

**CANDIDATE: JUDGE MANDISA MURIEL LINDELWA MAYA**

**COURT FOR WHICH CANDIDATE APPLIES:**

**SUPREME COURT OF APPEAL**

**1. Candidate's appropriate qualifications**

1.1. The candidate has obtained the following degrees:

1.1.1. BProc from the University of the Transkei (now Walter Sisulu University), 1986;

1.1.2. LLB from the University of Natal, Durban, 1988; and

1.1.3. LLM (Labour Law – Alternative Dispute Resolution and Constitutional Law) from Duke University School of Law, United States of America, 1990. The candidate was awarded a Fulbright Scholarship for this purpose.

1.2. The candidate is appropriately qualified.

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

2.1. The candidate has had a long and distinguished career as a lawyer and a judge, contributing substantially to the development of South African law. She has been a member of the judiciary, in various capacities, since July 1999, and has been a long-standing member of the Bench in the Supreme Court of Appeal since May 2006. She has also been a member of the South African Law Reform Commission since 2013.

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- 2.2. The candidate has shown a commitment to the Constitution and to human rights through many of her judgments, and her association with organizations such as the Black Lawyers Association and the National Democratic Lawyers Association. She was also the founder member of the South African Chapter of the International Association of Women Judges.
- 2.3. The candidate has also participated in community activism, making important contributions to promoting the rights of women and other vulnerable groups in South Africa.
- 2.4. 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 reflect the racial and gender composition of South Africa**

- 3.1. The candidate is a black woman and is currently a member of the Supreme Court of Appeal.
- 3.2. The Supreme Court of Appeal presently comprises 25 members (excluding Acting Judges): seven women (five black, two white) and eighteen men (twelve black, six white). There is therefore a clear under-representation of women in this Court.

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- 3.3. The President of the Supreme Court of Appeal is a black man. The appointment of a black woman to a leadership position would be an important step towards gender transformation.
- 3.4. In addition to her demographic characteristics, the candidate has through her legal career demonstrated a clear commitment to transformation and to the promotion of gender equality. She has taken active steps to promote gender transformation in the judiciary and in the broader legal profession, providing support and encouragement to her colleagues in this regard.
- 3.5. The appointment of the candidate to a leadership position in the Supreme Court of Appeal would therefore be a significant step in the advancement of gender representation in the judiciary.
4. **The candidate's knowledge of the law, including constitutional law**
  - 4.1. The candidate lists 179 judgments in her application. Most of these judgments are reported in the South African Law Reports, South African Criminal Law Reports, Butterworths Constitutional Law Reports and the Industrial Law Journal.
  - 4.2. Through database searches on JutaLaw and SAFLII, we found two additional judgments:
    - 4.2.1. *Merafong City Local Municipality v AngloGold Ashanti Limited* (20265/14) [2015] ZASCA 85 (28 May 2015);  
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- 4.2.2. *Lodhi 5 Properties Investments CC and others v Firstrand Bank Limited* (170/2014) [2015] ZASCA 72 (22 May 2015).
- 4.3. From this considerable pool of judgments, we have considered those that the candidate has identified in her application to be her most significant. These cases span a broad range of legal issues, demonstrating her in-depth knowledge of the law.
- 4.4. In *Mamone v Commission of Traditional Leadership Disputes and others* [2014] 3 All SA 1 (SCA) the candidate considered an application for administrative review of a decision involving the determination of the institution of the kingship of the Bapedi community and the lineage under which it resorts.
- 4.5. The case involved a complicated set of facts, drawing on principles of customary law. The candidate considered the facts and legal arguments carefully in dismissing the appeal.
- 4.6. The Constitutional Court upheld this decision on appeal.
- 4.7. In *S v Bogaards* [2012] 1 All SA 376 (SCA) the appellant was convicted of unlawfully harbouring and concealing two men who were charged with murder, sabotage and several counts of terrorism. The appellant challenged his conviction. Following a thorough analysis of the facts and applicable law, the candidate found that the State did not lead sufficient evidence for the appellant to be convicted on the charge in question, and set his

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conviction aside. However, she held that there was sufficient evidence to convict the accused on the alternative charge.

- 4.8. The following aspects of this decision are noteworthy:
- 4.8.1. The issues before the Court were complex. In a bench of five judges, there were four separate judgments. The candidate's judgment was the only one in which there was a concurrence, by Mhlantla JA. Mthiyane JA also concurred in the candidate's order, making up a majority of the Court.
- 4.8.2. The Constitutional Court unanimously upheld the candidate's order in respect of the conviction of the accused in *Bogaards v S* 2012 (12) BCLR 1261 (CC). The Court was split on the accused's appeal against his sentence. The case was remitted to the Regional Court for sentencing.
- 4.9. The candidate established important legal principles applicable to the State's vicarious liability in our constitutional democracy through her dissenting judgment in *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA). The case involved a claim for damages arising from the rape of the complainant by an off-duty policeman. The majority of the Court held that because the policeman was not on duty at the time of the rape, the Minister of Safety and Security could not be held liable.

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- 4.10. In her minority judgment, the candidate emphasized the important constitutional role of the police and the responsibility of police officers to conduct themselves properly to foster the community's trust in this institution. Taking these factors into account, the candidate indicated her disagreement with the majority's failure to find the Minister of Safety and Security vicariously liable for the policeman's conduct.
- 4.11. The Constitutional Court upheld the candidate's approach in *F v Minister of Safety and Security and another* 2012 (1) SA 536 (CC).
- 4.12. In *Ford v Ford* [2006] 1 All SA 571 (SCA) the candidate dealt with an entirely different area of the law, in an application by a custodian parent to remove a minor child permanently from South Africa. The candidate recognized the difficult emotional issues arising from the case, and the parents' rights at stake. In performing the Court's role as upper guardian of all minor children, the candidate conducted a thorough analysis of what would be in the minor child's best interests, taking into account the evidence of all parties and their experts. She dismissed the application on the grounds that the removal of the child would not be in her best interests.
- 4.13. The candidate considered the right of access to information in *MEC for Roads and Public Works and another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA). The case was decided in

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the context of an application to review a tender process in terms of Uniform Rule 53. The respondent had demanded access to documents falling outside the scope of the Rule 53 record. Adopting an interpretation of the Promotion of Access to Information Act that advanced the right of access to information rather than limiting it, and emphasizing the duties of the State in this context, the candidate found that the respondent was entitled to the documents sought.

- 4.14. These decisions demonstrate the candidate's excellent grasp of the law, including constitutional law, in wide-ranging and complex issues. Her clear sensitivity to the vulnerability of women and children emerges from these decisions, and has received support from the Constitutional Court. Her knowledge of the law, and her ability to apply it, makes her an asset to our judiciary.

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

- 5.1. The candidate holds an LLM in Constitutional Law from Duke University in the United States. This academic training in constitutional law would certainly benefit her in the position for which she has applied.
- 5.2. She has provided copies of two judgments she delivered during her time as an Acting Justice in the Constitutional Court:

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- 5.2.1. The candidate wrote the majority judgment in *Competition Commission v Loungefoam (Pty) Ltd and others* 2012 (9) BCLR 907 (CC), concurred in by eight judges. The substance of the case involved the right of the Competition Commission to amend a complaint referral to the Competition Tribunal, and to join an additional respondent as a consequence of one of the amendments. However, the candidate refused leave to appeal before reaching the merits of the case, on the grounds that the applicant had approached the Constitutional Court directly, seeking to bypass the requirement of leave to appeal from the Competition Appeal Court. In doing so, the appellant had not demonstrated that it would be in the interests of justice for a direct appeal to be allowed. Yacoob ACDJ and Cameron J wrote a dissenting judgment, finding that there was no statutory bar to a direct appeal to the Constitutional Court. The dissent held that leave to appeal should have been granted in the light of the importance of the Competition Commission's public role, the significance of the issues it sought to have determined, the prospects of success and the absence of any complex economic considerations in the merits of the case.
- 5.2.2. The candidate also wrote a dissenting judgment (in which Mogoeng CJ, Jaftha J and Skweyiya J concurred) in *South*

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*African Transport and Allied Workers Union and others v Moloto and another* 2012 (6) SA 299 (CC). In this judgment she dealt with the right to strike in terms of the Labour Relations Act and found that the dismissal of employees who participated in a strike without following the prescribed notification procedures was not automatically unfair.

5.3. The candidate has also dealt with cases involving the values underlying the Constitution during her time in the Supreme Court of Appeal. The following examples bear mentioning:

5.3.1. The candidate dealt with complex issues of customary law in *Mamone v Commission of Traditional Leadership Disputes and Claims and others* [2014] 3 All SA 1 (SCA). This was an administrative review under the Promotion of Administrative Justice Act and an analysis of the information taken into account in the Commission of Traditional Leadership Disputes and Claims in deciding that the institution of the Bapedi kingship resorted under the Sekhukhune lineage. In writing a judgment for a unanimous court, the candidate successfully married principles of African customary law and administrative law.

5.3.2. In *Department of Correctional Services and others v POPCRU and another* 2013 (4) SA 176 (SCA) the

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candidate was called upon to deal with alleged discrimination on the basis of gender, religion and culture, through the adoption and enforcement of a strict dress code. In a unanimous judgment, the candidate upheld the employees' cultural and religious rights.

- 5.4. Through all of these judgments the candidate has been required to balance competing constitutional values, and apply them to complex facts. We believe that her ability to do so will be strengthened by her experience as an Acting Judge in the Constitutional Court.
- 5.5. Her extra-curial activities, and particularly her community activism, reflect a deep commitment to the values of the Constitution. The candidate has become a symbol of gender transformation, and is an important role player in the promotion of cultural and gender rights.

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

- 6.1. The candidate lists two judgments in her application that have been overturned on appeal:
  - 6.1.1. *Gumbi v Old Mutual* (unreported), which was overturned in *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA). Although the candidate indicates that she wrote for the Full Court it appears from the judgment of the Supreme Court of Appeal that there was in fact a

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split decision. The candidate wrote the majority judgment that was overturned on appeal. The Supreme Court of Appeal preferred the dissenting view of Somyalo JP in upholding the appeal. It appears that the case, which involved the procedural fairness of an employee's dismissal, ultimately turned on the weighing of various factors and the application of these factors to the principles.

6.1.2. *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 (1) SA 654 (SCA), which was overturned in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC). The case involved difficult interpretational issues regarding transitional provisions in the legislative framework governing municipalities. Although the candidate's judgment was overturned on appeal, the Constitutional Court's judgment was split, with the three-judge minority endorsing the candidate's view of the case.

6.2. The candidate also lists in her application eight judgments that were taken on appeal unsuccessfully. The proportion of successful appeals to unsuccessful appeals is an indication of the quality of the candidate's judgments.

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

7.1. The candidate's CV reveals that her professional experience includes the following:

7.1.1. Acting Judge of the Constitutional Court: February to May 2012;

7.1.2. Acting Judge of Appeal, Namibia in a civil appeal involving a Namibian judge: dates not specified;

7.1.3. Judge of the Supreme Court of Appeal: May 2006 to present;

7.1.4. Acting Judge of the Supreme Court of Appeal: February 2005 to May 2006;

7.1.5. Acting Judge of the Labour Court: Fourth Term 2004;

7.1.6. Judge of the Transkei Division of the High Court: May 2000 – 2004;

7.1.7. Acting Judge of the Transkei Division of the High Court: October 1999 – April 2000;

7.1.8. Acting Judge of the Cape High Court: July to September 1999;

7.1.9. Practising Advocate Transkei Society of Advocates: January 1994 – July 1999;

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- 7.1.10. Investigator for the Independent Electoral Commission: 1994 National Elections;
  - 7.1.11. Assistant Law Adviser in the Department of Justice: April 1991 – August 1993; and
  - 7.1.12. Part-time Law Lecturer at the University of Transkei: 1992, 1993 and 1995.
- 7.2. The candidate therefore has a broad range of experience in the legal profession, with approximately sixteen years of judicial experience. She has sat as a judge in a large number of courts and has experience over many types of cases.

**8. The candidate's linguistic and communication skills**

- 8.1. From a reading of her judgments, the candidate demonstrates a high level of linguistic and communication skills in English. Her judgments are well-written, well-researched, and well-reasoned.
- 8.2. The candidate is also fluent in isiXhosa, isiZulu and Afrikaans.

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

- 9.1. No adverse comments have been received. To our knowledge, the candidate has no judgments outstanding. There therefore appears to be no basis to challenge the candidate's ability to deliver judgments promptly.

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

10.1. The candidate's judgments indicate a well-balanced, fair and impartial approach to the issues and parties before her. There is no basis on which to doubt the candidate's fairness and impartiality.

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

11.1. The candidate appears to be an independent judge.

11.2. She has written dissenting judgments on important and difficult legal issues in both the SCA and the Constitutional Court.

11.3. The candidate wrote a dissenting judgment in *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA), which involved difficult questions of vicarious liability in circumstances where an off-duty policeman raped a woman. The majority held that because the policeman was not purporting to act on behalf of the State at the time of the rape, the Minister of Safety and Security could not be held vicariously liable. In her dissent, the candidate emphasized the specific role of the police in our constitutional democracy and the protection of citizens. The Constitutional Court upheld this approach on appeal.

11.4. She also wrote a dissenting judgment in *Spearhead Property Holdings v E & D Motors (Pty) Ltd* 2012 (2) SA 1 (SCA). The case involved the enforceability of an option to purchase business premises in terms of a lease agreement.

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11.5. In *South African Transport and Allied Workers Union and others v Moloto and another* 2012 (6) SA 299 (CC) the candidate wrote a dissenting judgment (in which Mogoeng CJ, Jafta J and Skweyiya J concurred) involving the fairness of a dismissal of workers who had participated in a strike without following the prescribed notification procedures. She wrote this judgment while she was an Acting Justice in the Constitutional Court, which is indicative of her independent-mindedness and her willingness to express a different view where she deems it necessary to do so.

11.6. The candidate has also written a number of separate concurring judgments.

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

12.1. There do not appear to be any concerns in this regard from the judgments considered. The candidate has presided over and conducted numerous hearings in different courts over a period spanning many years. As a senior member of the Supreme Court of Appeal, she has presided over cases since 2013.

12.2. No adverse comments have been received.

**13. The candidate's administrative ability**

13.1. The candidate has detailed in her application her participation in the committees of judges in the Supreme Court of Appeal. She currently sits in the Finance Committee and chairs the

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Legislation and Liaison Committee. The candidate has also been a member of the Information (Library) Committee. Her participation in these committees is indicative of her administrative abilities.

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

- 14.1. There do not appear to be any issues for concern in this regard. It is clear from the candidate's application form that she conducts her affairs in accordance with a high degree of integrity and honesty.
- 14.2. For example, the candidate has dedicated a portion of her application form to detailing the circumstances of a grossly inaccurate media report concerning a sentence imposed following a conviction of accessory to murder. The way in which the candidate managed this matter, as well as her disclosure of the circumstances in her application form, confirms her high standard of ethics and integrity.
- 14.3. To our knowledge, no comments to the contrary have been made.

**15. The candidate's judicial temperament**

- 15.1. There is nothing to suggest that the candidate does not have the appropriate judicial temperament.
- 15.2. No adverse comments have been received.

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

- 16.1. It is evident from many of the candidate's judgments that she has a strong commitment to human rights and to ensuring that law plays an effective role in social justice. She has demonstrated her efforts to use the law to protect vulnerable members of society.
- 16.2. Her application form indicates that she has been involved in a number of community-based organisations, including the Transkei Women Zenzele Association and the Women's Economic advancement Group (Pty) Ltd.
- 16.3. She has also been a member of the Black Lawyers Association, the National Association for Democratic Lawyers and the Commonwealth Association of Law Reform Agencies. She founded the International Association of Women Judges in 2004, and holds various leadership and advisory roles in organisations such as Lawyers Against Abuse and the South African Institute for Advanced Constitutional, Public, Human Rights and International Law.
- 16.4. In 2012 the candidate was honoured as the South African Women Lawyers Icon, demonstrating the legal community's recognition of her stature.

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**17. The candidate's potential**

- 17.1. The candidate has demonstrated during her many years as a judge that she is a diligent, hard-working and committed judge, with a sound work ethic and a commitment to upholding the rights of the most vulnerable members of our society.
- 17.2. If appointed, the candidate would strengthen the leadership of the Supreme Court of Appeal and serve as an important role model in furthering the objectives of transformation of the judiciary.

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

- 18.1. The appointment of a black woman as Deputy President of the Supreme Court of Appeal will send a powerful message that gender and race transformation can be successfully married with appointing the leaders in our judiciary.
- 18.2. In our view, this is an important message at this time, particularly in the light of the criticism of inadequate measures to promote racial and gender transformation in the judiciary.

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## **ANNEXURE: LIST OF JUDGMENTS CONSIDERED**

### **Reported decisions**

*Wormald NO & Others v Kambule* 2006 (3) SA (SCA)

*MEC for Roads and Public Works, Eastern Cape & Another v Intertrade Two (Pty)* 2006 (5) SA 1 (SCA)

*Lebowa Platinum Mines (Pty) Ltd v Viljoen* 2009 (3) SA 511 (SCA)

*Camps Bay Ratepayers' and Resident's Association v Harrison* [210] 2 All SA 519 (SCA)

*Minister of Safety and Security v F* 2011 (3) SA 487 (SCA)

*Spearhead Property Holdings v E&D Motors (Pty) Ltd* 2012 (2) SA 1 (SCA)

*Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 (1) SA 654 (SCA)

*Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* 2011 (4) SA 551 (SCA)

*Kini Bay Village Association v Nelson Mandela Metropolitan Municipality & Others* 2009 (2) SA 166 (SCA)

*City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA)

### **Judgments Upheld on Appeal**

*Minister of Safety and Security v F* [2011] ZASCA 3 (22 February 2011)

### **Judgments overturned on Appeal**

*Gumbi v Old Mutual* (unreported)

*Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 (1) SA 654 (SCA)