

CANDIDATE: **MALETSATSI BETTY MAHALELO**

COURT FOR WHICH APPLICANT APPLIES: **GAUTENG DIVISION OF THE HIGH COURT**

1. The candidate's appropriate qualifications

1.1. The candidate holds B.luris and LLB degrees;

1.2. The candidate was previously employed as a prosecutor and thereafter, as a Magistrate and a Regional Magistrate, and has served as a presiding officer for 26 years. The candidate has served as an Acting Judge in both the Gauteng Division and the Gauteng Local Division for 11 terms over the past 6 years;

1.3. We accordingly consider the candidate to be suitably qualified.

2. Whether the candidate is a fit and proper person

2.1. The candidate has extensive experience as a presiding officer, having served as a Magistrate and Regional Magistrate for 26 years.

2.2. The candidate has served a considerable number of terms as an Acting Judge over the past 6 years.

2.3. Having considered the candidate's *curriculum vitae* (and the references enclosed therewith) and taking into account the fact that the candidate has served as an Acting Judge on a number of occasions, we are not aware of any fact or circumstance that might suggest that the candidate is not fit and/or proper.

3. Whether the candidate's appointment would help to reflect the racial and gender composition of South Africa

Yes. The candidate is a black female and her appointment would assist in diversifying both the racial and gender composition of the Court.

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

- 4.1. The judgments considered (listed below) cover a wide range of different topics and legal principles. They include criminal law and procedure, the principles applicable to the *quantum* of damages, interdicts, delictual and contractual disputes, issues of civil procedure and insolvency.
- 4.2. Whilst the candidate's professional background suggests a leaning towards criminal law and procedure, we consider the manner in which the candidate has formulated and prepared her judgments to be indicative of a good working knowledge of the law and the practical application of legal principles.
- 4.3. The judgments reviewed demonstrate that the candidate is able to consider complex factual disputes and apply difficult legal principles. The candidate considers and applies considerable case law in all of her judgments.
- 4.4. For example, in the unreported judgment of *Frese NO v Steve Biko Foundation and Another* 2017 JDR 0360 (GJ), the candidate was called upon to interpret the dispute resolution clause contained in a standard form building contract in order to determine whether an adjudication award is binding and enforceable pending the final resolution of the dispute in terms of the arbitration provisions of the contract. The candidate drew on a number of cases considering similar clauses in other standard form contracts to conclude that a notice of dissatisfaction issued in relation to an adjudication award does not affect the enforceability of the award in the interim. The candidate was further called upon to determine whether the enforcement of the adjudicator's decision would be *contra bonos mores* or against public policy in circumstances in which the company in whose favour the award had been made has entered business rescue. After a careful assessment of case law and academic writing on the subject, the candidate concluded that it would not. However, the candidate has granted leave to appeal her judgment, which appeal has not yet been determined.

- 4.5. The candidate's judgments cover a range of issues of fact and areas of law. The below table provides a summary of the fields covered by her judgments:

Field of Law	Cases
Civil Procedure	4
Criminal Law	7
Contract Law	3
Insolvency Law	1
Law of Delict	7
Other	1

- 4.6. The cases which have been considered have not directly concerned constitutional law, although the candidate does demonstrate a commitment to the values of the Constitution and appears to have given careful consideration and appropriate application to those values when they have arisen in the cases before her – which will be addressed below.

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

- 5.1. The judgments considered in the process of completing this questionnaire do not expressly involve constitutional issues.
- 5.2. It should be noted that, particularly in the candidate's criminal law-related judgments, while not relying directly on constitutional values, the candidate shows sensitivity towards the nature of punishment and the

extent of the punishment imposed. For example, in the case of *S v Ndlovu* 2017 JDR 0356 (GJ), the candidate was called upon to consider an appeal against a sentence of 15 years which was imposed on the appellant after the appellant was found guilty of robbery with aggravating circumstances. The candidate was careful to balance the various factors which ought to be considered in sentencing, and concluded that the sentence was particularly severe in light of its cumulative effect, when taken with another sentence which had already been imposed on the accused. Accordingly, the candidate ordered that the two sentences should run concurrently, and therefore upheld the appeal.

5.3. In *Ekene v Minister of Safety and Security* 2015 JDR 2160 (GJ), the candidate granted condonation to the applicant for its failure to give notice to the State in terms of the Institution of Legal Proceedings against Certain Organs of State act 40 of 2002. The candidate emphasised that in such cases, appropriate weight should be given to both an individual's constitutional right to access to justice, and the protection of the state's interest in receiving proper notice of legal proceedings. The candidate weighed these two interests with sensitivity, concluding that the State had not been unreasonably prejudiced by the failure to give notice.

5.4. In *S v Gani* NO 2012 (2) SACR 468 (GSJ), one of two of the candidate's reported judgments, with Victor J, commences with a careful consideration of the requirements of the Bill of Rights, the Children's Act, as well as the international human rights instruments to which South Africa is signatory, that pertain to the protection and welfare of children, and particularly in relation to children who have come into conflict with the criminal law. Against this background, the candidate and Victor J set aside the appellant's conviction and referred the matter back to the lower court for a proper determination of the matter in light of the correct provisions of the Child Justice Act.

6. **Whether any judgments have been overturned on appeal**

6.1. We have been unable to find cases where judgments delivered by the candidate have been overturned on appeal. However, in the case of *Frese NO v Steve Biko Foundation*, the candidate granted leave to appeal her decision to the Full Court. The appeal has not yet been determined.

6.2. We have also searched for cases where the candidate's judgments as a Magistrate have been considered by higher courts (whether by appeal tribunals or in reviews), which search has yielded no results.

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

7.1. The candidate's professional career spans approximately 28 years.

7.2. This includes employment as a prosecutor, service as a Magistrate and Regional Magistrate and a number of terms served as an Acting Judge.

7.3. The candidate has served as an Acting Judge for 11 terms, in both the Gauteng Division and the Gauteng Local Division, between 2011 and 2017. During those terms, the candidate presided over motion court (opposed and unopposed), civil trials, divorce court, criminal trials and both civil and criminal appeals and reviews.

7.4. It also bears mentioning that the candidate has been actively involved in leadership positions in a number of legal organisations, including:

7.4.1. The Provincial Treasurer of the National Association of Democratic Lawyers from 2000 to 2001;

7.4.2. The provincial Deputy Chairperson of the Judicial Officers' Association of South Africa from May 2001 to May 2002; and

7.4.3. The provincial Chairperson of the Judicial Officers' Association of South African from May 2002 until May 2003.

7.5. During her time as a Regional Magistrate, the candidate has largely been assigned to the criminal courts. However, as a Magistrate, she was assigned to a broader range of courts and cases, including a number of civil courts. During her terms as an Acting Judge, the candidate has considered and ruled on diverse cases.

7.6. The candidate does not have experience in the practice of an advocate, or an attorney, but she has served as a presiding officer for approximately 26 years.

8. The candidate's linguistic and communication skills

8.1. The candidate has un-complicated, to-the-point style of writing. Her judgments are not unduly lengthy, while at the same time managing to ensure that all of the key issues are addressed.

8.2. The candidate's judgments illustrate that she is more than capable of comfortably articulating her ideas, reasoning and findings. The judgments under consideration have been formulated in a structured manner and are easy to understand.

8.3. All of the candidate's judgments that have been considered demonstrate considerable research, which is evident in the extent of the case law and academic writings which are considered.

9. The candidate's ability to produce judgments promptly

9.1. We are not aware of complaints regarding delays in the delivery of judgments.

9.2. In a number of the judgments considered in this process, information concerning the date of hearing and the date on which the judgment was handed down was not available.

9.3. However, there are several instances of judgments being handed down *ex tempore* (see for example, *Willem Swanepoel Bouers CC v Mont Blanc Construction (Pty) Ltd* 2017 JDR 0270 (GJ); *S v Chauke* 2017 JDR 0359 (GJ); *Industrial Development Corporation of South Africa Ltd v Agri Varia Holdings (Pty) Ltd* 2017 JDR 0408 (GJ)) or within a day (see *S v Moremoholo* 2017 JDR 0355 (GJ)).

9.4. In other cases, judgment has taken between one and three months to be handed down. We have been unable to identify any case where judgment was inordinately delayed.

10. **The candidate's fairness and impartiality**

With reference to the judgments considered, we are unable to identify any instance or factor that might indicate a lack of fairness and impartiality. We also refer to the fact that we have been unable to find any reference to a case where one of the candidate's judgments have been corrected, or overturned on appeal.

11. **The candidate's independent mindedness**

With reference to the judgments considered, we are unable to identify any instance or factor that might indicate an inability on the part of the candidate to apply her mind independently.

12. **The candidate's ability to conduct court proceedings**

12.1. The judgments that have been considered suggest that the candidate is capable and able to conduct court proceedings.

12.2. As a practical example, in the case of **Frese, NO v. Steve Biko Foundation**:

12.2.1. The candidate required argument on a specific issue, not traversed in the applicant's heads of argument;

12.2.2. The candidate directed that the application should stand down for the parties to prepare and submit heads of argument on this issue. The further submissions were submitted by e-mail and considered by the candidate, where-after the hearing recommenced (a day later);

12.2.3. In this manner the candidate, in our view, ensured that all issues

and arguments were properly considered and ventilated, without undue delay. It also illustrates that the candidate was prepared, had read in and identified issues of importance, before the hearing.

12.3. The judgments that have been considered further reveal a willingness to grapple with, analyse and come to grips with questions of fact and law.

12.4. We are in the circumstances also unable to point to any fact or circumstance that might indicate an inability on the part of the applicant to conduct court proceedings.

13. The candidate's administrative ability

With the information available, we are unable to express a meaningful view of the candidate's administrative ability. We have noted that, in her capacity as a Magistrate, the candidate had certain managerial and administrative responsibilities and duties. The candidate's judgments appear to be handed down expeditiously, despite the considerable legal research they demonstrate, which would seem to indicate that the candidate had solid administrative ability.

14. The candidate's reputation for integrity and ethical behaviour

With the information available to us, we are unable to point to any fact or circumstance that might suggest a lack of integrity, or any sort of unethical behaviour.

15. The candidate's judicial temperament

With the information available to us, we are unable to point to any fact or circumstance that might suggest that the candidate is lacking in judicial temperament or otherwise prone to intemperate conduct. In the personal experience of one of the members of the team responsible for completing this questionnaire (in **Frese, NO v. Steve Biko Foundation**, as dealt with below) the candidate, at all times during a long hearing, that took place over two days, conducted herself in a polite, cordial and entirely appropriate manner.

16. The candidate's commitment to human rights, and experience with regard to the values and needs of the community

16.1. With the information at our disposal, we are unable to express a view on the candidate's commitment to human rights.

16.2. The candidate's previous employment as a prosecutor and later, as Magistrate, suggests that the candidate has had – in a professional capacity – exposure to the members of her immediate community and as such, that the candidate is attuned to community needs and values.

16.3. We also invite your attention to the candidate's involvement in the formulation of Domestic Violence Guidelines for Magistrates and her involvement with South African Chapter of the International Association of Women Judges.

17. The candidate's potential

We consider the candidate to have potential to meet and measure up to the challenges of being a Judge and to develop, as a Judge and a jurist.

18. The message that the candidate's appointment would send to the community at large

The candidate's appointment would help to reflect the racial and gender composition of South Africa.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

19. Reported decisions

19.1. **S v. Gani, NO** 2012 SACR 468 (GSJ)

An appeal from the Magistrate's Court, with Victor J; Child offenders; 17-year-old female pleading guilty to theft; Error in child's age; Procedure and the application of the Child Justice Act 75 of 2008

19.2. **S v Evelio** 2012 (1) SACR 367 (GSJ)

Appeal from the magistrate's Court, with Van Oosten J; Escape from custody; section 51(1) of the Criminal Procedure Act 51 of 1977; Automatic review in terms of section 302 of the Criminal Procedure Act of conviction of escaping from lawful custody; Failure to call arresting police official meaning no evidence had been presented of lawful arrest; Conviction and sentence set aside

20. Unreported decisions

20.1. **Ngubeni v Road Accident Fund** 2017 JDR 0237 (GJ)

Quantum of damages for future loss of income; Child of 13 sustaining mild to moderate brain injury; Future loss of income assessed at R6 million (after deduction of 30 % contingency)

20.2. **R v Member of the Executive Council for Education Gauteng Province** 2017 JDR 0238 (GJ)

Action for damages against the Provincial Government arising from injuries sustained by a learner, whilst at school; merits determination

20.3. **Von Botticher v Audatex (Pty) Ltd** 2017 JDR 0265 (GJ)

Exception on the basis that particulars of claim lacking necessary averments to sustain cause of action, alternatively is vague and embarrassing; Exception dismissed

20.4. ***City of Johannesburg v WMA Winners Chapel International*** 2017 JDR 0266 (GJ)

Application to interdict respondent from using a warehouse as a place of worship, contrary to its zoning

20.5. ***S v Malatjie*** 2017 JDR 0267 (GJ)

Appeal against sentence, with Vally J

20.6. ***Ngwenya v Minister of Police*** 2017 JDR 0268 (GJ)

Arrest without a warrant; Criminal Procedure Act, section 40(1)(b); Arrest justifiable and effected on reasonable grounds; Claim dismissed

20.7. ***Toyota South Africa (Pty) Ltd v Baobab Kiosk & Vulstasie CC*** 2017 JDR 0269 (GJ)

Appeal from the Magistrate's Court, with Mashile J; The candidate prepared the judgment, with Mashile J concurring; Contractual dispute relating to warranties and exclusions

20.8. ***Willem Swanepoel Bouers CC v Mont Blanc Construction (Pty) Ltd*** 2017 JDR 0270 (GJ)

Application for liquidation; Dismissed with costs

20.9. ***Sasfin Bank Limited v DCB Auto Spares Close Corporation*** 2017 JDR 0271 (GJ)

Exception on grounds that plaintiff's particulars of claim lacking the necessary averments to sustain cause of action; Exception dismissed

20.10. ***Hluthwa v Road Accident Fund*** 2017 JDR 0353 (GJ)

Quantum of damages; Loss of earnings/earning ability; 23-year-old cleaner suffering concussive head injury and rendered unemployable; R1, 4 million awarded (including R400 000 general damages)

20.11. ***S v Moremoholo*** 2017 JDR 0355 (GJ)

Appeal from the Magistrate's Court, with Windell J; the candidate prepared the judgment, with Windell J concurring

20.12. ***S v Ndlovu*** 2017 JDR 0356 (GJ)

Appeal from the Magistrate's Court against sentence; With Wepener J; The candidate prepared the judgment, with Wepener J concurring

20.13. ***ThyssenKrupp Elevators SA (Pty) Ltd v Moodley*** 2017 JDR 0357 (GJ)

Delict; Fraudulent misrepresentation; Defendant, an employee of plaintiff, fraudulently causing monies to be paid, ostensibly to plaintiff's creditors, but in fact into bank accounts of her own

20.14. ***Booyesen v Road Accident Fund*** 2017 JDR 0358 (GJ)

Damages; Bodily injuries, pain and suffering and loss of earnings; Significant head injury, resulting in moderate cognitive and neuropsychological changes and psychological difficulties; Diminished employability and earning capacity; R2 765 548 awarded in respect of loss of earning capacity/loss of income; General damages of R600 000 awarded

20.15. **S v Chauke** 2017 JDR 0359 (GJ)

Appeal from the Magistrate's Court against sentence; With Moshidi J;
The candidate prepared the judgment, with Moshidi J concurring

20.16. **Frese NO. v Steve Biko Foundation** 2017 JDR 0360 (GJ)

Application to make an adjudicator's decisions an order of court;
application granted and later, leave to appeal granted; the appeal has
not been heard

20.17. **Industrial Development Corporation of South Africa Limited v Agri
Varia Holdings Proprietary Limited** 2017 JDR 0408 (GJ)

Breach of contract; Failure to give relevant breach notice; Applicant
obtaining rule *nisi*, on an *ex parte* basis, perfecting security and
permitting it to take possession of assets; Rule *nisi* discharged

20.18. **City Press v Mokiti** 2017 JDR 0439 (GJ)

Interlocutory application for further and better discovery

20.19. **Dibedi v Road Accident Fund** 2017 JDR 0517 (GJ)

Damages; Claim for future medical expenses; past and future loss of
earnings and general damages; Plaintiff sustaining brain injury, leading
to deficits in cognitive functioning; R222 817,60 awarded in respect of
plaintiff's past and future loss of earnings; R600 000 awarded for general
damages for pain and suffering and loss of general amenities of life

20.20. **Visagie v Road Accident Fund** 2017 JDR 0884 (GP)

Damages for loss of support

20.21. **S v Mtshali** 2015 JDR 1645 (GJ)

Criminal appeal, with Vally J. Vally J wrote the judgment

20.22. **Ekene v Minister of Safety and Security** 2015 JDR 2160 (GJ)

Condonation for failure to give notice of proceedings against the State

21. Judgments upheld on appeal

None so far. Determination of the appeal in *Frese NO v Steve Biko Foundation* is awaited.

22. Judgments overturned on appeal

23. None so far. Determination of the appeal in *Frese NO v Steve Biko Foundation* is awaited.