

CANDIDATE: JUDGE N MHLANTLA

COURT FOR WHICH CANDIDATE APPLIES:

CONSTITUTIONAL COURT

1. The candidate's appropriate qualifications

1.1. The candidate holds the following degree:

1.1.1. BProc.

1.2. The candidate has served as an Acting Judge and Judge of the Provincial Division of the High Court for approximately six years.

1.3. The candidate has served as an Acting Judge of Appeal and Judge of Appeal of the Competition Appeal Court for four years.

1.4. The candidate has served as an Acting Judge of Appeal and Judge of Appeal of the Supreme Court of Appeal for about seven years.

1.5. The candidate has served as an Acting Judge of the Constitutional Court for one year.

1.6. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

2.1. The candidate has been a judicial officer for a cumulative period of thirteen years.

CANDIDATE: JUDGE NZ MHLANTLA

- 2.2. No adverse reports have been received.
- 2.3. She is 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 woman.
 - 3.2. Of the ten permanent judges of the Constitutional Court at present, five are black men, three are white men, and two are black women. As is apparent, there is a significant gender imbalance on the Court. It is also notable that the Constitutional Court has never had more than three permanently-appointed women at any given time.
 - 3.3. Women have historically been under-represented in senior judicial office and the elevation of a female candidate would be an important contribution to the gender transformation of the judiciary.
4. **The candidate's knowledge of the law, including constitutional law**
 - 4.1. The areas of law traversed by the candidate's judgements are broad. The reviewed judgments include constitutional law, criminal law, competition law, civil procedure, interpretation of statutes and contracts, the evaluation of evidence and a broad range of private law topics.

CANDIDATE: JUDGE NZ MHLANTLA

- 4.2. In *Grancy Property Limited and Another v Seena Marena Investment (Pty) Ltd and Others* [2014] 3 All SA 123 the candidate was called upon to determine principles relating to the manner of the debatement of an account, a novel question in the law. Having reviewed the guiding cases on the subject, the candidate displayed a facility for the fashioning of new remedies.
- 4.3. The candidate has delivered a number of judgments while sitting as an acting Judge of the Constitutional Court. In those judgments she demonstrated a good knowledge of constitutional law, especially the impact of the Constitution on the interpretation of statutes and other legislative instruments:
- 4.3.1. In *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC), the candidate wrote the main judgment on the question of the statutory powers of an MEC in respect of admissions to public schools. She reversed the approach adopted by the SCA and gave particular weight to the right to a basic education and the need to allow government to give effect to this right.
- 4.3.2. In *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC), the candidate wrote the main judgment on the impact of section 129 of the National Credit Act 34 of 2005. That section deals with the obligations of credit

CANDIDATE: JUDGE NZ MHLANTLA

providers to provide notice to consumers in default. The candidate's judgment gave important and helpful clarification on the position in this regard (which was heavily contested) and took account of the impact of the Constitution.

4.3.3. In *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) SA 521 (CC), the candidate wrote the judgment for the Court. The case concerned a challenge to the refusal of applications for subdivision and zoning under a piece of provisional legislation and raised the constitutional division of power between provinces and municipalities. The candidate's judgment resolved the issues concerned with clarity and in doing so helpfully restated the proper procedural approach to be adopted by Courts when facing constitutional issues.

4.4. In several judgments the candidate was called upon to interpret difficult statutory instruments. Her interpretation was closely reasoned.

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

5.1. The candidate displays a commitment to the Constitution and has acted in the Constitutional Court for a year.

CANDIDATE: JUDGE NZ MHLANTLA

- 5.2. The candidate displays an ability to balance rights in a sensitive and measured manner. For example in *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) the candidate interpreted the Constitutional Court's previous judgment on the delivery of a section 129 notice under the National Credit Act and, while emphasising the importance of notice under the Act, held that the Act does not allow consumers to frustrate the delivery of the section 129 notice.
- 5.3. Similarly, in *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC), the candidate carefully balanced the respective powers and duties of the MEC for education and public School Governing Bodies and the rights to education and administrative justice involved.
- 5.4. In *Law Society of the Northern Provinces v Dube* [2012] 4 All SA 251 the candidate refused to strike an attorney off of the role of attorneys for offences of dishonesty given the personal circumstances of the attorney and the circumstances leading to the commission of the offences.
- 5.5. In *Mashinini and Another v S* 2012 (1) SACR 604 (SCA) the candidate acquitted an accused person who had pleaded guilty to a serious offence because of fatal irregularities in the procedure by the Magistrate and the National Prosecuting Authority. In her judgment the candidate reprimanded the

CANDIDATE: JUDGE NZ MHLANTLA

NPA for having charged the accused incorrectly and for not having taken sufficient care in the conduct of the prosecution with the result that the accused person had been acquitted.

- 5.6. In *Roux v Health Professions Council of South Africa and Another* [2012] 1 All SA 49 (SCA) the candidate applied the principle of legality to set aside an additional charge raised against a medical practitioner by the Health Professions Council of South Africa because the charge added by the pro forma complainant was not approved by the Council.
- 5.7. *Rustenburg Local Municipality v Vincent Mdango & Others* Case No 937/13 (30 May 2014), unreported judgment of the Supreme Court of Appeal, concerned the eviction by the municipality of the respondents who had taken occupation of RDP houses allocated to other persons. In her judgment the candidate disapproved of the non-participation of the MEC and the Minister in the matter. They were ordered to file affidavits setting out what steps had been taken to ascertain the availability of suitable alternative land for the respondents and what alternative land and/or accommodation is or will likely become available for the respondents. The candidate further required the occupants to file affidavits setting out their personal circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

CANDIDATE: JUDGE NZ MHLANTLA

- 5.8. In *Ivanov v North West Gambling Board and Others* 2012 (6) SA 67 (SCA) the candidate set aside a search and seizure warrant where the search warrant had not been properly obtained. The candidate upheld the applicant's right to possession in a spoliation application where the applicant had been dispossessed of gambling machines because he did not possess a lawful license from the Gambling Board. The candidate emphasized that the underlying principles of our law made it clear that no one was entitled to take the law into their own hands.
- 5.9. In *Kriel v Legal Aid Board and Others* 2010 (2) SA 282 (SCA) the candidate dismissed an appeal brought by a former employee against his dismissal by his employer. In her judgment, the candidate distinguished the matter from the earlier decisions of the SCA and held that the appellant should have sought recourse from the Labour Court instead of bringing Review proceedings in terms of Rule 53 in the high court. On the authority of a long line of decisions of the SCA, the candidate further held that the dismissal of the appellant did not constitute administrative action in terms of PAJA and that it was therefore not reviewable.
- 5.10. In *Medicross Healthcare Group (Pty) Ltd and Another v Prime Cure Holdings (Pty) Ltd* [2006] ZACAC 3 (6 April 2006) the candidate sat in the Competition Appeal Court. In that matter, the candidate had occasion to criticise the findings of the

CANDIDATE: JUDGE NZ MHLANTLA

Competition Tribunal. In strong, and yet courteous and restrained terms, she described the Competition Tribunal's ruling as follows:

“It has not proved easy to isolate the essential reasoning upon which the Tribunal's determination is predicated. The following summary seeks to read its key findings in the best possible light.”

- 5.11. Elsewhere in her decision, the candidate criticised the approach adopted by the Tribunal in its analysis of the matter as follows:

“To return to the Tribunal's approach regarding market definition, there is an unfortunate absence of a rigorous exercise to determine the scope and nature of the market. The Tribunal did not perform any of the traditional exercises used for determining the dimensions of product market. There is no analysis in its determination which sector to compare prices of competing products or the functionality of those products from a consumer perspective. No customer substitution test was performed: that is an analysis of price substitutability or functional substitutability.”

- 5.12. This is indicative of a desire on the part of the candidate for rigorous and clear judicial reasoning.

CANDIDATE: JUDGE NZ MHLANTLA

- 5.13. In *S v Carolus* 2008 (2) SACR 207 (SCA) the candidate criticised the conduct of the investigation of the case by the state. In that matter, the complainant, a child, had identified the accused when the latter was already held in custody in the police cell. It was common cause that the complainant had learnt about the arrest of the accused. The candidate criticized the failure to conduct a proper identification parade which adhered to the acceptable rules of fairness. In that regard, the candidate expressed disapproval of the police's conduct of the case as follows:

“In my view, the investigation of this case was conducted in a slovenly manner. There are clearly defined rules on how to conduct identification parades. The investigating officer disregarded these rules. It is imperative that the police should strive to fulfil their duties with competence, diligence and efficiency. Failure to do so may affect the rights of the accused as well as the administration of justice.”

- 5.14. Notwithstanding this criticism, the candidate found that the complainant had properly identified the scene where the offence took place and the accused as the perpetrator. After a meticulous analysis of the material evidence, the candidate came to the conclusion that the accused had been properly convicted of the offence of indecent assault and that his sentence of 8 years imprisonment was fair in the circumstances.

CANDIDATE: JUDGE NZ MHLANTLA

- 5.15. Later in her judgment, the candidate further expressed her disquiet with the conduct of the police and the investigation of the case when she said the following:

“There are disturbing features of this case that we are constrained to address. In addition to the flagrant disregard of the rules relating to the identification of suspects, no crime kits were available at the hospital to enable Dr Theron to take a sample for DNA analysis. It is imperative in sexual assault cases, especially those involving children, that DNA tests be conducted. Such tests cannot be performed if crime kits are not provided. The failure to provide such kits will no doubt impact negatively on our criminal justice system. Fortunately in this matter such negative outcome has been avoided by the brave and satisfactory evidence of A as corroborated by other witnesses.

The most disconcerting aspect relates to the delays in the commencement and finalisation of this matter indicated above. Counsel for the state was unable to furnish any explanation. She invited comment by the court in this regard to ensure that law enforcement agencies and persons involved in the administration of justice act appropriately.”

CANDIDATE: JUDGE NZ MHLANTLA

- 5.16. In the same vein, the candidate was critical of the inordinate delays that occasioned the conduct of the matter. The candidate's criticisms are all the more significant given the general perception of the criminal justice system, by the public, as slow and unresponsive. Accordingly, she referred the state and police's conduct of the matter to the relevant authorities for investigation so that endless postponements and inordinate delays and the other unsatisfactory features she had identified and complained of, would be addressed.
- 5.17. The candidate ought to be commended for adopting a strong principled stance against the incompetence of the state in the handling of the matter whilst at the same time recognising that the evidence presented was overwhelming enough to warrant a conviction and an appropriate sentence.
- 5.18. As set out below, the candidate's decision in *Nelson Mandela Metropolitan Municipality v Ngonyama Okpanum Hewitt-Coleman and Others* (765/2010) [2012] ZASCA 11 (14 March 2012) was set aside on appeal. It is perhaps worthwhile to mention the brief factual background to the matter. In that matter, the candidate had dismissed with costs the plaintiff's action against the defendants for the repayment of fees that were allegedly not due. The action was dismissed on the ground that, although the amounts paid were in excess of what was due, the plaintiff when making payment was grossly negligent.

CANDIDATE: JUDGE NZ MHLANTLA

- 5.19. The decision of the candidate was overturned. After a careful analysis of the factual background to the matter, the SCA disagreed with the finding of the candidate in the court a quo and concluded that the mistake of the Municipality when making undue payments had been excusable. Despite arriving at a different conclusion and overturning her decision, the SCA did not, however, express any material criticism of the candidate's handling of the matter. If anything, the SCA emphasized that the issue of whether the mistake in *condictio indebiti* was excusable was a value judgment that one could only make after a consideration of various factors. There was no rule of thumb determining whether the mistake was excusable or not. The candidate's decision was upset on appeal on the factual conclusion that the Municipality had made an inexcusable error.
- 5.20. In *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs of the Republic of South Africa and Others, Rainy Days Farms (Pty) Ltd v Minister of Agriculture and Land Affairs of the Republic of South Africa and Others* 2013 (3) SA 263 (SCA) the appeal concerned the appropriate compensation in an expropriation of land matter. The candidate dismissed the appeal by owners of two immovable properties whose properties had been expropriated by the erstwhile Minister of Housing (House of Delegates) in terms of the Expropriation of Properties Act 63 of 1975. The appellants were dissatisfied

CANDIDATE: JUDGE NZ MHLANTLA

with the compensation paid and had launched proceedings in the Natal Provincial Division. Later, when the Restitution of Land Rights Act 22 of 1994 came into being, the appellants had abandoned their claim. They lodged new claims with the Regional Land Claims Commissioner, KwaZulu-Natal for the restoration of their properties, in terms of the Restitution Act. The appellants later abandoned their claims and asked for compensation in terms of the Restitution Act. The Land Claims Court had awarded the appellants compensation. In so doing, the Land Claims Court had used the Consumer Price Index (CPI) as a measure of calculating the value of money lost by the appellants. On appeal, the appellants contended that the Land Claims Court had erred when it applied the CPI instead of allowing claim for compound interest as an alternative method of calculation. The candidate dismissed the appeal and held that the Land Claims Court had properly exercised its discretion when it applied the CPI.

- 5.21. The judgment evidences the candidate's understanding that there are competing demands on the public purse and resources and that they ought therefore to be used responsibly by those in authority. In that connection, the candidate upheld the application of the CPI as a reliable measure of calculation.

CANDIDATE: JUDGE NZ MHLANTLA

6. Whether any judgments have been overturned on appeal

- 6.1. The candidate lists four judgments which have been overturned on appeal. We were unable to find any other judgments which have been overturned on appeal, other than these four. Of those four we have reviewed two of them, *Invula Quality Protection (Pty) Ltd v Loureiro and Others* 2013 (3) SA 407 (SCA) and *Nelson Mandela Metropolitan Municipality v Ngonyama Okpanum Hewitt- Coleman and Others* (765/2010) [2012] ZASCA 11 (14 March 2012).
- 6.2. In *Invula* three other members of the Supreme Court of Appeal concurred with the candidate's judgment. The Constitutional Court overturned the judgment based on a different conclusion as to whether facts demonstrated negligence by a security guard or not.
- 6.3. In *Nelson Mandela Metropolitan Municipality v Ngonyama Okpanum Hewitt- Coleman and Others* (765/2010) [2012] ZASCA 11 (14 March 2012) the Supreme Court of Appeal overturned a judgment which the candidate gave while she was sitting in the High Court. It concerned an enrichment claim and she had granted leave to appeal. The appeal was upheld, the Supreme Court of Appeal disagreed with the candidate on the issue of whether the overpayment by the Municipality concerned was an excusable error in law or not.

CANDIDATE: JUDGE NZ MHLANTLA

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

7.1. The candidate was an attorney for twelve years, although the nature of her work as an attorney is not known. She has served as a judge for a cumulative period of thirteen years.

8. The candidate's linguistic and communication skills

8.1. The candidate's judgments are succinct, clear and written in easily understandable language. Her judgment writing skills are of a high quality.

9. The candidate's ability to produce judgments promptly

9.1. No concerns were noted in this regard.

10. The candidate's fairness and impartiality

10.1. There were no indications to suggest that the candidate is not fair and impartial.

11. The candidate's independent mindedness

11.1. There were no indications that the candidate is not independent minded.

11.2. In one Constitutional Court decision, the candidate differed from her colleagues on a discrete but important legal issue, suggesting independent mindedness. In *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC), the

CANDIDATE: JUDGE NZ MHLANTLA

Constitutional Court dealt with the question of whether class actions had to receive certification from a court before proceeding and the requirements for such certification. The candidate considered the main judgment of the Court and concurred in it, save for two paragraphs. Those paragraphs suggested that the certification requirements might not apply to the enforcement of rights against the State or where the horizontal application of the Bill of Rights was at issue. The candidate's separate concurring judgment took a different approach, concluding that the certification requirement should apply in this context.

12. The candidate's ability to conduct court proceedings

- 12.1. No adverse comments were received. It has, however, been remarked of the candidate as a judge on the Supreme Court of Appeal that she does not question and engage fully with counsel during hearings and often appears to be passive when argument is being presented.

13. The candidate's administrative ability

- 13.1. The candidate was the founder of a firm of attorneys. This would suggest administrative skill.
- 13.2. She has also served as a member of a number of committees including seven years as the Deputy Chair of the Eastern Cape Gambling & Betting Board.

CANDIDATE: JUDGE NZ MHLANTLA

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

14.1. No adverse comments were received.

15. The candidate's judicial temperament

15.1. No adverse comments were 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 a lengthy track record of commitment to human rights and the needs of the community.

16.2. NADEL in their letter of nomination describe the candidate as a founder member of NADEL and a member of its executive since inception and an active member and participant in Human Rights and Advice Centre Projects until her elevation to the bench.

16.3. She acted as a Small Claims Court Commissioner for six years.

16.4. She served for six years as a member of her local attorneys' association.

16.5. She has a track record of assisting in judicial training.

17. The candidate's potential

17.1. It would be inappropriate to speak of potential in a candidate with this experience.

CANDIDATE: JUDGE NZ MHLANTLA

17.2. Given her lengthy judicial experience it appears that this candidate would likely be an asset on the Constitutional Court.

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

18.1. The appointment of the candidate to the Constitutional Court would reinforce the message that black women are valuable contributors to the highest level of judicial office.

CANDIDATE: JUDGE NZ MHLANTLA

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

- Avonmore Supermarket CC v Venter* 2014 (5) SA 399 (SCA)
- Mashinini and Another v S* 2012 (1) SACR 604 (SCA) (21 February 2012)
- Pangarker v Botha* 2015 (1) SA 503 (SCA)
- Liebenberg NO and Others v Bergrivier Municipality* 2013 (5) SA 246 (CC)
- Law Society of the Northern Provinces v Dube* [2012] 4 All SA 251 (SCA)
- Grancy Property Limited and Another v Seena Marena Investment (Pty) Ltd and Others* [2014] 3 All SA 123 (SCA)
- Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA)
- Diggers Development (Pty) Ltd v City of Matlosana and Others* [2012] 1 All SA 428 (SCA)
- Roux v Health Professions Council of South Africa and Another* [2012] 1 All SA 49 (SCA)
- Imvula Quality Protection (Pty) Ltd v Loureiro and Others* 2013 (3) SA 407 (SCA)
- Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC)
- Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) SA 521 (CC)
- MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC)
- Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC)
- Ivanov v North West Gambling Board and Others* 2012 (6) SA 67 (SCA)
- Kriel v Legal Aid Board and Others* 2010 (2) SA 282 (SCA)

CANDIDATE: JUDGE NZ MHLANTLA

Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs of the Republic of South Africa and Others, Rainy Days Farms (Pty) Ltd v Minister of Agriculture and Land Affairs of the Republic of South Africa and Others 2013 (3) SA 263 (SCA)

Just Names Properties 11 CC and Another v Fourie and Others 2008 (1) SA 343 (SCA)

S v Carolus 2008 (2) SACR 207 (SCA)

Koumantarakis Group CC v Mystic River Investment 45 (Pty) Ltd and another 2008 (5) SA 159 (SCA)

Unreported decisions

Nevilimadi v S (545/13) [2014] ZASCA 41 (31 March 2014)

Steyn v S [2014] ZASCA 20 (27 March 2014)

Dube v S [2011] ZASCA 236 (30 November 2011)

S v Nitito [2011] ZASCA 198

Magadla v S [2011] ZASCA 195 (16 November 2011)

Rustenburg Local Municipality v Mdango and Others [2014] ZASCA 83 (30 May 2014)

South African Land Arrangements CC & Others v Nedbank LTD [2015] ZASCA 88 (29 May 2015)

National Health Laboratory Service v Lloyd-Jansen van Vuuren [2015] ZASCA 20 (19 March 2015)

Road Accident Fund v Zulu and Others [2011] ZASCA 223 (30 November 2011)

City of Johannesburg Metropolitan Council v Ngobeni [2012] ZASCA 55 (30 March 2012)

Johannes Windvogel v The State [2015] ZASCA 63 (8 May 2015)

Medicross Healthcare Group (Pty) Ltd and Another v Prime Cure Holdings (Pty) Ltd [2006] ZACAC 3 (6 April 2006)

CANDIDATE: JUDGE NZ MHLANTLA

Judgments upheld on appeal

None reviewed

Judgments overturned on appeal

Invula Quality Protection (Pty) Ltd v Loureiro and Others 2013 (3) SA 407 (SCA)

Nelson Mandela Metropolitan Municipality v Ngonyama Okpanum Hewitt- Coleman and Others (765/2010) [2012] ZASCA 11 (14 March 2012) (appeal judgment of the SCA reviewed, not the candidate's judgment *a quo*).

CANDIDATE: JUDGE MM MAYA