

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 ZONDO ACJ AS CHIEF JUSTICE

- 1 Please find below the General Council of the Bar's (**GCB**) comments on the nomination of Zondo ACJ 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: ACTING CHIEF JUSTICE RAYMOND MNYAMEZELI
MLUNGISI ZONDO**

1 Whether the candidate meets the Constitutional requirement of citizenship:

1.1 The candidate is a South African citizen and meets the requirement set out at section 174(1) of the Constitution.

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 61 years of age.

2.3 The candidate was first appointed as a judge in 1997 and has served continuously since that time. He was appointed as a judge of the Constitutional Court on 1 September 2012. He has held office as such for 9 years and 4 months.

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 as Chief Justice will terminate in August 2024 after approximately 2 years and 9 months.

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

- 3.1 The candidate is reputed to be of unblemished integrity and is ethically beyond reproach. There are no known findings or pending complaints of misconduct against the candidate.

- 3.2 In a view which can readily be echoed, WOZA Leadership NPC, a women lawyers' group which nominated and supported the candidate's application, said the following about the candidate:

It is our view that he had the acumen to lead the Judiciary of South Africa at this point in our democracy which has become embroiled by corruption. ... His contribution has ensured that the Rule of Law is firmly intact and that a positive perception of integrity and functioning of the judiciary is ensured in the eyes of the citizens of South Africa.

- 3.3 In his application, the candidate has dealt openly with previous complaints regarding undue delays in the finalisation of matters in the Labour Court and Labour Appeal Court during the time he held office at those Courts. The candidate accepted responsibility for those delays as the head of those Courts. This shows that the candidate is a leader and is prepared to take responsibility as a leader of a Court.

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

4.1 The candidate holds the following degrees:

4.1.1 B Juris (University of Zululand);

4.1.2 LLB (Natal);

4.1.3 LLM (*cum laude*) (UNISA);

4.1.4 LLM with specialisation in commercial law (UNISA);

4.1.5 LLM (patent law) (UNISA).

4.2 His judicial positions:

4.2.1 Judge, Labour Court, 1 November 1997 – August 1999;

4.2.2 Judge, Gauteng Division, Pretoria, April 1999;

4.2.3 Judge President of the Labour Appeal Court and Labour Court,
May 2000 – April 2010;

4.2.4 Acting Justice of the Constitutional Court, November 2011 –
May 2012;

4.2.5 Judge of the Constitutional Court, 1 September 2012 – present;

- 4.2.6 Deputy Chief Justice of the Republic of South Africa, 1 June 2017 – present;
- 4.2.7 Acting Chief Justice of the Republic of South Africa, 1 to 30 November 2017, 1 July 2021 – present.
- 4.3 The candidate has authored over 200 judgments, many of which were unanimous or have been confirmed on appeal. The candidate is clearly able to work with his colleagues, is respected by them and is able to obtain consensus.
- 4.4 The candidate was a member of the Ministerial Task Team which drafted the Labour Relations Act, 1995.
- 4.5 The candidate was the first Chairperson of the Governing Body of the Commission for Conciliation, Mediation and Arbitration (CCMA) and held this position from 1995 to early 1997.
- 4.6 In June 2017 the candidate was appointed as the Acting Chairperson of the Judicial Conduct Committee of the Judicial Service Commission. The candidate remains in this position to date.
- 4.7 In 2018 the candidate was appointed the Chairman of the Executive Committee of the South African Judicial Education Institute (“SAJEI”) Council and also became a member of the SAJEI Council and Acting Chairperson of the SAJEI Council. The candidate still holds these positions today.

- 4.8 On 9 January 2018 the candidate was appointed as Chair of the Judicial Commission of Inquiry into the allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (“the Zondo Commission”). At the date of this review the candidate has successfully overseen more than 400 days of evidence and procedural hearings, heard the evidence of more than 300 witnesses and submitted the first report which consists of 874 pages and refers to a record of 75,099 pages of transcribed oral evidence and 8,655,530 pages of documentary evidence.
- 4.9 The reputation of the candidate first as a jurist and second as a leader of the judiciary shall be dealt with in the paragraphs that follow.
- 4.10 The candidate has an excellent reputation arising from his judgments in the Labour Court, the Labour Appeal Court and the Constitutional Court. His specialisation is quite clearly employment or labour law. In this field he has delivered judgments which are confident, authoritative and clear. South African employment law jurisprudence is widely regarded as coherent and fair and the candidate has played an enormous part in establishing and sustaining its reputation.
- 4.11 In its assessment of the candidate in May 2012 the Johannesburg Bar Council’s submission stated the following in regard to, what were then, 104 reported judgments handed down by him stating –

A reading of the candidate’s judgments indicates that he is capable of producing lucid (albeit sometimes regarded by legal practitioners as needlessly lengthy) judgments. The judgments

are well set-out, logically structured, and are easy to comprehend in terms of both style and legal reasoning. He proceeds from basic principles, and develops his reasoning from this starting point. He demonstrates a good sense of the practicalities of law and legal procedure. This is balanced by a resort to, and discussion of, relevant authority in all of his judgments. His judgments reflect a sense of legal maturity befitting his tenure. All of his judgments are substantial, and deal fully with all the relevant issues raised.

4.12 The analysis remains a fair one. His judgments in the Constitutional Court subsequent to his appointment are perhaps less criticised for being ponderous and are well-regarded for their clarity of thought and exposition. The reservations concerning his expertise being limited to the employment field have been dispelled by judgments in several fields, including administrative law. His reputation among members of the Bar is that of being a substantial and authoritative jurist.

4.13 The list of significant judgments is long but several stand out for particular mention. These cases settled a controversy and brought clear direction to the law on the relevant issues. In *Modise v Steve's Spar Blackheath* (2000) 21 ILJ 519 (LAC) he settled a long-standing dispute about the rights of unprotected strikers to procedural fairness by holding that the principles of *audi alteram partem* applied in employment law and that a dismissal in a strike forms no general exception. In *NEHAWU v University of Cape Town* (2002) 23 ILJ 306 (LAC) the candidate set out a formulation of the test in interpreting and applying section 197 of the Labour Relations Act to the transfer of contracts of employment in

the context of transfers as a going concern which has since been adopted applied regularly in the cases concerning this knotty issue. In the face of a contrary approach by several authoritative judgements concerning the correct test for reviewing arbitration decisions in the CCMA and bargaining councils (which hear the majority of employment disputes) in *Engen petroleum Ltd v CCMA* (2007) 28 ILJ 150 (LAC) he set aside the ‘reasonable employer’ test as having no application as a measure to determine the reviewability of arbitration decisions.

- 4.14 The candidate played a significant role in the transformation of the Labour Court and Labour Appeal Court to reflect a greater diversity of judges, both in terms of race and gender. While there was criticism of delays in rendering judgments and the absence of a firm control in respect of officials and employees within the Labour Court registry, the candidate’s authority and integrity as judicial leader was well-respected.
- 4.15 As stated previously, the candidate has submitted Part 1 of his report on the Commission of Enquiry into corruption (the Zondo Commission). Despite public criticisms of the delays regarding the conduct of the Zondo Commission and the production of its report, the thoroughness of the investigation and the candidate’s handling of the Commission has not been seriously questioned.
- 4.16 The candidate’s recent Chairmanship of the hearings conducted by the Judicial Services Commission in respect of judicial appointments was widely praised for the dignity and gravitas which the candidate brought

to the proceedings. This is consistent with the experience of legal practitioners in appearances in courts in which the candidate presides.

4.17 The candidate has published significant legal articles in the foremost publication for commentary on employment law decisions – the Industrial Law Journal (ILJ) – and contributed chapters on retrenchments and the right to work respectively to The South African Human Rights and Labour Law Yearbook (1990) and (1991) and the book, Human Rights for South Africans, published in 1991 by Oxford University Press.

4.18 The candidate has authored over 200 judgments. The judgments have been widely accepted as authoritative and have provoked very limited academic criticism or legal controversy. The large number of judgments speaks well of the candidate's industry and commitment to his judicial responsibilities.

5 The candidate's experience in court administration and leadership or similar roles:

5.1 The candidate's leadership and administrative positions have been dealt with above. His achievements in this respect are considerable and some of these achievements ought to be highlighted.

5.2 The candidate was the leader of the Labour Court and the Labour Appeal Court for 11 years. During this time the candidate managed to fill all vacant rolls for Judges and by the time he departed this position, the Labour Appeal Court consisted of 10 permanent Judges, including

a Judge-President and Deputy-Judge-President. The court was able to form three panels of its permanent Judges to hear appeals. This is a notable achievement from the position in 1999 when the court could not even form a quorum of 3 permanent Judges.

5.3 During the candidate's tenure at the Labour Appeal Court, he transformed the court from one consisting of only white male Judges to one consisting of eight black Judges, two of whom were female Judges.

5.4 Similarly, during the candidate's tenure at the Labour Court, he transformed the court to one consisting of seven black judges and three female judges.

5.5 When the candidate took over as the head of the Labour Appeal Court there had never been a female judge of the Labour Appeal Court and no female Judge had ever acted in the Labour Appeal Court. During the candidate's term he secured various female judges to act in both the Labour Court and Labour Appeal Court. Many of these female judges have gone on to be appointed in the Constitutional Court and the Supreme Court of Appeal.

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

6.1 The candidate has fulfilled the role of Deputy Chief Justice of the Republic of South Africa from 1 June 2017 to date and Acting Chief

Justice of the Republic of South Africa from 1 to 30 November 2017 and 1 July 2021 to date.

- 6.2 There are no known complaints regarding the candidate's ability to fulfil these roles or any complaints regarding his conduct during this time.
- 6.3 The candidate has a reputation for independent mindedness. This has been evidenced by dissenting or minority judgments by him during his career. Where these judgments were taken on appeal, his views were often upheld – testament to his well-placed confidence in his reasoning and judgment.
- 6.4 A further demonstration of the candidate evidencing the qualities required to defend, protect and uphold the Constitution relates to his approach in relation to the objections of former President Zuma in testifying before the Zondo Commission and his requirement that the legal consequences of the former President's refusal must follow. This decision was made despite considerable political pressure. The candidate's approach was vindicated by the strong judgments of the Constitutional Court which reiterated the importance of the compliance by everyone with legal rules.
- 6.5 There is no question that the candidate will work constructively and will command and show appropriate respect when representing the judiciary in engagements with different arms of the Government.

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 There is nothing to suggest that the candidate lacks judicial independence – the opposite in fact. As set out previously, the candidate’s handling of the Zondo Commission, including the refusal by the former President Zuma to testify before the Zondo Commission, indicates a fearless attitude to upholding, defending and protecting the Constitution and the judiciary.

7.2 Furthermore, the candidate’s findings in Part 1 of his report of the Zondo Commission clearly evince a fearless respect for the separation of powers and a commitment to upholding the values of an independent judiciary. In this regard, the candidate made, *inter alia*, the following findings:

7.2.1 *“On the evidence heard by the Commission there is absolutely not doubt that President Zuma did, indeed, instruct Minister Chabane to fire Mr Themba Maseko or move him from his position as DG and CEO of GCIS. There is also no doubt that in giving this instruction, President Zuma was giving effect to the wishes of the Guptas or was complying with their request or instruction to him to remove Mr Maseko because he had refused to co-operate with them.”*

7.2.2 *“It is a fabrication by Mr Zuma to avoid accountability for a decision that he took. Mr Zuma falsely implicated Minister*

Chabane because he knew that Minister Chabane has passed on and will not be there to refute his evidence.”

7.2.3 *“If officials can be compromised and they exercise delegations of authority for nefarious purposes of ignore them altogether and suffer no consequences, then, again, the policies and processes serve no purpose.”*

7.3 The candidate has also written a number of dissenting judgments during his tenure as a permanent judge of the Constitutional Court, and also during his acting appointment at the Constitutional Court (for example, the strong dissent in *Sebola v Standard Bank of SA* 2012 (5) 142 (CC)). This shows that, when the candidate disagrees with his colleagues he is confident and independent minded enough to express his differing views.

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 The candidate possesses the qualities required to lead the judiciary in these fields.

8.2 The candidate has played a significant role in the transformation of the Labour Court and the Labour Appeal Court while sitting as Judge President of the Labour Appeal Court and Labour Court during May 2000 to April 2010.

- 8.3 When the candidate took over as the head of the Labour Appeal Court there had never been a female judge of the Labour Appeal Court and no female judge had ever acted in the Labour Appeal Court.
- 8.4 During the candidate's term he secured various female judges to act in both the Labour Court and Labour Appeal Court.
- 8.5 The candidate transformed the Labour Appeal Court from consisting of only white male Judges to one consisting of eight black Judges, two of whom were female Judges and transformed the Labour Court to one consisting of seven black judges and three female judges.
- 8.6 The South African Chapter of the International Association of Woman Judges supported the candidate's application stating that *"He showed formidable leadership on gender issues. During his tenure he met the gender transformation challenge. Before that not a single woman Judge had ever acted in the LAC"* and *"Justice Zondo is sensitive to the challenges facing woman in their appointment to the judiciary and has been instrumental in recommending female colleagues for appointment of Acting Deputy Judge President of the LAC. His consistency in trying to achieve gender balance in the judiciary has been characterized by leading and being proactive. It is clear that Justice Zondo has the ability to visualise the future needs of our judiciary but also has the ability to achieve those goals as he has done in relation to race and gender transformation as described."*

- 8.7 During the candidate's role as Deputy Chief Justice and Acting Chief Justice at various stages during the period 1 June 2017 to present, his authority and integrity as judicial leader was well-respected.
- 8.8 As set out previously, the candidate displayed the leadership qualities required for the role of Chief Justice during the conduct of the Zondo Commission and in his role as Chairman of the hearings conducted by the Judicial Services Commission in respect of judicial appointments.
- 8.9 From an analysis of his judgments, the candidate is clearly committed to promoting the advancement of social justice and access to justice for all, including historically and currently vulnerable groups. One example is the candidate's reprimand of the Legal Aid Centre for the dilatory and reprehensible manner in which it provided assistance to vulnerable members of society in *Links v MEC, Department of Health, Northern Cape Province* [2016] ZACC 10, at para [52]:
- The Centre is supposed to render a service to indigent people who are part of a vulnerable section of our society to enable them to pursue claims that they otherwise would not be able to pursue for lack of funds. It should not be the Centre that destroys their claims by failing to attend to them with diligence and allowing them to prescribe.*
- 8.10 Another example can be found in *Ndimma & others v Waverly Blankets Ltd Sithukuza & others* (1999) 20 ILJ (LC) where the candidate showed empathy for the plight of employees in a matter in which the candidate dealt with the question as to whether or not the transfer of shares from

one company to another constitutes a transfer of business as a going concern as contemplated in section 197(2) of the Labour Relations Act, 1995. In this matter the candidate stated the following at para [77] of his judgment:

I am of the opinion that there is a crying need for an amendment of section 197 to cover the situation such as the one which occurred in this case. Accordingly, government, business and labour may do well to consider the desirability of such an amendment of s 197. Another way to deal with the problem may be to amend s 38 of the Insolvency Act to say upon the granting of a provisional liquidation order, existing contracts of employment are suspended pending the discharge of the role or the granting a final liquidation order. Upon the granting of a final liquidation order, the contracts of employment may then terminate by operation of law, or, upon the discharge of the provisional liquidation order, the suspension of contracts can be uplifted by operation of law and the contracts of employment may continue as before.

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 The candidate has authored over 200 judgments many of which were unanimous or have been confirmed on appeal.

- 9.2 The candidate's judgments are logical and reasoned and deal fully with the issues and legal principles. The candidate's work ethic cannot be questioned, he has shown a firm commitment to his role as a judicial officer, in all the positions that he has held during his career.
- 9.3 During the candidate's tenure as Deputy Chief Justice of the Republic of South Africa from 1 June 2017 to date and Acting Chief Justice of the Republic of South Africa from 1 to 30 November 2017 and 1 July 2021 to date, he authored many judgments, including majority judgments, minority judgment and dissenting judgments.
- 9.4 The candidate possesses a work ethic deserving of the position of Chief Justice of the Republic of South Africa. There are no known complaints regarding the candidate's ability to fulfil the role of Chief Justice or any complaints regarding his conduct and work ethic during his role as Acting Chief Justice.
- 9.5 The candidate's handling of the Zondo Commission and the first part of his Report on the Zondo Commission further emphasises his outstanding work ethic. The candidate heard 400 days of evidence and procedural hearings, heard the evidence of more than 300 witnesses and compiled the first report which consists of 874 pages and refers to a record of 75,099 pages of transcribed oral evidence and 8,655,530 pages of documentary evidence.
- 9.6 The candidate conducted the Zondo Commission and produced Part 1 of the Report while holding down his position of Deputy Chief Justice and Acting Chief Justice of the Republic of South Africa.

- 9.7 There has been almost unanimous agreement within the profession that the candidate conducted the proceedings of the Commission in a manner which has enhanced not only his own but also the standing of the South African judiciary. Notwithstanding the controversy concerning the subpoena relating to the former President, Mr Zuma, the hearings were widely regarded as fair and free of partiality. The candidate's approach in relation to the controversy has been widely applauded for upholding the rule of law and enforcing respect for legal process. In this he showed no little courage and leadership.
- 9.8 The initial report produced by the Commission has been well-received for its careful consideration of the evidence and thoughtful recommendations. This is consistent with the body of work produced in his career as a jurist.
- 9.9 The clearest indication of the candidate's leadership potential may be seen in his example of dignity, care and commitment to the judiciary and constitutional principles. He has set high standards for himself in his career's work and it is likely these will be required of those with whom he works if he is appointed to the position as Chief Justice.
- 9.10 The candidate has no known findings or pending complaints of misconduct against him.