

CANDIDATE: MRS NELISA PHIWOKAZI MALI

**COURT FOR WHICH CANDIDATE APPLIES: HIGH COURT GAUTENG
– NORTH AND SOUTH DIVISIONS**

1. The candidate's appropriate qualifications

1.1. The candidate has disclosed she has the following degrees:

1.1.1. B Iuris 1992;

1.1.2. LLB 1994; and

1.1.3. LLM (Commercial Law in tax) 1996.

1.2. The candidate is properly qualified.

2. Whether the candidate is a fit and proper person

2.1. The candidate has disclosed in her application that she served articles as a candidate attorney during the period 1 December 1996 to January 1999 but was not admitted as an attorney until 24 May 2001.

2.2. The reason for the delay is disclosed by the applicant (paragraph 4.2 of the application) in that, during January 1998, she was arrested and charged with fraud in Mthatha, Eastern Cape. After having been arraigned in the Mthatha High Court, the matter was postponed. The candidate states that the charges were withdrawn during August 2000 due to insufficient evidence. The applicant states that she never had sight of the docket, knows nothing about what allegations were made against her and/or why she was implicated in the matter.

2.3. Following the withdrawal of the charges, the applicant was admitted as

CANDIDATE: MRS N.P. MALI

an attorney in May 2001. Since 2001, the Applicant has practised as an attorney and has been employed as a senior manager at the South African Revenue Service. The applicant has not disclosed any further issues or allegations made against her for misconduct or that would otherwise reflect on her being considered a fit and proper person for judicial appointment.

2.4. In the circumstances, the criminal charges having been withdrawn and there being no further allegations, we do not find any obstacle to the candidate being considered to be a fit and proper person for appointment as a judge.

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

3.1. The candidate is a black African woman.

3.2. The appointment of the applicant will advance both the cause of gender representation and racial representation in the High Court.

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

4.1. The candidate has a diploma and 3 law degrees (B Juris, LLB and LLM).

4.2. The applicant worked as a public prosecutor in the criminal courts in the Eastern Cape from 1988 to 1995. It is not clear whether this employment was full-time or if the candidate engaged in vacation work as a bursary student during this period.

4.3. The employment record of the applicant reflects that she is a tax and

CANDIDATE: MRS N.P. MALI

excise specialist and has developed skills in relation to tax law as well as the forensic aspects of tax investigation work. While tax is a specialised discipline, the candidate's specialisation ought not, without more, to be a factor against her appointment.

- 4.4. The applicant has been appointed as an acting judge for various periods since 2013. The applicant has referred to a limited number of written judgments in her application but further judgements are published on www.saflii.org. The available judgments permit a limited assessment of the applicant's experience and the applicant's ability to deal with matters other than tax matters.
- 4.5. The applicant has disclosed that the litigation work in which she is generally involved in practice focuses mainly on tax law and there is little or no application of other areas of law in her work. The applicant records that her practice does not involve constitutional law. (Application form paragraph 6.2.)
- 4.6. The judgments written by the applicant during her time as an acting Judge reflect an ability to produce a judgment reflecting facts and/or arguments presented. However, they suggest that the applicant has not developed the skill of recording the judicial reasoning or the process of analysis and reasoning. The result of each matter appears to follow a recordal of facts and reference to previous cases but does not involve the candidate engaging in the necessary analytical process in reaching her conclusion.
- 4.7. An example of the above appears in the judgment in the *Amawe* matter

CANDIDATE: MRS N.P. MALI

which turned on statutory interpretation and whether the specific project/work undertaken by *Amawele* qualified as a zero-rated housing scheme or not. Instead of engaging with the words of the relevant legislation and (to the extent relevant) the context in which the legislation was promulgated, the applicant considered the evidence of operational personnel and how they interpreted and purported to apply the legislation (para 32) – with respect, an impermissible approach and contrary to the authority referred to in the judgment.

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

- 5.1. There is nothing to indicate that the candidate is not committed to the values of the Constitution.
- 5.2. Her experience in practice and in public service appears to have been focussed on tax and there appears to be little engagement with the Constitution and the principles embodied in the Constitution. It is not clear from the applicant's application or from the judgments delivered by the candidate as to whether the provisions of the Constitution have been considered in any of the legal work that she has done.
- 5.3. Although there is limited involvement in her practice, the candidate has shown commitment to Constitutional principles in her participation and involvement in various community organisations as appears from the letter from the South African Women's Lawyer's Association of the Eastern Cape Province.

CANDIDATE: MRS N.P. MALI

6. Whether any judgments have been overturned on appeal

6.1. In her application, the candidate refers to two judgments that are currently pending on appeal. It does not appear that any appeals against the candidate's judgments have been completed.

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

7.1. As stated above, it is not clear from the application whether the applicant was a full time public prosecutor or whether her experience as a public prosecutor was obtained during vacations while a law student (and bursary holder) (see Section 2 - Legal Background paragraph 1).

7.2. Following her academic qualification, the candidate worked as a candidate attorney and was then employed by the South African Revenue Service (SARS). From 1999 to 2006, the applicant worked in various positions within SARS and was seconded to the National Prosecuting Authority as a Deputy Director – Tax Unit during 2003. From end 2003 to 2006, the candidate was an “Assistant General Manager – Excise” at SARS.

7.3. Between August 2006 and 2008, the applicant worked for short periods in a number of firms. It is not clear what the reasons were for the short duration of the applicant's involvement at Mali Attorneys, Langa Attorneys and Rooth & Wessels Attorneys. (Application form, paragraphs 6.9 – 6.11)

7.4. Since August 2008, the applicant has practised as a director at Nelisa Mali Attorneys where she is the sole director.

CANDIDATE: MRS N.P. MALI

7.5. The applicant has been appointed as an acting judge on 8 occasions (for approximately 8 months in total) since October 2013.

8. The candidate's linguistic and communication skills

8.1. There are no indications from the candidate's judgments that she has any linguistic or communication difficulties. The judgments written by the applicant are written in the English language (which, presumably, is not the candidate's mother tongue) and her grasp of the language is good.

8.2. As stated above, there is a concern regarding the applicant's ability to communicate the reasoning supporting the conclusions reached in the judgments.

9. The candidate's ability to produce judgments promptly

9.1. It does not appear that any of the judgments were inordinately delayed. The time periods relevant to those disclosed by the applicant are set out below. The judgments published on saflii.org reflect similar or shorter periods.

9.1.1. In the matter *Mallory Trade 38 Proprietary Limited*, the judgment took 2 months to deliver – although this is not an inordinately long period, the issues do not appear to have been complex;

9.1.2. In the tax matter of *Shaft Sinkers v CSARS* the hearing was on 12 June 2014 and the judgment was delivered on 29 September 2014;

9.1.3. In the tax matter of *Amawele Joint Venture CC v CSARS* the hearing was on 29th September 2014 and the judgment was

CANDIDATE: MRS N.P. MALI

delivered on 4 December 2014;

9.1.4. In the criminal appeal of *Ntuli Velly*, the appeal was heard on 21 May 2015 and the judgment delivered on 26 June 2015.

9.2. The applicant indicates that, of the other matters she has heard, judgments are outstanding in respect of *Ramoroka v Ramoroka* – heard 5 June 2015 and *EC Jawat v CSARS* heard 28 July 2015.

10. The candidate's fairness and impartiality

10.1. There is limited material included in the application which permits of a comprehensive consideration of the candidate's fairness and impartiality. The content of the application and the judgments previously delivered by the applicant give no indication that the applicant would not act fairly and impartially as a judge.

11. The candidate's independent mindedness

11.1. There is nothing to suggest that the candidate is not independently minded.

12. The candidate's ability to conduct court proceedings

12.1. The candidate has acted as a judge since 2013. From inquiries placed with counsel who appeared in her Court, no adverse comments or criticisms had been received which would indicate that the candidate is unable to conduct court proceedings. The impression created while acting is that the applicant is able to conduct court proceedings judiciously and appropriately.

CANDIDATE: MRS N.P. MALI

13. The candidate's administrative ability

13.1. In her experience as an attorney practising for her own account (as a sole director of a firm) and in a senior managerial position within SARS, it appears that the candidate should have developed skills that would assist her in discharging the administrative responsibilities of a judge in the High Court.

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

14.1. The candidate has disclosed the charges that were made and then withdrawn against her. There is nothing to indicate any other allegations against the candidate. Further, there is no finding or instance of unethical behaviour or lack of integrity. No adverse comments have been received from the Bar to this effect.

15. The candidate's judicial temperament

15.1. No adverse comments have been received.

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

16.1. The candidate has been a member of the Black Lawyers Association, the Law Society of the Northern Provinces (LSNP), the Council on the LSNP and a member of the South African Women's Lawyers Association (SAWLA).

16.2. In addition, as set out in the SAWLA nomination letter and her application, the candidate has participated in various SAWLA training

CANDIDATE: MRS N.P. MALI

programmes, has developed young practitioners, has lectured law at university and has been involved in various community organisations which assist in access to justice activities, giving free legal services to communities and has been involved in outreach programmes for disabled children in Queenstown.

17. The candidate's potential

17.1. A candidate with tax experience would likely strengthen the judiciary and particularly the Tax Court, which is a busy, specialist court within the Gauteng Division of the High Court.

17.2. There is, however, a question over the limited judicial reasoning in the applicant's judgments and the ability of the applicant, at this stage, to produce reasoned judgments efficiently and effectively and to deal with the workload in the Gauteng Division.

17.3. There are no statements in the application in which the candidate sets out why she wishes to be appointed as a High Court judge, what she would set out to achieve as a High Court judge and/or what she believes the important aspects of such an appointment to be. Such insight may provide further guidance as to the candidate's potential to develop further as a High Court judge.

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

18.1. The candidate is a black African woman and her appointment would be in line with the need for racial and gender transformation of the courts. If

CANDIDATE: MRS N.P. MALI

appointed, the candidate would be an example of an appointment from the practice as an attorney and specifically from one with a background from public service at the office of SARS.

- 18.2. Her appointment would respond to the need to transform the gender imbalance that persists in our Courts and particularly the limited number of black women judges who are currently appointed.

CANDIDATE: MRS N.P. MALI

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

None found

The following **unreported decisions** were reviewed

Attached to the application:

Mallory Trade 38 Proprietary Limited and Others v Coin Wise Trading 24 Proprietary Limited and Others Case No. 24601/2014 (Gauteng Local Division) 8 May 2015

Shaft Sinkers (Pty) Ltd v CSARS Case No. VAT1015 Tax Court Gauteng Division 29 September 2014

Amawele Joint Venture CC v CSARS Case No. VAT1005 Tax Court Gauteng Division 4 December 2014

Ntuli Velly v The State Case No. A362/2014 Criminal Appeal Gauteng Local Division 26 June 2015

Published on www.saflii.org:

Molefi v S (A887/2014) [2015] ZAGPPHC 484 (4 June 2015)

Pierre v Road Accident Fund (44981/2013) [2015] ZAGPJHC 159 (11 June 2015)

Nkwinika v Malapane and Another (19477/2008) [2015] ZAGPJHC 42 (27 February 2015)

Moloto v Road Accident Fund (34751/2011) [2015] ZAGPPHC 434 (10 July 2015)

Motha v Minister of Police (20495/2013) [2014] ZAGPPHC 887 (12 November 2014)

Moller v Gasant and Others (35724/13) [2014] ZAGPPHC 442 (30 May 2014)

Panagiotopoulos v Liberty Group Ltd (3955/2011) [2014] ZAGPPHC 229 (25 April 2014)

CANDIDATE: MRS N.P. MALI

Memeza v Ninos Group (Pty) Ltd (29635/2012) [2015] ZAGPJHC 58 (19 March 2015)

Magadla and Another v Daniso and Others (43143/2013) [2015] ZAGPJHC 158 (11 June 2015)

Augustine and Others v Minister of Police (19296/10) [2014] ZAGPPHC 969 (8 December 2014)

Stalcor (Pty) Limited v Cawac Solutions CC and Others (54182/13) [2014] ZAGPPHC 420 (30 May 2014)

Great North Long Distance Taxi Association v Ngwenya and Another (4465/12) [2014] ZAGPPHC 328 (30 May 2014)

Raboshaba v Minister of Safety And Security and Another (41312/2011) [2014] ZAGPPHC 280 (9 May 2014)

Swart and Another v Silver Solution 688 CC and Others (14897/13) [2014] ZAGPPHC 277 (9 May 2014)

AB CC v Commissioner for the South African Revenue Service (VAT 1005) [2014] ZATC 4 (9 December 2014)

Vulindlela Bergville Long Distance Taxi Association v Gauteng Provincial Regulatory Entity and Another (13135/2011) [2015] ZAGPJHC 178 (5 August 2015)

Judgments upheld / overturned on appeal

No appeals to any of the applicant's judgments have been completed and consequently there appear to be no judgments upheld or overturned on appeal at this stage.