

CANDIDATE: JUDGE KE MATOJANE

COURT FOR WHICH CANDIDATE APPLIES: LAND CLAIMS COURT

1. The candidate's appropriate qualifications

1.1. The candidate has the following qualifications:

1.1.1. BProc;

1.1.2. LLB (Zululand);

1.1.3. LLM (RAU);

1.1.4. LLM (UNISA);

1.1.5. Diploma in Company Law (RAU); and

1.1.6. Diploma in Trial Advocacy (Colorado).

1.2. These formal qualifications represent excellent qualifications for judicial office.

2. Whether the candidate is a fit and proper person

2.1. There is nothing in the application or judgments that would suggest 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. The candidate is a black man.

CANDIDATE: JUDGE KE MATOJANE

3.2. The appointment of the candidate would not advance gender transformation of the judiciary.

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

4.1. It is apparent from his judgments that the candidate has a wide range of experience as a Judge dealing with matters across the spectrum, including criminal, family, customary, personal injury, commercial, banking, procedural and administrative law matters.

4.2. These judgments in general indicate a firm grasp of both substantive and procedural law.

4.3. It is, however, somewhat concerning that although the candidate presided in the Land Claims Court in 2013 and acted as the Judge President of that court for a term in 2014, the extent of his professional experience in the area covered by the jurisdiction of the Land Claims Court (LCC), which is a specialist court, may be questioned.

4.4. We could only find one unreported judgment delivered in the LCC (*Bakgatla-Ba-Kgafela Communal Property Association v Minister of Rural Development And Land Reform and Others* [2013] ZALCC 16 (14 June 2013)) by the candidate. This judgment was subsequently overturned on appeal by the Supreme Court of Appeal ([2014] ZASCA 203 (28 November 2014)). In doing so, the Court noted in paragraph 6 that:

“The LCC referred the application for the hearing of oral evidence due to perceived disputes of fact on the

papers. The oral evidence turned out to obfuscate the issues rather than clarify them. The case could have been decided on the papers alone.”

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

5.1. While it is not possible to tell from the candidate’s application, in *Mbonani v Minister of Correctional Services* 2011 JDR 1290 (GNP) the candidate criticised the failure of Correctional Services authorities to deal timeously with the a prisoner’s right to be considered for parole on the basis of constitutional values as follows:

“Organs of state are not free to act as they please. It is expected of organs of state that they treat people with whom they deal with, with dignity, honesty, openly and fairly. This is particularly so in the case of the applicant, a prisoner who is in a position of weakness in relation to the respondents. It is evident that the fourth respondent would not have held a parole hearing, if it had not been for the pressure placed on them by the applicant's attorney.”

5.2. It is notable that in two of the instances where the candidate’s judgments have been overturned on appeal (*Esofranki Pipelines (Pty) Ltd v Mopani District Municipality* [2014] 2 All SA 493 (SCA) and *Allpay Consolidated Investment Holdings (Pty) Ltd v The Chief Executive Officer of The South African Social Security Agency* 2012 JDR 1443 (GNP)), this has been in relation to instances where he has exercised a discretion to allow administrative action to be acted upon despite a finding that it had been unlawful and contrary to the Constitution.

6. Whether any judgments have been overturned on appeal

6.1. Apart from the cases referred to above, the judgment of the SCA in *Foize Africa (Pty) Ltd v Foize Beheer BV* 2013 (3) SA 91 (SCA) contains some severe criticism of the candidate's judgment *a quo*, including that he “*failed to appreciate*” and “*overlooked*” certain facts (para 13); that he committed at least one “*misdirection*” (para 24) and that he relied upon facts seemingly not raised in the papers without identifying what they were (para 30).

6.2. Of passing note is the treatment of one of the candidate's judgments regarding the validity of customary marriages in an article by S Nkosi, “*Customary marriage as dealt with in Mxiki v Mbata in re: Mbata v Department of Home Affairs and Others (GP)*” De Rebus, Jan/Feb 2015:67. This critique is rooted in a broad academic debate regarding “living customary law” and cannot be taken as a basis upon which to criticise the candidate.

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

7.1. The candidate was an attorney for approximately 18 years before being appointed as an Acting Judge in 2008 and then as a Judge in December 2009. He thus has approximately 5 years' experience as a full time Judge.

7.2. The candidate's first LLM (RAU, 1994) was in the area of criminal procedure and evidence, whereas his second diploma (RAU, 2001) and second LLM (UNISA, 2007) were in the area

CANDIDATE: JUDGE KE MATOJANE

of commercial law.

7.3. As noted above, the candidate's judicial experience over the past 7 years covers a wide range of areas.

8. The candidate's linguistic and communication skills

8.1. The candidate's judgments read well. They move quickly to the relevant points, which are then addressed and disposed of with clarity and concision.

9. The candidate's ability to produce judgments promptly

9.1. While it was not possible to tell from the cases considered what the period between the date of hearing and the date of judgment was in each case, it appears that the candidate is highly efficient in producing judgments.

9.2. It is impressive that none of the judgments referred to in the candidate's application was at that time outstanding for more than three days since the hearing.

10. The candidate's fairness and impartiality

10.1. The candidate is regarded by counsel as a fair and impartial Judge.

11. The candidate's independent mindedness

11.1. No concerns have been raised. It is not possible to tell from the candidate's application or his judgments, save to note that we found no instance in which he has written a dissenting or concurring separate judgment.

12. The candidate's ability to conduct court proceedings

- 12.1. The candidate has experience as a Judge in a large number of criminal and civil trials.
- 12.2. No concerns have been raised.

13. The candidate's administrative ability

- 13.1. While the candidate undoubtedly developed administrative skills as the head of his own attorney's practice for many years and mention is made of a term as the Acting Judge president of the Land Claims Court, his application refers to no management or administrative positions that he may have held.

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

- 14.1. No concerns have been raised. It is not possible to tell from the candidate's application or his judgments.
- 14.2. During the preparation of these comments, it was reported in the media (see <http://www.iol.co.za/news/crime-courts/judge-denies-talks-with-sibiya-s-lawyers-1.1829835>) that it was alleged in an affidavit in a matter of intense public interest that the candidate had engaged in discussions with the legal representatives of one party to the exclusion of the other. To his credit, the candidate (who indicated that the discussions in question were in fact conducted with his registrar and were in any event of a purely procedural nature) is reported to have recognised that this was a "disturbing allegation" and referred the matter to the Deputy Judge President. This is a matter that should be enquired into further by the Commission. However

CANDIDATE: JUDGE KE MATOJANE

it would appear that the criticism directed at the candidate may well have been unfounded.

15. The candidate's judicial temperament

15.1. It is not possible to tell from the candidate's application or his judgments.

15.2. No concerns have been raised. Counsel perceives the candidate to be a "quiet" Judge who is courteous and does not interrupt counsel, sometimes to a fault in that he seldom gives any indication of the aspects of the matter that may be troubling him and which may benefit from elucidation by counsel.

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

16.1. It is not possible to tell from the candidate's application.

16.2. The candidate mentions his membership of the Black Lawyers Association, but gives no detail of any involvement in civil society that he may have had prior to his appointment.

17. The candidate's potential

17.1. Although the candidate is already a Judge who has produced detailed judgments of a high quality, it is suggested that he has potential to rise further in the judicial ranks.

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

18.1. Although no negative message would be sent by the

CANDIDATE: JUDGE KE MATOJANE

appointment, it must be considered whether it would be appropriate to appoint a candidate who has a good grasp of a wide range of areas of the law into a position with an administrative focus in a specialised court in which he appears to have had relatively little experience, particularly when compared with the other shortlisted candidate for the position.

CANDIDATE: JUDGE KE MATOJANE

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Hubbard v Mostert 2010 (2) SA 391 (WCC)

Netcare Hospitals (Pty) Ltd v KPMG Services (Pty) Ltd and another
[2014] 4 All SA 241 (GJ)

Unreported decisions

Abel v Road Accident Fund 2010 JDR 0149 (GNP)

Alberts v Hitchcock NO and Others (8927/10) [2011] ZAGPPHC 202 (21
October 2011)

*Allpay Consolidated Investment Holdings (Pty) Ltd v The Chief Executive
Officer of The South African Social Security Agency* 2012 JDR
1443 (GNP)

B v D (30377/2008) [2010] ZAGPPHC 612 (27 May 2010)

*Bakgatla-Ba-Kgafela Communal Property Association v Minister of
Rural Development And Land Reform and Others* (LCC 80/2012)
[2013] ZALCC 16 (14 June 2013)

Beaux Lane SA Properties (Pty) Ltd v Robbertse 2012 JDR 1875 (GNP)

*Blue Cell (Pty) Ltd v Blue Financial Services Limited and Others, In Re;
Blue Cell (Pty) Ltd and Another v Blue Financial Services Limited
and Others, In Re; Blue Financial Services Limited v Blue Cell
(Pty) Ltd* (3489/07, 8456/07) [2014] ZAGPPHC 14 (14 February
2014)

Blue Cell (Pty) v Blue Financial Services Limited and Others (3489/07,
8456/07) [2014] ZAGPPHC 267 (16 May 2014)

Botha v Road Accident Fund 2011 JDR 1798 (GNP)

*Century Civils CC and Another v Calsicrete Brickworks (Pty) Ltd; In Re:
Century Civils CC v Calsibrick (Pty) Ltd* (4145/2009) [2010]
ZAGPPHC 618 (7 May 2010)

Dalindyabo v President of the Republic of South Africa and Others
(2342/2014) [2014] ZAECMHC 34 (20 June 2014)

De Waal v Momentum Group Limited 2011 JDR 1371 (GNP)

Esofranki Pipelines (Pty) Ltd v Mopani District Municipality 2012 JDR
1560 (GNP)

CANDIDATE: JUDGE KE MATOJANE

Firststrand Bank Limited v Baloyi N.O. (69715/2013) [2014] ZAGPPHC 995 (13 November 2014)

Flora & Others v Changing Tides 74 (Pty) Ltd [2009] JOL 23629 (GSJ)

Gumede v Minister of Safety and Security 2013 JDR 2128 (GNP)

Kruger v Botha (A598/08) [2011] ZAGPPHC 81 (31 May 2011)

Lebepe v Road Accident Fund (51420/2008) [2011] ZAGPPHC 31 (25 March 2011)

Malumo v Tredoux (69431/2009) [2011] ZAGPPHC 37 (30 March 2011)

Maponya v Mogafe 2011 JDR 1728 (GNP)

Masemola v Road Accident Fund (44501/2012) [2014] ZAGPPHC 636 (18 August 2014)

Masilela and Others v Vilane and Others (78213/14) [2014] ZAGPPHC 983 (17 November 2014)

Matlala v Minister of Police 2012 JDR 1877 (GNP)

Mbonani v Minister of Correctional Services and Others (15991/2011) [2011] ZAGPPHC 196 (5 October 2011)

Mirchandani v Unica Iron and Steel (Pty) Ltd 2014 JDR 1188 (GP)

Mntambo and Others v Changing Tides 74 (Pty) Ltd (08/39225) [2009] ZAGPJHC 17 (4 May 2009)

Mogoje and Another v Road Accident Fund (17700/2008) [2010] ZAGPPHC 571 (15 February 2010)

Money Skills Property Investment (in liquidation) v Money For Jam Investments 7 (Pty) Ltd 2010 JDR 0129 (GNP)

Moore v Road Accident Fund (21462/2008) [2010] ZAGPPHC 561 (12 February 2010)

Moos v Minister of Safety and Security 2011 JDR 1736 (GNP)

Mxiki v Mbata , In Re: Mbata v Department of Home Affairs and Others (A844/2012) [2014] ZAGPPHC 825 (23 October 2014)

N v N (14530/2009) [2010] ZAGPPHC 536 (26 April 2010)

Nkosi NO v Road Accident Fund (46585/2008) [2011] ZAGPPHC 197 (12 October 2011)

Nkwali Brothers Farming CC v Thela 2010 JDR 0663 (GNP)

Nxele v Mathebula 2011 JDR 1748 (GNP)

Palmer and Others v Engelbrecht (9543/2009) [2010] ZAWCHC 352 (1

CANDIDATE: JUDGE KE MATOJANE

January 2010)

Pambili Ranch (Pty) Ltd v Potgieter 2011 JDR 1787 (GNP)

Pankhurst v Fitzgerald (47605/2009) [2013] ZAGPPHC 31 (7 February 2013)

Parsons and Another v Viljoen (50122/2008) [2011] ZAGPPHC 153 (13 May 2011)

PN v DN 2010 JDR 0486 (GNP)

Prime Invest 253 (Pty) Ltd and Others v 114-11th Road Kew (Pty) Ltd and Others (57426/2009) [2011] ZAGPPHC 139 (27 July 2011)

Raseneri v S (A1007/2011) [2012] ZAGPPHC 206 (10 September 2012)

Registrar of Banks v Dafel and Others (64378/2013, 64380/2013, 64381/2013) [2014] ZAGPPHC 884 (13 November 2014)

Risenga v Hobyani 2013 JDR 1967 (GNP)

Risenga v Makondo 2013 JDR 1969 (GNP)

Risenga v Nkwinika 2013 JDR 1968 (GNP)

Roets v MEC for the Department of Public Works, Road & Transport (Mpumalanga) 2013 JDR 2242 (GNP)

S v Barendse 2012 JDR 1271 (GNP)

S v Cezu 2013 JDR 2129 (GNP)

S v EM 2012 JDR 1664 (GNP)

S v Karoles (A501/2004) [2008] ZAWCHC 117 (14 November 2008)

S v Mokonyane 2014 JDR 0679 (GNP)

S v Mpitsi 2012 JDR 1847 (GNP)

S v Mtshiselwa (SS47/2006) [2008] ZAWCHC 322 (14 August 2008)

S v Mxuma 2010 JDR 0695 (GNP)

S v Phiri 2012 JDR 1269 (GNP)

S v Raseneri 2012 JDR 1693 (GNP)

S v Thulare 2013 JDR 2233 (GNP)

Saligwazi v Road Accident Fund (40676/2008) [2010] ZAGPPHC 563 (2 March 2010)

Scheffer v Road Accident Fund (56098/2010) [2014] ZAGPPHC 424 (11 June 2014)

CANDIDATE: JUDGE KE MATOJANE

Sebidi v Thobejane (36432/2012) [2014] ZAGPPHC 57 (21 February 2014)

Selepe v S (A897/2011) [2012] ZAGPPHC 89 (4 June 2012)

Smith v Cordier 2010 JDR 0662 (GNP)

Stemar v Minister of Police and Another (4789/2012) [2014] ZAGPPHC 295 (16 May 2014)

Sukazi v Road Accident Fund (18928/2008) [2011] ZAGPPHC 175 (22 September 2011)

The Director of Public Prosecutions v Mahlangu 2011 JDR 0447 (GNP)

The Minister of Safety and Security v Wessels 2011 JDR 0440 (GNP)

Tshibangu v City of Tshwane Metropolitan Municipality 2010 JDR 0114 (GNP)

Van Deventer v Mathews 2012 JDR 0295 (GNP)

W Capital Finance (Pty) Ltd v Dykes Van Heerden Inc. 2013 JDR 2615 (GNP)

Williams v Isaacs (24968/2014) [2014] ZAGPPHC 230 (9 April 2014).

Judgments upheld on appeal

Allpay Cons Inv Holdings (Pty) Ltd v Chief Executive Officer, SA Social Security Agency 2014 (1) SA 604 (CC) (in part)

Asla Devco (Pty) Ltd v Bubesi Investments 74 (Pty) Ltd, Bitou Local Municipality v Bubesi Investments 74 (Pty) Ltd and Others (10999/09, 12393/09) [2011] ZAWCHC 24 (22 February 2011)

Du Toit NO v Road Accident Fund [2010] ZAWCHC 99 (19 May 2010)

Member of the Executive Council for Education, Mpumalanga v Skhosana (in her capacity as mother and guardian of minor child Solomon Skhosana) [2013] JOL 29995 (SCA)

Saloman and Others v S 2014 (1) SACR 93 (WCC).

Judgments overturned on appeal

B v S [2011] JOL 27188 (SCA) (judgment not written by candidate)

Esorfranki Pipelines (Pty) Ltd and another v Mopani District Municipality and others [2014] 2 All SA 493 (SCA)

Foize Africa (Pty) Ltd v Foize Beheer BV 2013 (3) SA 91 (SCA)

CANDIDATE: JUDGE KE MATOJANE

Minnies v S [2012] JOL 29188 (SCA) (judgment not written by candidate)

Qahoosein and Another v Bharshila Liquor Store CC [2013] ZAGPPHC 508 (4 December 2013).