

VACANCY: JUDGE OF THE SUPREME COURT OF APPEAL**Candidate: Judge Mmathebe Violet Phatshoane****1. The candidate's tertiary qualifications, professional admissions, honours, and permanent judicial appointments**

1.1. The candidate holds the following tertiary qualifications:

- BProc, University of the North (1995);
- LLB, University of the Orange Free State (1997);
- LLM, University of the Orange Free State (1999).

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

- admitted as attorney in March 1999;
- admitted as a notary and conveyancer in 2009.

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

- Judge of the High Court (Northern Cape Division) on 10 May 2011;
- Deputy Judge President of the Northern Cape Division of the High Court on 01 July 2021.

1.4. The candidate has acted in the following roles:

- Deputy Judge President of the Northern Cape Division of the High Court for approximately 13 months;
- Judge President of the Northern Cape Division of the High Court for approximately two years and 3 and a half months;
- Judge of the Labour Court of South Africa for approximately one term;
- Judge of the Labour Appeal Court for approximately ten months from August 2016 to May 2017;
- Deputy Judge President of the Labour Court for approximately 22 and a half months;

- Judge of the Supreme Court of Appeal for approximately 10 months.

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 of the bench

- 3.1. As far as could be ascertained, there are currently 23 permanent justices of the Supreme Court of Appeal:
- 9 black women (6 African, 2 Coloured, 1 Indian)
 - 7 black men (3 African, 3 Coloured, 1 Indian)
 - 3 white women
 - 4 white men
- 3.2. According to the questionnaire, the candidate is an African woman.

4. The maximum period the candidate could serve if appointed

- 4.1. At the time of the interviews, the candidate will be approximately 53 years and 10 months old and will have completed a period of approximately 16 years and 8 months of service as a judge. If appointed, the candidate would be eligible to serve as Justice of the Supreme Court of Appeal for a period of up to 16 years and 1 month.

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

- 5.1. The candidate has made significant contributions towards the advancement of women, gender equality and their representation in the judiciary and the legal profession. She has also contributed towards the education of junior legal practitioners, colleagues and peers. In particular:
- She holds a Master of Laws in Human Rights from the University of the Orange Free State, obtained in 1999.
 - She made contributions to chapters 6 and 7 of 2001 Butterworths: Employment Equity Law, in particular, "*racial, ethnic and national origin harassment*" and "*reasonable accommodation of religion*".

- She lectured students enrolled for the Advanced Certificate in Labour Law at the University of the Free State, on individual labour law (including dismissal based on conduct, dismissal based on capacity, and forms of discrimination).
- She was an external moderator for students and an external examiner for LLM students (Department of Constitutional Law).
- She also lectured to candidate attorneys on aspects of gender law; aspects of customary law at the School for Legal Practice, Law Society of South Africa (Free State).
- While practising as an attorney, she took on many matters *pro bono* for underprivileged employees before the CCMA, bargaining councils and the Labour Courts.
- She is a member of the South African Chapter of the International Association of Women Judges (“SAC-IAWJ”) and served on its executive committee as the Vice-President Programmes, from August 2012 to August 2014.
- In August 2018, she presented a paper, “*The present synopsis of gender equality from the workplace perspective*”, at a SAC-IAWJ conference in Kimberly.

5.2. Accordingly, the candidate has demonstrated a commitment to the values of the Constitution.

6. The candidate’s knowledge of the law, including constitutional law
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6.1. The candidate’s judgments traverse many aspects of the law, including complex areas of procedural and substantive law, and show that the candidate is well versed in the relevant legal principles.

- In *Bayport Securitisation Ltd and Another v University of Stellenbosch Law Clinic and Others* 2022 (2) SA 343 (SCA), the candidate grappled with the scope of collection costs and what charges may be levied under the National Credit Act, 2005 (“NCA”).
- In *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh NO* 2022 (4) SA 420 (SCA), the candidate, writing a minority judgment in the Supreme Court of Appeal (“SCA”), engaged with the court’s discretionary power to decide whether an agreement to arbitrate existed or instead may order that the parties submit

their disputes to arbitration and once the arbitrator has published an award, decide the issue afterwards: the principle of “*competence*”.

- In *Set Square Developments (Pty) Ltd v Power Guarantees (Pty) Ltd and Another and a related matter* 2025 (6) SA 552 (SCA), the candidate, sitting as an acting judge in the SCA, wrote a unanimous judgment dealing with “*on demand*” performance guarantees.
- In *Eskom Holdings SOC Ltd v Letsemeng Local Municipality and Others* [2022] 2 All SA 347 (SCA), Eskom brought a counterapplication. The candidate penned the majority judgment. The case deals with Eskom’s electricity supply to a local municipality; legislation governing electricity, municipal finances and disputes between those organs of state.
- In *Arends obo NM v MEC, Department of Health*, 2025 (1) SA 410 (NCK), the candidate, sitting as a judge in the Northern Cape High Court, considered an application to reconsider costs and engaged with the *Calderbank* principle, derived from English law.
- In *Director of Public Prosecutions, Free State v Mokati* [2022] 2 All SA 646 (SCA), the candidate wrote a majority judgment for the SCA. Both the State and the appellant appealed to the SCA, concerning the accused’s convictions of rape and robbery, after which the victim died in hospital. However, the accused was acquitted of the charge of murder. The candidate held that the State’s grounds of appeal, brought under section 319 of the Criminal Procedure Act, 1977 (“CPA”), were appeals against the trial court’s factual findings. Those, she said, were grounds of appeal that the State may not bring under section 319 of the CPA, and she dismissed them. She agreed that the trial court’s sentence of 10 years was too lenient. Accordingly, she increased the sentence to 18 years’ imprisonment. Makgoka JA disagreed with her decision on the appeal against the appellant’s sentence and wrote a minority judgment.

6.2. In addition to the candidate’s listed judgments, she has many other judgments available on SAFLII or the Law Library of South Africa, which show the candidate’s breadth of experience in various legal areas. These include:

- *Careline Clinic (Pty) Ltd v Al-Kant Opbergers en Verpakkings CC and Others* (1572/2022) [2022] ZANCHC 39 – judgment on an urgent interdict against the respondents who intended to connect electrical cables to the applicant’s property;
- *Annandale v Meintjes and Meintjes Rekenmeesters CC and Another* (632/2023) [2025] ZASCA 113 (29 July 2025) – concerning an application to reconsider a refusal to grant special leave to appeal against a majority judgment and order of the full court of the Gauteng Division High Court in Pretoria. The case concerned an accounting practice’s application for an order that its income and expenses be audited. The court made adverse credibility findings against the appellant, Ms Annadale. The court engaged with the tests for leave to appeal, reconsiderations, and credibility findings.
- *RB v ES* (2321/2016) [2025] ZANCHC 68 – judgment on an application for leave to appeal in divorce proceedings.
- *Kammies v S* (CA&R51/2015) [2016] ZANCHC 78 – judgment in an appeal from the regional magistrates’ court concerning a conviction of the appellant on the charge of robbery for assaulting an elderly woman and taking her diamond ring, worth R436 000. The candidate dismissed the appeal and supported the judgment and reasoning of the court *a quo*.
- *Imperial Group (Pty) Ltd v Dipico* 2016 JDR 0690 (NCK) – judgment on an application in terms of s 148(2)(a) of the NCA, to the decision of the Chairperson of the Northern Cape Consumer Court that refused to condone the late filing of an appeal. The candidate had to engage with the Consumer Protection Act, 2008, and the jurisdiction of the various tribunals that decide disputes or enforce consumers’ rights under consumer legislation.

7.	Judgments of the candidate that have been overturned, upheld, or commented on, on appeal:
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- 7.1. The candidate has disclosed that nine judgments have been taken on appeal. On appeal, six judgments have been upheld and three judgments have been overturned. No appeals remain to be decided.
- 7.2. The judgments of the candidate upheld on appeal are:

- *Schenker South Africa (Pty) Ltd v Fujitsu Services Core (Pty) Ltd* 2022 JDR 0061 (SCA), confirmed by the majority of the Constitutional Court justices in *Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd* 2023 (6) SA 327 (CC). The Constitutional Court disagreed with some of the candidate's reasoning in its judgment on appeal.
- *Capital Newspapers (Pty) Ltd and Others v Media24 Holdings Ltd and Others* (259/CAC/Oct24); [2025] ZACAC 3 (16 September 2025) (part B) – leave to appeal against the candidate's judgment was refused by the Constitutional Court on the grounds that there were no reasonable prospects of success.
- *De Beers Consolidated Mines Ltd v Elizabeth Burke* (NCK case no 1857/110), in which the SCA refused leave to appeal as it was of the view that there were no reasonable prospects of success.
- *Elsiesdrift Plase (Pty) Ltd v Awengloed Boerdery (Pty) Ltd* 2016 JDR 1714 (NCK) – the candidate, sitting as the trial judge of the Northern Cape High Court, found Elsie'sdrift Plase (Edms) Bpk liable to pay Awengloed Boerdery Bpk damages for breach of contract. The full bench confirmed her decision on appeal. It made certain positive findings regarding the candidate's judgment. It found that the candidate did not misdirect herself in dealing with her factual and credibility findings. It also considered the trial judge to have “*painstakingly*” analysed the evidence led during the trial.

7.3. *Schenker South Africa (Pty) Ltd v Fujitsu Services Core (Pty) Ltd*

- The candidate wrote the judgment for the SCA on appeal to it from the Gauteng Division, Johannesburg (*per* Adams J).
- There, the appellant, Schenker South Africa (Pty) Ltd was ordered to pay the respondent damages since it was found to be liable for its employees' theft of goods from a South African Airways (“SAA”) cargo warehouse at an airport. Schenker is a warehouse operator and distributor. It concluded a written agreement with Fujitsu under which Fujitsu would use its services. Those services were subject to certain standard terms.
- In 2012, Schenker's employee stole cargo from an SAA warehouse. As a result, Fujitsu brought a delictual action for damages against Schenker, claiming that it is

vicariously liable to Fujitsu for its employees' theft of the goods. Schenker admitted that the employee was acting in the course and scope of his employment. But it contended it had disclaimed liability under exemption clauses in the standard terms between it and Fujitsu.

- The High Court found that the employee's actions did not fall within the ambit of the exemption clauses. The candidate disagreed.
- Fujitsu argued that the employee was not "*handling*" the goods when they were stolen. However, the candidate held that employee's actions were within the meaning of "*handling*" since the goods were handed over to the employee after arriving at the warehouse and released to him using documents prepared by Schenker.
- She also held that the ordinary meaning of the exemption clause must be given effect to. Since the clauses included the exemption from liability "*for any claim of whatsoever nature (where in contract or in delict) ...*", those words, when given their ordinary meaning, were sufficiently wide to include intentional acts by Schenker's employees.
- Accordingly, the candidate upheld the appeal.
- In the Constitutional Court, the majority, *per* Zondo CJ, dismissed Fujitsu's appeal to it. Fujitsu contended, for the first time, that the clause offended public policy and ought to be declared unconstitutional.
- Zondo CJ held that the contract must be interpreted to mean that, unless the parties made special arrangements, Schenker was not liable for theft of goods by an employee.
- Zondo CJ held further that there was nothing unfair or unreasonable about the terms of the exemption clause. There was no evidence that Fujitsu was bargaining from a weaker position or why it did not or could not make special arrangements with Schenker. Zondo CJ also held that previous authorities have held that an exemption clause that exempts liability for loss arising out of intention conduct of its employees is not contrary to public policy. Accordingly, the appeal was dismissed.
- The minority, *per* Mathopo J, considered that the candidate had "*obfuscated*" the issues by "*focusing too intently*" on the meaning of the words, "*handle*" or "*dealt*

with”. The minority went on to say that the candidate made three flaws, one of which was that the candidate did not interpret the words in the clause within the overall context of the agreement itself. It then interpreted the clauses to mean that the exemption only covered acts or omissions falling within the terms of the contract, not theft. Lastly, the minority also found that the broad language used in the clauses did not extend to the unauthorised execution of the contract.

- The minority also disagreed with the candidate’s judgment in which she found that the SCA’s decision in *G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and Another* 2017 (2) SA 24 (SCA) was distinguishable.

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

- *MBS Transport CC v CCMA and others* Case No J1807/2015 and *Bheka Management Services and others* Case No. J1706/2015, upheld on appeal in *CCMA v MBS Transport CC and Others, CCMA v Bheka Management Services (Pty) Ltd and Others* ZALAC 34 [2016] [2016] 10 BLLR 999 (LAC); (2016) 37 ILJ 2793 (LAC);
- *State v Van Schalkwyk; Van Schalkwyk v the State*, Case No: CA & R 119/14; upheld on appeal in *Van Schalkwyk v S* 2016 (2) SACR 334 (SCA); and
- *S v Botha* 449/2011, 10 December 2015, in which the conviction was upheld, but the sentence was set aside in *Botha v S* (901/2016) [2017] ZASCA 148 (8 November 2017).

7.5. *MBS Transport*

- In *MBS Transport*, the LAC upheld an appeal against the judgment of the candidate, sitting as an acting judge of the Labour Court. The candidate had given orders setting aside writs of execution for the enforcement of awards given by the CCMA under section 143 of the Labour Relations Act, 1995 (“LRA”). The candidate interpreted section 143(1) of the LRA to mean that CCMA awards may be enforced as if they were orders of the Labour Court “*provided*” that a writ had been issued.
- The LAC held that the candidate erred in finding that the CCMA did not have jurisdiction to issue writs of execution in respect of arbitration awards it issues. The LAC held that she misunderstood the section, which provides for a legal fiction that an arbitration award, once certified by the Director of the CCMA, becomes a writ

and has the status of an order of the Labour Court. The award was a writ. The insertion of the word “*provided*” in the candidate’s interpretation of the section was wrong.

- Accordingly, the LAC found that the Labour Court did have the power to stay a writ and the candidate’s conclusion that there was no reason why the writ should not be stayed was wrong. The appeal was upheld, and the proceedings were remitted to the Labour Court to be dealt with in light of the LAC’s judgment.

7.6. Van Schalkwyk

- In *Van Schalkwyk v S*, the appellant had killed the deceased by stabbing him with a hay hook which penetrated his heart and fractured a rib. The candidate, sitting as part of a full bench of the Northern Cape High Court, confirmed the appellant’s conviction of murder with intent in the form of *dolus eventualis*. The candidate refused the appellant’s application for leave to appeal.
- The SCA, on appeal, held that the candidate had erred in finding that the appellant actually foresaw the possibility of death. Accordingly, the majority decision of the SCA upheld the appeal and set aside the conviction of murder and replaced it with a conviction of culpable homicide. The appellant’s sentence was reduced from eight years’ imprisonment to six years’ imprisonment. The majority of the SCA found these errors:
 - The candidate held that a reasonable person using a hay hook as a weapon to attack the deceased on the facts would have foreseen the risk of death. Accordingly, the candidate found that *dolus eventualis* was present. The SCA disagreed. It referred to *S v Humphreys* 2013 (2) SACR (1), para 13, in which the SCA confirmed that the test for *dolus eventualis* requires that the accused subjectively foresee the risk of death. Accordingly, the full bench had conflated the test for negligence, being an objective test, with the test for *dolus*, a subjective test.
 - Second, that the candidate had disregarded the undisputed evidence that, after striking the deceased in the presence of witnesses, the accused had said that he had not intended to kill him. That fact justified a reasonable inference that the accused had not foreseen the possibility of death from striking the deceased with the hay hook.

7.7. Botha

- In *Botha*, the candidate, sitting as the trial court judge in the Northern Cape Division of the High Court, found the appellant guilty of murder. She also held that the murder was premeditated. She found substantial and compelling reasons to impose a sentence of 12 years. The accused testified that the deceased had committed suicide. The candidate disagreed. She based her conviction on circumstantial evidence, including that there was primer residue on the appellant's hands and that the version of the accused was improbable. The SCA, in two judgments, dismissed the appeal against the appellant's conviction.
- The candidate had found that the accused was motivated by greed as she wished to have control over the family's finances. The first judgment in the SCA disagreed and held that there was no evidence to sustain a finding that the murder was premeditated. The judgment also held that the candidate had "*completely disregarded*": (i) the appellant's emotional and physical state; and (ii) the expert psychiatrist evidence concerning the deceased's severe abusive behaviour towards the appellant and her family members. Instead, Mbatha AJA held that the candidate had overemphasised the seriousness of the offence.
- The SCA ordered that the question of the appellant's sentencing be remitted back to the court *a quo*.
- Notably, the minority judgment found that the candidate had committed an irregularity in allowing the state to re-open its case. In a separate minority judgment, the court agreed that the candidate had committed an irregularity, but held that this irregularity was not serious enough to warrant a finding that the proceedings were vitiated.

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

8.1. The candidate has extensive professional experience in many areas:

- She began her career as a legal researcher working at the SCA.
- She then transitioned to her role as an attorney. She served as a director of Naude Attorneys from 2000 to 2002 and then as a founder and director of Phatshoane Henny Inc from 2002 to May 2011.
- She was appointed as a judge and has been on the bench for 16 years.

- She has acted in specialised law courts (the Labour Court) and appellate courts (both the LAC and the SCA).
- Her judgments traverse many areas of the law, including civil and criminal law.

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. The candidate indicated that two 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, both of these judgments were still outstanding, and both have been outstanding for more than three months.
- 10.3. Of the 20 judgments of the candidate considered by the reviewers, three were handed down more than three months after hearing, namely:
 - *Minister of Justice and Correctional Services v Ramaila* 2020 JDR 2488 (LAC) (5 May 2020 to 9 November 2020);
 - *Eskom Holdings SOC Ltd v Letsemeng Local Municipality and Others* [2022] 2 All SA 347; (26 November 2021 to 9 March 2022);
 - *Arends obo NM v MEC, Department of Health*, 2025 (1) SA 410 (NCK), (30 January 2024 to 31 May 2024)

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. There is no reason to believe that the candidate, if appointed, would not bring an independent mind to bear on issues presented for judicial determination, nor that the

candidate would be unduly influenced in any way, including by the executive or legislative branches of government.

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

- 13.1. The candidate has taken up many leadership roles during her career. She was a director of two law firms. She was an important contributor towards establishing Phatshoane Henny Inc.
- 13.2. The candidate has taken up many leadership roles within the judiciary. She is currently the Deputy Judge President of the Northern Cape High Court, and has previously acted as the Deputy Judge President for the Labour Court.
- 13.3. Accordingly, she has extensive administrative experience.

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

- 14.1. The candidate's appointment would send the message that a competent candidate has been elevated to an appellate court:
- First, the candidate's proven track record of delivering judgments that reflect earnest application of her mind to the issues, the law, and the facts involved.
 - Second, the candidate performs her judicial functions impartially. She is unafraid of differing from her colleagues and has, on one occasion, convicted a politician of the majority political party, the ANC.
 - Third, she generally writes judgments expeditiously, some on complex issues, some on simple disputes. Given her lengthy career as a judge, there are relatively few of her judgments successfully taken on appeal.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported judgments

1. *Jumalo Trading CC v Visagie NO* [2026] 3 All SA 135 (NCK)
2. *Bayport Securitisation Ltd and Another v University of Stellenbosch Law Clinic and Others* 2022 (2) SA 343 (SCA)
3. *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh NO* 2022 (4) SA 420 (SCA)
4. *Set Square Developments (Pty) Ltd v Power Guarantees (Pty) Ltd and Another and a related matter* 2025 (6) SA 552 (SCA)
5. *Eskom Holdings SOC Ltd v Letsemeng Local Municipality and Others* [2022] 2 All SA 347 (SCA)
6. *Arends obo NM v MEC, Department of Health*, 2025 (1) SA 410 (NCK)
7. *Director of Public Prosecutions, Free State v Mokati* [2022] 2 All SA 646 (SCA)

Unreported judgments

8. *Annandale v Meintjes and Meintjes Rekenmeesters CC and Another* (632/2023) [2025] ZASCA 113 (29 July 2025)
9. *Careline Clinic (Pty) Ltd v Al-Kant Opbergers en Verpakkers CC and Others* (1572/2022) [2022] ZANCHC 39 *Minister of Justice and Correctional Services v Ramaila* - 2020 JDR 2488 (LAC)
10. *RB v ES* (2321/2016) [2025] ZANCHC 68
11. *Kammies v S* (CA&R51/2015) [2016] ZANCHC 78
12. *Imperial Group (Pty) Ltd v Dipico* 2016 JDR 0690 (NCK)

Judgments upheld on appeal

13. *Schenker South Africa (Pty) Ltd v Fujitsu Services Core (Pty) Ltd* 2022 JDR 0061 (SCA) upheld in *Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd* 2023 (6) SA 327 (CC).

14. *Capital Newspapers (Pty) Ltd and Others v Media24 Holdings Ltd and Others* [2025] ZACAC 3 (16 September 2025). The Constitutional Court refused leave to appeal against the candidate's judgment.
15. *S v Solomons 2021 JDR 1377 (NCK)*, confirmed in *Solomons v S* (1292/2021) [2022] ZASCA 124
16. *Elsiesdrift Plase (Pty) Ltd v Awengloed Boerdery (Pty) Ltd*, Case No: 449/110; confirmed in *Elsiesdrift Plasse (Edms) Bpk v Awengloed Boerdery (Pty) Ltd* 2016 JDR 1714 (NCK)

Judgments overturned on appeal

17. *MBS Transport CC v CCMA and Others* Case No J1807/2015 and *Bheka Management Services and Others* Case No. J1706/2015, upheld on appeal in *CCMA v MBS Transport CC and Others, CCMA v Bheka Management Services (Pty) Ltd and Others* ZALAC 34 [2016] [2016] 10 BLLR 999 (LAC); (2016) 37 ILJ 2793 (LAC)
18. *State v Van Schalkwyk Van Schalkwyk v the State*, Case No: CA & R 119/14; upheld on appeal in *Van Schalkwyk v S* 2016 (2) SACR 334 (SCA)
19. *S v Botha 449/2011*, 10 December 2015, the conviction was upheld, but the sentence was set aside in *Botha v S* (901/2016) [2017] ZASCA 148 (8 November 2017)

Academic writings

20. None disclosed or identified.