

GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA

*Admitted at The Hague on 21 August 1948
as a full member of the International Bar Association*

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Secretariat
Judicial Service Commission
per email: Chiloane@concourt.org.za and TPhaahlamohlaka@judiciary.org.za
cc: JSC@judiciary.org.za

Dear Members of the Judicial Service Commission

GCB COMMENTS ON THE NOMINATION OF MLAMBO JP AS CHIEF JUSTICE

- 1 Please find below the General Council of the Bar's (**GCB**) comments on the nomination of Mlambo JP for appointment as the Chief Justice.
- 2 The GCB's general approach in making submissions to the Judicial Services Commission (**JSC**) is not to endorse or promote any candidate above other candidates. Rather, it endeavours to comment on each candidate on their merits independently of the other candidates under consideration. The GCB would ask that these comments are not seen as endorsing this candidate over the other candidates under consideration. Nor should these submissions be seen as a comparative analysis of the candidates, or an effort to rank them.
- 3 The GCB prepared these comments as follows:
 - 3.1 The candidate was allocated to a team of approximately four counsel who are members of bars affiliated to the GCB. The team was led by a senior counsel.
 - 3.2 The team then assessed the candidate by considering:

- 3.2.1 The candidate's application;
 - 3.2.2 The biography of the candidate distributed by the Presidency when referring the application to the JSC;
 - 3.2.3 Previous reviews conducted by the GCB on the candidate (in so far as such were available);
 - 3.2.4 The candidate's reported judgments and, to the extent practicable, the candidate's unreported judgments;
 - 3.2.5 The candidate's previous interviews before the JSC;
 - 3.2.6 Publications, speeches and other extra-curial writings by the candidates, where such could be located; and
 - 3.2.7 Publicly available media reporting and commentary on the candidate.
- 3.3 The team then worked independently of the other teams allocated to review other candidates to prepare the comments on the candidate.
- 3.4 The draft comments for all the candidates were then circulated amongst the teams with the goal of achieving a level of consistency of tone and style. It should however be emphasised that it was impossible to achieve complete consistency given the nature of the process adopted, which was intended to incorporate a range of views in the limited time available during a period when many practitioners were taking a well-earned annual rest.
- 4 The GCB's comments are structured around the following 9 topics, we elaborate on briefly below:
- 4.1 Whether the candidate meets the constitutional requirement that members of the Constitutional Court be South African citizens.
 - 4.2 The period for which the candidate could serve as Chief Justice if appointed.
The Constitution, and Judges Remuneration and Conditions of Employment

Act, 47 of 2001 impose limits on the period for which individuals may serve on the Constitutional Court.

4.3 The candidate's reputation for integrity and ethical behaviour. Under this topic, comments are directed at whether the candidate is reputed to be of unblemished integrity and ethically beyond reproach. Any findings or pending complaints of misconduct against the candidate are addressed as well as any evidence of leadership in the area of judicial ethics.

4.4 The candidate's qualities as an outstanding leading jurist who seeks (and is able to achieve) consensus.

4.4.1 It is a central responsibility of the Chief Justice to ensure that the Constitutional Court functions efficiently and delivers judgments with clear *rationes decidendi* timeously even in the most contentious matters. Comments are directed at whether the candidate is a leader who commands respect and that s/he seeks (and is able to achieve) consensus. Comments are also directed at any conclusions that might reasonably be drawn about the candidate's leadership qualities when drafting majority, concurring or dissenting judgments as part of a bench of judges.

4.4.2 Where appropriate given the evidence available, comments are included on the extent to which the candidate's judgments have generated dissents and concurrences, how frequently the candidate dissents or concurs, the tone or tenor of the candidate's judgments when concurring or dissenting, and whether their judgments in ground-breaking matters have been supported on appeal. Comments are included if there is glaring evidence that the candidate almost always agree with the same group of judges, and almost never with a different group.

4.4.3 The comments are also directed at the candidate's academic qualifications and career as a jurist, their academic articles and

public addresses related to the law generally and any notable judgments. The GCB has also sought to take a robust view on whether the candidate's reputation as a jurist is one of excellence.

- 4.5 The candidate's experience in court administration and leadership or similar roles. Comments are directed at the candidate's leadership and administration positions held in the judiciary and other organisations.
- 4.6 Whether the candidate possesses the qualities required to lead the judiciary in effectively defending, protecting and upholding the Constitution. Comments are directed here at any notable judgments, academic articles, public addresses or the like addressing constitutional law, and in particular constitutional supremacy. Where appropriate, comments are made on evidence of the candidate's potential to work constructively and to command and show appropriate respect when representing the judiciary in engagements with different arms of government on a range of issues.
- 4.7 Whether the candidate possesses the qualities required to lead the judiciary in fearlessly asserting its independence and respect for separation of powers. Comments are directed at the candidate's judgments, academic articles, public addresses, or the like that have dealt with the independence of the judiciary and the separation of powers.
- 4.8 Whether the candidate possesses the qualities required to lead the judiciary in pursuing a transformative jurisprudence geared for the advancement of social justice and access to justice. Comments are directed at the candidate's involvement in any voluntary associations, non-governmental, or community organisations committed to promoting the advancement of social justice, substantive equality of historically and currently vulnerable groups (including in terms of race, gender, persons with disabilities and LGBTI people) and access to justice, as well as any notable judgments, academic articles, public addresses, or the like reflecting the candidate's views thereon.

4.9 Whether the candidate possesses the leadership qualities required to instil a judicial culture and work ethic that will meet acceptable judicial performance standards and standards of accountability. Comments are directed at the candidate's ability to produce judgments timeously, the candidate's propensity to write concurring or dissenting judgments, the number of reported and unreported judgments found by GCB, the time period over which those judgments were produced, and in which court, and the candidate's performance in any leadership positions held within the judiciary.

5 The GCB takes responsibility for the attached comments, and they are made by it. They represent the work of the teams assembled to prepare them and while efforts were made to achieve some consistency of approach, differences naturally emerge in tone and emphasis.

Yours faithfully



Craig Watt-Pringle SC
Chairman: General Council of the Bar of SA

CANDIDATE: JUDGE PRESIDENT DUNSTAN MLAMBO

1. Whether the candidate meets the Constitutional requirement of citizenship:

1.1. Section 174(1) of the Constitution provides that any person appointed to the Constitutional Court must be a South African citizen.

1.2. The candidate is a South African citizen.

2. The implications of the constitutional mandatory age requirements for discharge from active service of Constitutional Court judges:

2.1. Section 176(1) of the Constitution provides that a Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of seventy, whichever occurs first, unless extended by an Act of Parliament.

2.2. The candidate is 62 years old.

2.3. The candidate has not previously held office as a Constitutional Court judge.

2.4. The provisions of the Judge's Remuneration and Conditions of Employment Act, 47 of 2001 do not bear on the candidate's period of office.

- 2.5. If appointed, the candidate's office will terminate in 2030 when he turns 70, and the candidate will hold office as Chief Justice for approximately 8 years.

3. The candidate's reputation for integrity and ethical behaviour:

- 3.1. At the age of 25, the candidate worked as a legal assistant in the KaNgwane Government. At the age of 28, he was a fellow at the Legal Resources Centre, an institution dedicated to the advancement of disadvantaged people. This showed an early commitment to the ethos of service and a desire to contribute to the upliftment of the oppressed of South Africa.
- 3.2. The candidate served articles at a large law firm from the age of 29 to 30 where he was taken on as a professional assistant in 1990 and made an associate partner in 1993 at the age of 34. The candidate could have stayed on the career path of status at the big law firm, but he chose not to do so. At the age of 35, he started his own firm, demonstrating a capacity for leadership and a determination to express an independence of mind and spirit in the practice of law.
- 3.3. At the relatively youthful age of 38 he took his first judicial position in the Labour Court. Married, with two children at the time (he was to have a further two children, one in the first year of his life on the bench), the candidate was turning his back on a promising legal career in private practice in favour of judicial service. Choosing judicial service over the material rewards of private practice, the candidate made himself available to the bench at a point when his

career was about to enter its most lucrative phase, the hard early years of private practice being behind him.

- 3.4. Throughout his years in practice the candidate was a public interest and trade union lawyer. There is no reason in the light of his career path to doubt his statement that he was able to devote his professional career towards the upliftment of the vulnerable and enabling access to law and justice.
- 3.5. The candidate's commitment to legal aid since joining the bench stands out as evidence of his actions speaking as loudly as his words, a hallmark of integrity. He was 43 when he was appointed to the Board of Directors of Legal Aid SA and 44 when he was elevated to the Chair of the Board of Directors of Legal Aid SA, a position which he held for 17 years until he reached the age of 60. During that time, the legal aid landscape was changed under the leadership of the candidate from the Judicare model to the more efficient and effective Justice Centre model where salaried lawyers in State employ provide legal services to the indigent.
- 3.6. The candidate strove to improve the institution for the betterment of the people it was designed to serve, and he made significant progress in the period of service, his success having been recognised in international legal aid circles as demonstrated by his selection as a trustee of the International Legal Foundation, a position he has held since the age of 54 and which is dedicated to the establishment of justice centres around the world.

- 3.7. To summarise at this point, the candidate has demonstrated immunity to the allure of materialism, favouring service over surplus, and has demonstrated a commitment to the upliftment of the oppressed people of South Africa through more action than words.
- 3.8. Whilst on the subject of the candidate's words he claims not to have been published, but this is unduly modest. He could have enlarged on his curriculum vitae by referencing his speech "The role of the judiciary in promoting economic parity within the backdrop of the separation of powers principle" that was published in the Judiciary newsletter during 2021.
- 3.9. The candidate could also have referenced his two articles on the subject of legal costs published in the *Advocate*. These articles reveal that as long ago as 2012 the candidate was agitating for a costs regime that reduced the barriers to litigation, concluding these scholarly pieces by urging that the default costs award not be (as it has so long been) that the costs should follow the result, but that each party should pay its own costs, the candidate having argued for this more equitable cost regime with academic and legal forcefulness. It is notable that this adjusted approach to costs is now standard in the Labour Courts.
- 3.10. The words of the candidate, as published in the Judiciary newsletter in 2021, can thus be taken as likely to be translated into action when he says:

Armed with the Constitution as our guide we are under an obligation to lead the country and its people into a peaceful

era ... Let us focus on the income disparities we have in this country. Our preoccupation with paying obscenely huge salaries and bonuses to executives and starvation wages to the lowly based workers must come to an end. We must realise that the first step towards addressing our problem is agreeing and paying decent wages, that will enable lowly paid workers to provide appropriate shelter for their families, afford basic commodities of life like food, transport, education and healthcare to name a few... We are collectively responsible to ensure that no child goes to bed on an empty stomach. In this way we will take forward the fight against poverty and inequality that has consigned the homeless and the unemployed to the fringes of society so that at the end of it all we can proudly say that we are an indivisible nation in one country under one flag committed to eradicating poverty and inequality.

- 3.11. A further instance of the candidate's integrity which stands out from his *curriculum vitae* is the unusual career move of stepping away from the status of being a Supreme Court of Appeal Judge and taking up the position of Judge President of the busiest Division in the country. To prefer hard work over status is real ethical integrity where the focus of the hard work is to make the busiest division in the country work better. An ethical choice, yes, but choices made are not always choices successfully executed, even hard work does not always translate to tangible results. In the case of the candidate, he has successfully executed his choice and results have proven the candidate to be a successful Judge President.

- 3.12. A Judge President can get by with a lot less assumption of personal responsibility for running the division than does the candidate. He has been prepared to shoulder the heavy cases (those most demanding of a Judge), when his position gave him the opportunity to delegate. This shows integrity; he is not only prepared to occupy the office, he does what is expected of a leader of the Division; he leads from the front, anchoring the bench in the high profile and difficult cases where the most senior members of the executive have been at odds with Chapter 9 institutions, in particular the Public Protector, and the glare of publicity has been great, which only increases the stress of sitting as a senior Judge in such matters.
- 3.13. The candidate has demonstrated an admirable willingness not only to shoulder these responsibilities in the public eye, but he has also increased the capacity of the public to see that justice is done by handing down a decision permitting television cameras in the court rooms, once again translating principle into action.
- 3.14. The candidate's commitment to constituting diverse benches is evident from the benches that he has chosen to hear high profile, difficult matters. In so doing he has demonstrated the recognition of the seniority of his fellow judges and a commitment to representativity of all sectors of South Africa's diverse society.
- 3.15. He does not simply surround himself with 'yes men' (or women); the benches he assembles are of strong-willed senior judges from different backgrounds who can be relied upon to be independent in their thinking and able to stand up for their own positions on a case. This makes the Judge President's job harder if his objective is simply

to make the judgment reflect his own views, but the quality of justice dispensed by such a bench is the better for having been more thoroughly debated before the judgment is produced. Putting himself ‘on the field’ with the strongest players demonstrates a confidence in his own ability and the humility to be guided by others of judicial ability to achieve a representative judgment in the matter.

3.16. There is no better way to lead than by example, and given the ethical track record of the candidate, which is, as the above demonstrates, outstanding, his entire career stands as a monumental example of leadership in the area of judicial ethics.

4. The candidate’s qualities as an outstanding leading jurist who seeks (and is able to achieve) consensus:

4.1. The candidate has the leadership qualities necessary to draft judgments as part of a bench of judges. It is clear from the available information that the candidate has the leadership qualities to ensure that the Constitutional Court functions efficiently and delivers judgments with clear *rationes decidendi* timeously even in the most contentious matters. Our conclusions in this regard are based on the information set out below.

4.2. In the Supreme Court of Appeal, the candidate wrote at least sixteen judgments for unanimous benches. The candidate wrote for the majority in *S v Egglestone* 2009 (1) SACR 244 (SCA). In the matter of *Director of Public Prosecutions: Transvaal v Venter* [2008] 4 All SA 132 (SCA), the candidate and the two other presiding judges each

wrote their own judgments. In that matter, Cloete JA remarked as follows at paragraph [35] regarding the candidate's judgment:

I have had the advantage of reading the judgment of my colleague Mlambo. I agree with his conclusion in regard to the attempted murder charge. I am, however, with respect, unable to agree either with the reasoning or the conclusion reached in regard to the sentence he considers should be imposed for the murder charges. As I shall endeavour to demonstrate, my colleague's judgment both constitutes a radical departure from sentences hitherto considered appropriate by the courts, including this Court, for murder committed with diminished responsibility, and also emphasises aspects of sentencing which this Court has repeatedly held do not require emphasis in such cases.

- 4.3. In the Labour Appeal Court, the candidate wrote at least one judgment for a unanimous bench. In the Gauteng Divisions, the candidate was a member of at least fourteen full benches where the judgments were written by the court.
- 4.4. Besides *S v Egglestone* and *Director of Public Prosecutions: Transvaal v Venter*, no other instances were found where the candidate's judgments generated dissenting judgments.
- 4.5. In the Supreme Court of Appeal, the Labour Appeal Court and the Gauteng Divisions the candidate concurred in at least fifty-four judgments, ten judgments and fourteen judgments respectively.

- 4.6. The candidate dissented in *S v Crossberg* [2008] 3 All SA 329 (SCA); 2008 (2) SACR 317 (SCA).
- 4.7. The candidate's judgments in ground-breaking matters have, to a large extent, been supported on appeal. In this regard, see the candidate's answers at paragraphs 16.3 and 16.4 of the Questionnaire for Judges.
- 4.8. There is no discernible pattern of the candidate almost always agreeing with the same group of judges, and almost never with a different group.
5. **The candidate's experience in court administration and leadership or similar roles:**
- 5.1. The candidate held and holds the following leadership positions in the judiciary:
- 5.1.1. Judge President of the Labour and Labour Appeal Courts of South Africa from 2010 to 2012.
- 5.1.2. Judge President of the Gauteng Division of the High Court of South Africa from 2012 to present.
- 5.2. The candidate held and holds the following leadership or similar roles that also speak to his administrative ability:
- 5.2.1. Chairperson of the Court of Military Appeals since 2012.

5.2.2. Chairperson of the Heads of Court Sub Committee of the Judiciary and Administration IT Steering Committee.

5.2.3. Chairperson of the Law Reform Commission's Sub Committee tasked to conceive and finalise a Mediation Bill for South Africa.

6. Whether the candidate possesses the qualities required to lead the judiciary in effectively defending, protecting and upholding the Constitution:

6.1. The candidate, having served on the benches of the Labour Court, Labour Appeal Court, Supreme Court of Appeal and most recently the High Court, Gauteng Division, has dealt at length with and delivered a significant number of judgments pertaining to issues of constitutional supremacy and the rule of law. Such judgments were concentrated in the last four years of the candidate's tenure as Judge President of the Gauteng Division of the High Court. The candidate presided over and delivered judgments during this time in a number of significant cases that develop the jurisprudence particularly with reference to the judiciary's position in respect of, and *contra*, other branches and institutions of government, and included judgments on the powers of the Public Protector, the powers and obligations of the State arising from the Disaster Management Act, 2002 ("the DMA"), and the regulations promulgated in respect thereof in response to the Covid-19 pandemic. The candidate has throughout these judgments displayed appreciation for and sensitivity to judicial respect while making firm pronouncements both in favour of and against the

executive and legislative arms of government, and organs of State and the Constitution, such as the Public Protector.

6.2. The candidate's notable judgments on constitutional supremacy and fundamental rights include the following (the underlined sections highlight pronouncements on constitutional supremacy):

6.2.1. *Residents, Industry House v Minister of Police and Others* 2021 (2) SA 220 (GJ): The candidate (*coram* with Meyer J and Kathree-Setiloane J), in the Johannesburg High Court, considered the constitutionality of warrantless police searches conducted in terms of section 13(7)(c) of the South African Police Services Act, 1995. The searches in *casu* were directed in general at all of the residents in a purported 'high crime' area of Johannesburg for the purpose of, ostensibly, restoring public order or ensuring the safety of the public in the area. The effect of these searches and seizures were *inter alia* to target illegal immigrants in so-called 'hijacked buildings,' who would be arrested. The Court held that the searches and seizures constituted abuse and infringement of the applicants' right to privacy and dignity, in this regard analysing at length the nature and reach of the individual's right to privacy. The Court however declined to declare section 13(7)(c) unconstitutional in its entirety, as it served a legitimate function in the public interest when applied legitimately (and which may constitute a justifiable limitation on the subject's right to privacy), and suspended the declaration of invalidity thereof for 24 months to afford the legislature to cure the constitutional defect. The Court also considered and declined

to grant the relief sought by the applicants in the form of constitutional damages for the infringement of their constitutional rights, as the Court found that it could not grant a blanket order for damages where all of the applicants had not made out sufficient facts in their founding papers to justify such an order.

6.2.2. *Democratic Alliance v President of the Republic of South Africa and others (Economic Freedom Fighters as Intervening Party and Commission for Gender Equality as amicus curiae)* [2020] 3 All SA 747 (GP): The candidate (*coram* with Davis J and Molefe J), in the Pretoria High Court, considered the use of race, gender, age or disability as criteria applied by the Minister of Small Business Development to distribute government funds in the form of financial aid to businesses in response to the national State of Disaster declared in terms of the DMA. The Court found that the criteria were so vague to “*fall foul of basic principles of the rule of law that such requirement that the exercise of a public power must be certain, even, if as obviously is the case in these circumstances, discretion to allocate funds is permissible.*”

6.2.3. *Democratic Alliance and others v Premier for the Province of Gauteng and others* [2020] 2 All SA 793 (GP): The candidate (*coram* with Potterill ADJP and Ranchod J) in the Pretoria High Court, considered the power of the Court to review a decision to dissolve a municipal council in terms of section 139 of the Constitution, finding that a Court may interfere with such a decision if objectively the requisite jurisdictional facts

are not present at the time when the decision is made, based on the principle of legality. The Court in this matter further considered and assessed the Constitutional relationship between local and provincial government.

6.2.4. *Freedom Front Plus v President of the Republic of South Africa and others* [2020] 3 All SA 762 (GP): The candidate (*coram* with Keightley J and Kollapen J), found that the DMA does not permit the deviation from a normal constitutional order nor limitation of fundamental rights which is not subject to section 36 of the Constitution. As a result, the DMA need not include a specific provision preserving the competence of courts to rule on the validity of the regulations pronounced in response to a declared State of Disaster, and the Courts maintain their power to review the declaration and extension thereof in the normal course, under the principle of the rule of law and in line with the Bill of Rights.

6.2.5. *One South Africa Movement and another v President of the Republic of South Africa and others (Solidarity as amicus curiae)* [2020] 3 All SA 856 (GP): The candidate (*coram* with Keightley J and Kollapen J), recognised that competing constitutional prerogatives (which “*pull in different directions*”) informed the State’s decision in regulating the Covid-19 State of Disaster. The Court found that each of the respondents explained the rationale behind each of their decisions, and expert advice relied upon. The Court recognized that the right to life means more than “*biological*” life, and is intertwined with dignity, and includes the right to

share in the experience with humanity. The Court also interpreted section 27 of the DMA in respect of the meaning of the phrase “*to the extent necessary*,” and whether the measures taken by the respondents “*to the extent*” that they deemed necessary were rational and satisfied the principle of legality.

6.2.6. *The President of the Republic of South Africa v The Public Protector (The Information Regulator amicus curiae)* 2020 JDR 0406 (GP): The candidate (*coram* with Matojane J and Keightley J) considered an application brought by the President to review the Public Protector’s report and findings into funding of the CR17 campaign, considering and applying the powers of the Public Protector under the Constitution and the Public Protector Act in the circumstances, *inter alia* confirming that a legal dispute between such two high bearers of office would always be of constitutional import, that as the Public Protector’s reports do not constitute administrative action but an exercise of public power, they are reviewable under the principles of the rule of law in terms of section 1(c) of the Constitution. The Court found that the Public Protector had committed a material error of law which warranted the review and setting aside of the report, and that she had reached an irrational and unlawful conclusion of the facts before her.

6.2.7. *The Helen Suzman Foundation v The Speaker of the National Assembly* 2020 JDR 2119 (GP): The candidate (*coram* with Kollapen J and Baqwa J) considered whether the DMA was intended to operate only in the short term in order to allow

Parliament and Cabinet to prepare applicable legislation in response to the Covid-19 pandemic, whether the government's continued reliance on the DMA over the long term undermined Parliament's law-making powers and democratic order, and whether section 7(2) of the Constitution triggered an obligation on the legislature to take positive measures to protect, promote respect for and fulfil the rights in the Bill of Rights, including measures such as legislation. The Court found that the DMA was intended to cover disasters of a progressive nature (or of extended duration), which required continuous responses and measures (not only a once off intervention) and that it also extended to cover the post disaster period, and that there was no need illustrated for an outcome that was to be achieved in the legislation that Parliament would pass in lieu of the DMA.

- 6.2.8. *Corruption Watch and another v Arms Procurement Commission and others* [2019] 4 All SA 53 (GP): The candidate (Coram with Davis JP and Leeuw JP) considered whether it had the power to review the findings of a judicial commission of enquiry. This was notable as there had not been at that point comparative South African authority on the issue, and New Zealand and Canadian law were applied. The Court held that the purpose of a public commission is to restore public confidence in a situation that is investigated in the process of government, which dictates that it must operate within the framework of legality. The Court held that, while accepting that the courts must be cautious before exercising a power of review over proceedings of a commission, when

uncontested evidence reveals such significant failures by the commission as in the present case (with regard to inter alia its failure to admit material evidence), the principle of legality dictates that the findings of the Commission should be set aside. The Court further held that to exercise a review power in an “*overzealous*” manner would subvert a commission’s flexible nature, but that it was bound in terms of the principle of legality.

6.2.9. *President of the Republic of South Africa v Public Protector and Others* 2018 (2) SA 100 (GP): The candidate (*coram* with Boruchowitz J and Hughes J) considered in detail and at length the role and powers of the Public Protector – specifically, whether the Public Protector may instruct the President to appoint a commission of inquiry and direct its manner of implementation. The President’s application to review and set aside the Public Protector’s report and recommendations on purported “state capture” was considered within the purview of the principle of legality as an incident of the rule of law, and the application ultimately dismissed and the Public Protector’s powers reinforced.

6.2.10. *Langa and others v Hlophe* [2009] 3 All SA 417 (SCA): The candidate was part of a panel of nine justices of the SCA writing unanimously as “the Court” that considered an appeal by the Justices of the Constitutional Court against a majority judgment of the High Court declaring that the Justices had violated the constitutional rights to dignity, privacy and equality of Judge Hlophe, by laying a complaint of judicial

misconduct against him without, *inter alia*, affording him a prior hearing. The Court found that the Justices did not “*act as a court*” or a judicial or administrative organ, and that the provisions of the Constitution confirming the *audi alteram partem* principle did not arise. The Court further confirmed that the fact that Judge Hlophe was a judge did not give him special rights or protection, that he is an ordinary citizen.

7. Whether the candidate possesses the qualities required to lead the judiciary in fearlessly asserting its independence and respect for separation of powers:

- 7.1. In *Democratic Alliance v President of the Republic of South Africa and others (Economic Freedom Fighters as Intervening Party and Commission for Gender Equality as amicus curiae)* [2020] 3 All SA 747 (GP), the candidate was a member of a full bench where the Court ruled that the qualifying criteria as claimed to be applied by the Minister of Small Businesses fell foul of the basic principles of the rule of law in that the requirement that the exercise of a public power must be certain even if a discretion to allocate Covid relief funds was permissible. In this case, the Court set aside the criteria and referred the matter back to the Minister for redrafting of the Regulations. The Court managed to walk a tightrope of asserting its independence whilst respecting the principle of separation of powers.
- 7.2. The candidate recently delivered a speech at the Third Annual Summit on Social Justice on the topic: “The role of the Judiciary in

promoting Economic parity within the backdrop of the Separation of Powers Principle” and had this to say:

On the role of the Judiciary, its role is not determined by the individual or collective idiosyncrasies of judges, but rather the architecture of the constitution and the norms and values found therein. While the process of differentiated incorporation may allow to enforce socio-economic rights in a useful and appropriate manner, it does not speak to the capacity of such adjudication to rectify social injustice. The question we must then ask ourselves is, have the South African courts contributed to positive social change?

7.3. The candidate’s probing question at the end of the quote is indicative that he is always striving to challenge himself as a jurist to excel in his judicial responsibilities and contribute positively towards building transformative jurisprudence to achieve social justice. In this article, the candidate denounced the perception of the politicisation of the Judiciary and the narrative of a politicised or captured Judiciary as it has the effect of undermining the judicial system.

8. Whether the candidate possesses the qualities required to lead the judiciary in pursuing a transformative jurisprudence geared for the advancement of social justice and access to justice:

8.1. It is clear from the material reviewed that the candidate has the track record, judicial stature and pedigree to pursue transformative

jurisprudence, which is geared towards the advancement of social justice and access to justice.

- 8.2. This candidate is a strong proponent for social justice and access to justice for the poor and marginalized communities. In his paper delivered at the Middle Temple and SA Conference (September 2010) captioned “The reform of the costs regime in South Africa”, he identified the need to reform the costs regime in South Africa as a way of making justice accessible.
- 8.3. Furthermore, the candidate served as a Board member at the Legal Aid South Africa since 2001 and was elevated to the Chair in 2002 to 2019. He was a Trustee of Africa Legal Aid (AFLA) between 2008 to 2011. He is currently a member of the International Association of Refugee and Migration Judges (IARMJ) since 2012. He is a current Council Member of the IARMJ Africa Chapter since 2016 and Global Executive Council Member of the IARMJ since 2020. He is also a President of Africa Chapter of IARMJ since 2020.
- 8.4. In his capacity as the Chairperson of the Board of Directors of Legal Aid SA, the candidate championed the Justice Centre Model as the most ideal vehicle to deliver legal aid services.
- 8.5. The candidate established a track record as an advocate for transformation in the Judiciary including the establishment of acting judge pools that advance women in particular.
- 8.6. In *SAPS v Solidarity* [2013] (3) BCLR 320 (LAC), the candidate’s judgment upheld the SAPS Affirmative Action Policy and after

being reversed in the SCA, was in substance reinstated by the Constitutional Court. Transformation and employment equity is a hotly debated issue in South Africa and this judgment and its confirmation by the Constitutional Court assisted in clarifying this matter.

8.7. In *Multichoice (Proprietary) Limited v National Prosecuting Authority, In Re; S v Pistorius, In re; Media 24 Limited v Director of Public Prosecutions North Gauteng* [2014] 2 All SA 446 (GP), the candidate's judgment affirmed the open justice principle and enabled media to broadcast Mr Oscar Pistorius' murder trial, which allowed the public to access and follow the high profile murder case, which contributed immensely in educating the public about the judicial system and its inner workings.

8.8. As a Convenor of the Judiciary and Administrative Information Technology Committee, the candidate demonstrated that innovation must be embraced in the judiciary and information technology should be used as an enabler in the judicial space. This was proven when the Covid 19 pandemic led to lockdowns and personal contact restrictions, but courts were still able to function and deliver justice.

9. **Whether the candidate possesses the leadership qualities required to instil a judicial culture and work ethic that will meet acceptable judicial performance standards and standards of accountability:**

9.1. To answer the question whether the candidate possesses the leadership qualities required to instil a judicial culture and work ethic that will meet acceptable judicial performance standards and

standards of accountability, we would refer to the answers above and add the following.

- 9.2. The candidate has produced at least 176 judgments. Yet numbers alone do not do justice to the industry required to produce the quality of judgments produced by the candidate and the track record of rare overturning by higher Courts.
- 9.3. The candidate's judgments are in the most part lengthy, scholarly, well-structured and well-reasoned. Obviously, certain judgments do not have to be particularly long or complex, but those which required diligent attention evidently received it from the candidate. This capacity for discernment of the important cases and the willingness to 'grasp the nettle' of the big cases of the day with independence and courage, and a firm commitment to Constitutional values, is clear from a conspectus of all his judgments.
- 9.4. His track record in Gauteng is testimony to his leadership and the maintenance of a judicial culture and work ethic in the busy and diverse (geographically and culturally) division. The judicial culture and work ethic was sustained under the leadership of the candidate in the Gauteng Division most admirably during the pandemic. He introduced and sustained the Caselines system which enabled his judicial teams to turn up and deliver case management, hearings, judgments and the vital products of the courts, day after day from remote locations with remote hearings, providing support to those Judges with technical limitations through their Registrars and the IT Department. The candidate has thus demonstrated a capacity to

maintain and develop a judicial work ethic in new and challenging circumstances.

- 9.5. The candidate is known for attending many functions (pre-pandemic) such as the annual Judges lunch hosted by the Johannesburg Bar and the bi-annual Bar Dinner. His decisions not to delegate these attendances to subordinates (as is done by others in high office) have not gone unnoticed by the Bars which appreciate his personal attendance at their functions with his fellow Judges.
- 9.6. The candidate's recorded speech at the conference on acting judges held at Liliesleaf Farm is a popular one on the YouTube channel record of this conference.
- 9.7. On the subject of acting judges, in paragraph 18.6 of his application, the candidate reports that he has established acting judge 'pools' that advance women. One may be the rule 43 family law Judges. The candidate has given a number of women an opportunity to act and that those (men, women and non-binary) who have acquitted themselves adequately when afforded this opportunity the candidate presumably includes in his 'pools' of practitioners and academics whom he would be prepared to invite to act again. Who gets invited to act is, however, an opaque process and the existence of these 'pools' referred to by the candidate is of concern as it lacks transparency, appears arbitrary, and is a form of gatekeeping without discernible criteria for the application process without tangible peer review safeguards. Given that acting Judges are dealing with real matters with litigants' fates in play this is undesirable, if only because the production of judgments can be inexcusably delayed by

acting judges who go back to practice and fall outside the authority of the Judge President.

- 9.8. As the candidate will play a role in deciding who gets to act on the Constitutional Court bench, should he be appointed Chief Justice, it would be appropriate for the Judicial Services Commission to seek insight into how the candidate has performed his selection processes for acting Judges of recent times, how the ‘pools’ of acting judges are formed, how this system will be transferred to his successor should he leave the position of Judge President of Gauteng (if there is a system at all – or will he simply leave it to his successor to devise his or her own method of choosing Acting Judges and creating pools of them to serve the Judiciary)?
- 9.9. Acting judges at present are an essential component of the functioning of the Gauteng Division which simply could not function without them picking up a significant part of the case load, much of which is done on a *pro deo* basis (introduced by the candidate). This is a matter that will require attention by a Chief Justice also at the Constitutional Court as it is the CJ decides who gets to act on the Constitutional Court bench.
- 9.10. The candidate’s statement at paragraph 18.7 of his application: “*My leadership of Legal Aid SA, the Labour Court and the Gauteng Division of the High Court (both busy and challenging divisions) has instilled in me the crucial skills of leadership – the ability to listen, to motivate, to be visionary, to take people along with you, to lead by example and finally to act as uniting force in bringing together diverse people for the common good*” is, as far as the GCB is able to

confirm, supported by the facts. There is significant unity amongst the judges of the Johannesburg High Court and acting judges report on this with admiration and respect when they return to the Bar after their acting stints.

- 9.11. Continuing on the subject of leadership, the candidate's contribution to the establishment of the Limpopo and Mpumalanga Division High Court building projects should not be overlooked as a significant contribution to the distribution of justice to the outlying areas beyond the cities. In this regard, see paragraph 18.6 of the candidate's application.
- 9.12. The candidate's independence of mind and willingness to dissent is perhaps best exemplified in the case of *S v Crossberg*, in which the candidate strenuously differed from Navsa and Ponnan JJA in a judgment that clearly identified and substantiated his grounds for coming to a different conclusion. *Crossberg* is a case in which the accused claimed, once he had shot certain persons, to have been shooting at a troop of baboons. The candidate vehemently rejected that version in his dissenting judgment in a manner that reads very convincingly. This demonstration of independence and confidence in his own judgment in the face of strongly phrased opposing views is exemplary leadership material, real backbone.
- 9.13. *Crossberg* is a rare dissent. The candidate is not prone to dissenting, and is clearly a consensus builder given the number of full Court decisions in which he has been involved. The candidate remains capable of and prepared to dissent strongly where the occasion arises.

- 9.14. In this and the other judgments delivered by the candidate in the field of criminal law such as *S v Egglestone*, he demonstrates a balanced perspective on the offender and the victim. This case was a sexual offences one in which he made the finding for the majority and in which Farlam JA wrote a dissent. Once again, backbone of substance may be discerned, but the flaw of rigidity is admirably absent in the candidate's track-record as he has demonstrated sensitivity and insight in criminal matters.
- 9.15. The subject of diminished responsibility in *S v Maarohanye* (the Jub Jub reckless driving / murder case) was delicately reasoned out by the candidate, reflecting a capacity for nuance, discernment and balance under the glare of public scrutiny, it is by no means an easy task not to be swayed by the gallery in the modern era of social media and invasive coverage, yet the candidate holds a firm grip on his Court and his commitment to a reasoned, independent decision.
- 9.16. If one takes into account the candidate's labour background, his work at the SCA, the running of the Provincial Division and the importance of his public law and criminal law decisions, it is clear that he has the breadth of experience and knowledge both of the administration of the Courts, the Constitutional order and the criminal law (a vital aspect of our justice system often overlooked when evaluating illustrious legal careers) that seem likely to equip him to be able to contribute both as leader and as co-adjudicator to the debates that take place in the Constitutional Court across a wide range of legal disciplines, bringing to the task an in-depth understanding of the conditions in which the Courts work to generate the judgments that end up before the Constitutional Court, a

significant asset in any Chief Justice's appreciation of the difficulties faced by the Courts and an empathetic ability to lead with insight and sensitivity.