available to the family advocate's office. In the judgment it is noted that social workers were already engaged at the behest of the respondent; however, no reference to this resource was made in terms of the interim provisions provided.

6.9.7. The order contained in paragraph 35(c)(i) does not make sense.

6.9.8. In making interim provisions pertaining to the minors, the candidate failed to address the pertinent issues raised. The schooling, choice of school, as well as the parties' relative responsibilities for school fees and general maintenance of the minor children, whilst awaiting the family advocate's report, were not addressed. This is especially pertinent given that the minors originally started to reside with the applicant due to the financial inability of the respondent, coupled with the applicant's assertions that he has been the sole provider for the minors to date of removal.

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

7.1. The candidate has disclosed the following two judgments that have been taken on appeal:

7.1.1. *Mango Airlines SOC Limited v Minister of Public Enterprise and Others* 2024 SCA

The citation provided by the candidate is incorrect. The SCA did not hear the matter as it had refused a late petition for leave to appeal in March 2024. The citation of the candidate's judgment in the leave to appeal application heard by him in November 2023 is *Mango Airlines SOC Limited (In Business Rescue) and Others v Minister of Public Enterprises and Others* (010700/2023) [2023]

ZAGPPHC 1990 (13 December 2023. The candidate has attached his judgment *a quo* to the questionnaire.

7.1.2. *King Price Company Ltd v Mhlongo* 2023 SCA

The correct neutral citation is *King Price Insurance Company Limited v Mhlongo* (Case no 1016/2022) [2023] ZASCA 152 (15 November 2023.) In this matter the candidate had penned the judgment of the full Court in *King Price Insurance Company Ltd v Mhlongo* (A159/2021) [2022] ZAGPPHC 463 (27 June 2022)

In overturning the full bench's judgment and order, the SCA held that the full bench erred on two bases. The first was that the full bench erred in finding that the fundamental issue was not the correct interpretation of the agreement, but rather the case as pleaded by Mr Mhlongo. The second basis is that the full bench court found that the onus was laid on the defendant to plead and prove an alternative basis for the calculation of damages, and that it had failed to do so.

7.1.3. The reviewers have also noted that the judgment in *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and Others* (CCT 97/24) [2024] ZACC 6; 2024 (7) BCLR 869 (CC) (20 May 2024) was taken on appeal to the Constitutional Court.

7.1.4. Sitting as a non-judge member of the Electoral Court, the candidate concurred with the second judgment penned by Modiba J in which it was reasoned that the effect of the remission of Mr Zuma's sentence was to reduce the sentence to three months imprisonment. The Constitutional Court criticised this approach stating that:

> "*Modiba J, joined by Professor Ntlama Makhanya and Professor Phooko, incorrectly held that remission reduces a sentence.(...) On this interpretation of section 47(1)(e), what matters is the "effective sentence", not the sentence that was imposed. (...) The text does not support that interpretation: the text says "convicted . . . and sentenced", without regard for how much of that "sentence" is served.*
>
> *This reasoning undermines section 165(1) of the Constitution, which vests judicial authority in the courts. It is the role of the judiciary to sentence offenders. As the Supreme Court of Appeal explained in Mhlakaza, "[t]he*

function of a sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served."

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

8.1. Whilst the candidate has extensive academic experience, save for his periods as an acting judge, he has very limited experience in court practice.

9. The candidate's linguistic and communication skills

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

9.2. In terms of the candidate's communication abilities, the comments pertaining to his written judgments per paragraph 6 above should be considered.

9.3. During the evaluation of the candidate's application a concern was raised by the reviewers with regards to answers in the questionnaire not being completely or comprehensively dealt with.

9.4. In answering which percentage of type of work he attributed to each part of his practice, he only indicated that 10% thereof was linked to criminal work. This does not assist the evaluation of the application where the other 90 % is not disclosed.

9.5. In his answer to section 2 question 1, with regards to his period as an article clerk at the legal resources centre (2007 to 2009), he includes the provision of a new school to learners in 2022 as part of the work he performed without indicating how his work some 21 years prior resulted or contributed to the outcome in 2022.

9.6. With regards to his employment as law clerk to Justice Yacoob in the Constitutional Court, he asserts that his research influenced the minority opinion of Justice Moseneke "*...which later turned into a majority opinion*" in the case of *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others (CCT12/09) [2009] ZACC 31; 2010 (2) BCLR 99 (CC) (14 October 2009*). No explanation of the nature of the research and how the minority opinion became the majority opinion as a result thereof is proffered. Considering that Justice Yacoob penned the only dissenting judgment therein, some explanation would have been expected. The candidate also submits that the case *"...highlighted the plights of vulnerable groups.*" Whilst the plight of homeless persons undoubtedly was noted, the

case primarily concerned the constitutionality of provisions of the Slums Act.

9.7. He does not address for instance the periods where he appeared in court as an advocate. He does not expand on his career as an academic. These periods of employment would have a greater bearing on the position that he is applying for.

10. The candidate's ability to produce judgments promptly

10.1. The candidate indicated that he did not have any judgments which were outstanding at the time of completing the questionnaire.

10.2. All the judgments reviewed were delivered promptly, save for *Mdibi v Road Accident Fund* (discussed in 6.14 above) which was delivered after 4 months.

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.

12.2. The reviewers did note that both the candidate's nomination by the President of the Society for Law Teachers of Southern Africa ("SLTSA") as well as his acceptance thereof were done on the letterhead of SLTSA. It is noted that the candidate was the president of the organisation until 2022, but that he is currently only a member. He is employed as a lecturer at the University of Fort Hare currently. The reviewers were unable to ascertain whether the nature of membership of the organisation entitles members to use the letterhead thereof in personal correspondence.

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

13.1. From the questionnaire it appears that the candidate has experience in the organisation of committees, compiling of reports, and general administration that goes hand in hand with being a lecturer.

14. The message that the candidate's appointment would send to the public at large

14.1. The appointment of the candidate would reiterate the position that there is no single path to becoming a judge. It would also strengthen the public's confidence in the

academic excellence and research capabilities of the judiciary.

14.2. However, the appointment of this candidate could be seen as premature. As evidenced in the discussion above, his inability to translate his academic abilities into sound judicial reasoning and judgments, is indicative of his lack of practical experience.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported judgments

1. *Mango Airlines SOC Limited and Others v Minister of Public Enterprises and Others (010700/2023)* [2023] ZAGPPHC 1112; [2023] 4 All SA 475 (GP) (6 September 2023)

Unreported judgments

2. *Rasemane v S* (A557/2016) [2023] ZAGPPHC 1787 (4 October 2023)
3. *M.B.M v J.P.M* (63162/2020) [2022] ZAGPPHC 912 (23 November 2022)
4. *C.S.S v O.R* (000763/2024) [2024] ZAGPPHC 37 (26 January 2024)
5. *Rightplay Business Rehabilitation (Pty) Ltd v Transnet SOC Ltd* - Leave to Appeal (000183/2024) [2024] ZAGPPHC 176 (28 February 2024)
6. *Simakuhle v Simakuhle and Another* (003632/2024) [2024] ZAGPPHC 33 (19 January 2024)
7. *Mdibi v Road Accident Fund* (68138/2017) [2023] ZAGPPHC 1820 (24 October 2023)
8. *D.R v T.V.R* (009562/2023) [2023] ZAGPPHC 690 (17 August 2023)
9. *Body Corporate of SS Country View v City of Johannesburg Metropolitan Municipality and Another* (079326/2023) [2023] ZAGPPHC 710 (22 August 2023)

Leave to appeal sought or granted, and not yet adjudicated by SCA:

10. *Tegeta Exploration and Resources (Pty) Ltd and Others v Knoop and Others* (035371/2023) [2024] ZAGPPHC 144 (20 February 2024)
11. *Rightplay Business Rehabilitation (Pty) Ltd v Transnet SOC Ltd* (000183/2024) [2024] ZAGPPHC 91 (30 January 2024)

Judgments upheld on appeal

12. *Mango Airlines SOC Limited and Others v Minister of Public Enterprises and Others* (010700/2023) [2023] ZAGPPHC 1112; [2023] 4 All SA 475 (GP) (6 September 2023)

Judgments dismissed on appeal

13. *King Price Insurance Company Ltd v Mhlongo* (A159/2021) [2022] ZAGPPHC 463 (27 June 2022)

Academic writings

14. Mr Phooko & F Mnyongani “When ancestors call an employee: Kievits Kroon Country Estate (Pty) Ltd v Johanna Mmoledi and Others (JA 78/10”

15. MR Phooko & SB Radebe “Twenty-three years of gender transformation in the Constitutional Court of South Africa; Progress or regression?”
16. MR Phooko “Conflict between participatory and representative democracy: A call for model legislation on public participation in the law-making process in South Africa”
17. MR Phooko “Revisiting the monism and dualism dichotomy: What does the South African Constitution of 1996 and the practice by the courts tell us about the reception of SADC Community Law (Treaty Law) in South Africa?”
18. MR Phooko “A call for public participation in treaty-making process in South Africa: What can South Africa learn from the kingdom of Thailand?”
19. MR Phooko “A sin committed by the (suspended) SADC Tribunal: The erosion of state sovereignty in the SADC region and beyond”
20. MR Phooko “Direct applicability of SADC Community Law in South Africa and Zimbabwe: A call for supranationality and uniform application of SADC Community Law
21. M Mokgokong & MR Phooko “Afriforum v University of the Free State: What has the Constitutional Court given us?”