

APPLICANT: JUDGE NELISA PHIWOKAZI MALI

COURT FOR WHICH CANDIDATE APPLIES: GAUTENG DIVISION

1. The candidate's appropriate qualifications:

1.1. The candidate seeks a transfer from the Mpumalanga High Court to the Gauteng High Court. The Candidate was previously a judge of the Gauteng High Court from her initial elevation in January 2016 until 30 September 2019, before being transferred to Mpumalanga on 1 October 2019.

1.2. The candidate states the reason for her requested transfer as follows:

“I applied for transfer to Mpumalanga after taking into account my health situation. Then, I was recovering from two surgeries, as alluded in paragraph 10. The daily travel to and from work and the traffic situation meant that my recovery would be prolonged and would invariably impact my performance negatively at work. As advised by my doctor, I made the move. But the move was premised on the successful sale of our family home, which did not happen due to the downturn in the housing market during 2018/19. We are now in 2020 with the economy struggling to outdo the COVID 19 consequences with the result that although my health has markedly improved, the financial strain of maintaining two homes has compelled me to apply to move back to Gauteng”.

1.3. The candidate has appropriate academic qualifications.

1.4. The candidate is already a judge and is also qualified in terms of her experience.

2. **Whether the candidate is a fit and proper person:**

2.1. The candidate has been involved in several legal organisations (including the Bar) without criticism.

2.2. The candidate has indicated that she divested herself of all business interests prior to her initial appointment as a judge.

2.3. There is nothing to indicate that the candidate is not a fit and proper person.

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

3.1. While the candidate is a black woman, she is already a member of the judiciary and her appointment in Gauteng would not further advance the goals of transformation.

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

4.1. The candidate has very few reported judgments and none that demonstrate a deep knowledge of the law with exceptions in the areas of tax law (in which she has a Master's Degree) and criminal law (having been a former public prosecutor).

4.2. The candidate prodigiously produced written judgments across a diverse range of areas in matters in which the law was settled in the period 2016 – 2017. This, however, appears to have stopped abruptly towards the end of 2017 when the number of judgments appearing

on Safflii suddenly decreased dramatically. The reasons for this are not known.

5. The candidate's commitment to the values of the constitution:

5.1. We have not been able to find any judgments by the candidate suggesting any particular commitment to constitutional values. However, little may be read into this – the candidate does not select the cases that she has heard.

5.2. The candidate refers to *Vermeulen v Marx* 2016 JDR 1435 (GP) as a judgment that asserts the rights of women in live-in relationships. The decision was made on the basis of uncontroversial facts and settled law. There is no engagement in the judgment of questions of constitutional law or legal policy or philosophy.

6. Whether any judgments have been overturned on appeal:

6.1. The candidate lists one judgment (Sasol Oil, referred to below) that has been overturned on appeal.

6.2. In *Sasol Oil Proprietary Limited v The Commissioner for the South African Revenue Service* 2018 JDR 1953 (SCA), the candidate, sitting in the tax court, found that the evidence of the taxpayer (Sasol) was not credible and that certain transactions were simulated. On appeal the majority of the SCA (per Lewis JA) observed that this was a “*serious finding*” but that “*there is not a shred of evidence that this was the case ... [t]he evaluation of [the] witnesses as untruthful and unreliable is simply not fair*”. Ponnann JA, in a concurring judgment expressed himself about the candidate's judgment in the following strong terms:

“It is unclear to me why the Tax Court took the view that the evidence of Sasol Oil's witnesses fell to be rejected. The criticism of their evidence was not only unduly generalized, but also rather severe. The rejection of the evidence of senior employees, two of whom were retired, absent any countervailing evidence, is disquieting. They had no motive to lie in order to save tax for Sasol Oil. No ready answer presents itself as to why these professional persons would perjure themselves. There thus appears to be no reason to question the reliability of their evidence (either individually or collectively), much less their integrity or to brand them untruthful or evasive witnesses.”

- 6.3. On the other hand, a minority of two SCA judges (Makgoka JA and Mothle AJA) found in a dissent that they were *“unable to find any misdirection by the Tax Court in regard to the finding of credibility and contradictions”*.
- 6.4. In *Commissioner for the South African Revenue Service v Amewele Joint Venture CC 2017 JDR 0188 (GP)*, a full bench dismissed the appellant's appeal against a judgment of the candidate but granted the respondent's cross-appeal on the basis that she had erroneously ordered that interest was to run from the date of the order rather than the date set in the relevant tax legislation. The full bench also noted that *“in addition, the rate of interest was incorrectly calculated by the court a quo and this too amounts to an error on the part of the court a quo”*. In granting the cross appeal, the full bench ordered each party to pay their own costs *“as the error was not of any one of the parties' doing but rather that of the court a quo”*.

- 6.5. The swingeing criticism of the candidate by the SCA and the candidate's apparently elementary error in an area of expertise is concerning.
- 6.6. A further concern arises from *The Road Traffic Management Corporation v De Villiers* 2020 JDR 1170 (MN) in which the candidate granted an order on an unopposed basis that “*any and all pending "overspeeding" prosecutions in the Mpumalanga Province, wherein the ProLaser 4 equipment is or was used, be stayed permanently*” despite the fact that neither the Road Traffic Management Corporation nor any of the Provincial Departments responsible for roads and safety, in particular the Mpumalanga Department of Community Safety Security and Liaison, were cited in the application. The order was rescinded. In our view, this is a further concerning instance of what is (at best) a lack of attention to detail.
- 6.7. Finally, in *Masenya v S* 2018 (1) SACR 407 (GP), Fabricius J criticised the candidate's decision in *Magabara v S* (A800/2015) [2017] ZAGPPHC 117 (21 March 2017) as follows:

“The argument adopted by the trial Court, and accepted on appeal, was that (amongst others), ... when an accused has been convicted on 2 counts of rape, but not yet sentenced, when there are three or more counts of rape in issue, the provisions of ... paragraph (a)(iii) of Part 1 to Schedule 2 apply. As said, this approach is not justified by a proper interpretative exercise, and it is clearly wrong and should not be followed.”

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

- 7.1. The candidate has wide experience, she has inter alia been a:
- 7.1.1. Prosecutor;
 - 7.1.2. Tax consultant;
 - 7.1.3. Assistant manager at SARS;
 - 7.1.4. Attorney (including director at a major firm for one year); and
 - 7.1.5. Judge.

8. The candidate's linguistic and communication skills:

- 8.1. It is apparent from the candidate's written judgments that her linguistic and communication skills are more than adequate.

9. The candidate's ability to produce judgments promptly:

- 9.1. The candidate states that she has no outstanding judgments.

10. The candidate's fairness and impartiality:

- 10.1. A majority of the SCA found that the candidate's conclusions as to the reliability of evidence was "*simply not fair*", "*unduly generalized*", "*rather severe*" and "*disquieting*".
- 10.2. On the other hand, the applicant went out of her way to seek a fair solution in the *Joemath* matter (attached to the application), granting costs in favour of an unsuccessful applicant for review in circumstances where although the application was not yet ripe, the approach of the respondent "*was open to considerable criticism*"

which justified the launch of the application in the view of the candidate.

10.3. There is nothing to indicate that the candidate lacks impartiality.

11. The candidate's independent mindedness:

11.1. There is nothing to indicate that the candidate is not independent minded.

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

12.1. Other than the far-reaching order granted on an unopposed basis in the matter of *The Road Traffic Management Corporation v De Villiers* 2020 JDR 1170 (MN), there is no reason to doubt the candidate's ability to conduct court proceedings, especially since she is an established judge .

13. The candidate's administrative ability:

13.1. The candidate is a former director at Rooth & Wessels and manager at SARS. She was also a councillor of the Law Society of the Northern Provinces, which indicates administrative experience.

13.2. There is nothing to indicate that the candidate does not possess the requisite administrative ability.

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

14.1. There is nothing to indicate that the candidate lacks integrity.

15. The candidate's judicial temperament:

15.1. There is nothing to indicate that the candidate's judicial temperament is inappropriate.

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

16.1. Neither the candidate's judgments nor her application reveal any exceptional commitment to human rights.

17. **The candidate's potential:**

17.1. The candidate is 51 years old and has been a permanent Judge since 2016.

17.2. She has no reported judgments and in my (limited) view there is little to indicate further development of her potential.

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

18.1. The candidate is already a Judge and her appointment (which would effectively be a transfer) is likely to go unnoticed.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions:

Association of Test Publishers of SA v President of the RSA and others [2017] 8 BLLR 850 (GP); (2017) 38 ILJ 2253 (GP) (attached to application) (Employment Equity Act 55 of 1998, Psychological testing and other similar assessments, Prohibition, Amendment to requirements for testing and assessment in s 8, Additional requirement that test be certified by Health Professions Council of SA, Additional requirement struck down as being irrational.)

Unreported Decisions:

Pine Glow Investments (Pty) Ltd v Brick-On Brick Property Investments 23 (Pty) Ltd 2019 JDR 1681 (MN) (Review of dismissal of administrative appeal against grant of environmental authorisation for filling station)

S v Masombuka (MN) (referred to in application)

XYZ (Pty) Ltd v The Commissioner for the South African Revenue Service 2019 JDR 0142 (Tax) (attached to application) (Whether receipt of lease premium was income or capital receipt)

Van Vuuren v Road Accident Fund 2017 JDR 0611 (GP) (Quantum of general damages)

Commissioner of the South African Revenue Service v Tloubatla 2017 JDR 0612 (GP) (Confirmation of preservation order under Tax Administration Act 28 of 2011)

H v H (4897/2007) [2017] ZAGPPHC 1200 (30 October 2017) (application to set aside warrants of execution dismissed)

Mokobaki v S (A708/16) [2017] ZAGPPHC 1069 (19 September 2017) (Criminal appeal on verdict dismissed, granted on sentence)

Government Employees Pension Fund v Phala (50819/14) [2017] ZAGPPHC 961 (19 September 2017) (Rescission application)

Visser v Dinokeng Lofts (Pty) Limited 2017 JDR 0613 (GP) (Interpretation of contract relating to pigeon racing)

Harvest Bopp Bags Manufacturing (Pty) Ltd v Liberated Metal Workers' Union of South Africa 2017 JDR 0931 (GP) (Return date of rule nisi; Punitive costs against union on basis that union officials participated in unlawful strike)

Ngomane v Road Accident Fund 2017 JDR 0932 (GP) (Quantum of damages, no oral evidence)

Varachia v The MEC Department of Local Government & Housing Gauteng 2017 JDR 0938 (GP) (Institution of Legal Proceedings against Certain Organs of State At, refusal of condonation)

Masuku v Road Accident Fund 2017 JDR 1856 (GP) (Quantum of general damages)

Joemath v Minister of Justice, June 2017 (attached to application) (Administrative law, review of decision not to shortlist applicant for post of magistrate refused on basis that application was not ripe, costs nevertheless awarded to the applicant)

V v Road Accident Fund (2069/2016) [2017] ZAGPPHC 882 (31 March 2017) (MVA, quantum of loss of income and general damages)

Cele v S (A933/2015) [2017] ZAGPPHC 118 (24 March 2017) (Criminal appeal against conviction and sentence refused)

Magabara v S (A800/2015) [2017] ZAGPPHC 117 (21 March 2017) (Criminal appeal against conviction and sentence refused)

Yunus v Da Mata (A465/2016) [2016] ZAGPPHC 1031 (15 December 2016) (Magistrates' court civil appeal)

Ramoraswi and Others v Hlongwane and Others; Matlala and Another v Hlongwane and Others (37227/2011; 14614/2009) [2016] ZAGPPHC 1009 (2 December 2016) (Deceased estate, executorship and eviction)

Slabbert v Schutte 2016 JDR 1336 (GP) (Separation application refused)

Vermeulen v Marx 2016 JDR 1435 (GP) (Matrimonial, universal partnership)

Superway Construction (Pty) Ltd v City of Tshwane Metropolitan Municipality (46599/2015) [2016] ZAGPPHC 1184 (29 November 2016) (Contractual interpretation)

Ritchie NO v Ritchie NO and Others (75467/15) [2016] ZAGPPHC 1235 (11 November 2016) (Declaratory order re payment of interest on proportionate share of estate duty)

Mphosi v S (A614/2011) [2016] ZAGPPHC 965 (28 October 2016) (Conviction set aside on appeal in absence of record)

Gianni v Road Accident Fund (54221/2014) [2016] ZAGPPHC 1186 (27 October 2016) (MVA, quantum of general damages)

Viljoen and Another v Cornelius and Others (48446/14) [2016] ZAGPPHC 1185 (27 October 2016) (Delict, slip and fall)

Ngxongwana v Road Accident Fund (1273/2015) [2016] ZAGPPHC 985 (27 October 2016) (MVA, merits decision)

Ajooda v Minister of Safety and Security 2016 JDR 1915 (GJ) (Arresting officer in unlawful arrest not personally liable for costs)

Mboni Shatsane Joint Venture (Pty) Ltd v Khawuyeza Trading (Pty) Ltd 2016 JDR 2275 (GP) (Interdict to suspend operation of bank account)

Sibara v Minister of Safety and Security (31416/2012) [2016] ZAGPPHC 904 (13 October 2016) (Costs)

Mnisi and Another v Mahlare and Others (56247/2013) [2016] ZAGPPHC 794 (9 September 2016) (Rescission application)

De Wee v Road Accident Fund (71326/2013) [2016] ZAGPPHC 822 (2 September 2016) (MVA, merits decision)

Focus Mining Services CC v Joubert (A158/2016) [2016] ZAGPPHC 792 (2 September 2016) (Civil appeal from the Magistrates' Court dismissed on facts)

Muller v Lawrence (15279/2015) [2016] ZAGPPHC 744 (24 August 2016) (Delict, slip and fall)

Maluleke v Mashaba 2016 JDR 1447 (GP) (Application dismissed for absence of proof of service on third respondent)

Sibara v Minister of Safety and Security 2016 JDR 1878 (GP) (Postponement application)

Van Der Burgh v Moosa and Another (37238/2014) [2016] ZAGPPHC 664 (29 July 2016) (Application to strike out plea)

Anglo American Platinum Ltd and Others v Pienaar and Others (89567/2014) [2016] ZAGPPHC 656 (29 July 2016) (Interlocutory application for joinder)

Mafrika v Magongwa (28553/2016) [2016] ZAGPPHC 647 (29 July 2016)
(Enforceability of sale of immovable property)

Nedbank Limited v Kloppers (66933/2015) [2016] ZAGPPHC 642 (29 July 2016)
(Interim attachment order refused on basis that matter was *lis pendens* in summary judgment proceedings)

Reunert v The Commissioner for the South African Revenue Service, July 2016
(attached to application) (Tax; Accrual of income; Constitution of the tax court)

Tlam and Others v Tladi and Another (11384/2015) [2016] ZAGPPHC 339 (1 March 2016) (Close Corporation)

Mothoa v Road Accident Fund (48272/2014) [2016] ZAGPPHC 567 (13 May 2016) (Quantum of damages: loss of income)

Sithole v Minister of Police and Another (63897/2011) [2016] ZAGPPHC 393
(27 May 2016) (Quantum of damages: general damages for unlawful arrest)

Judgments upheld on appeal:

Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service 2020 (2) SA 19 (SCA) (the candidate notes that she was not the scribe of the judgment but participated extensively in the determination)

The Commissioner for the South African Revenue Service v Reunert Ltd 2017 JDR 1868 (SCA)

Judgments overturned on appeal:

Commissioner for the South African Revenue Service v Executor of the Estate late Lot Maduke Ndlovu (A395/2016) [2020] ZAGPPHC 601 (12 October 2020) (Tax, ability of taxpayer to challenge raising of section 89quat interest for the first time before the Tax Court, remittal of section 76 additional tax)

Sasol Oil Proprietary Limited v The Commissioner for the South African Revenue Service 2018 JDR 1953 (SCA) (Tax, simulated transactions)

Commissioner for the South African Revenue Service v Amewele Joint Venture CC 2017 JDR 0188 (GP) (Cross Appeal successful)