

CANDIDATE: JUDGE RS MATHOPO

COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL

1. The candidate's appropriate qualifications

1.1 BProc (1985).

1.2 The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

2.1 The candidate has had a thirty-year legal career as an attorney, Judge and Acting Judge of appeal. He has spent the last 9 years on the bench. He hands down judgments promptly.

2.2 No adverse comments were received regarding the candidate.

2.3 He is a fit and proper person for elevation to the Supreme Court of Appeal.

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.

3.2 Currently, the Supreme Court of Appeal comprises of twenty-one permanent Judges. Five are black women, ten are black men, one is a white woman, and five are white men. It is apparent, therefore, that while strides have been taken to address racial representivity, gender representivity still lags behind.

3.3 Given the current composition of the bench, the appointment of a black man will not advance the transformation of the judiciary from a gender perspective.

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

4.1 The candidate appears to have 5 reported judgments and 19 unreported judgments which he personally authored. Of these judgments 7 were written by the candidate in his capacity as an Acting Judge of Appeal in the Supreme Court of Appeal.

4.2 The judgments cover a broad range of legal topics including administrative law, constitutional law, contract, credit transactions, criminal law, company law, delict, family law, lease, enrichment and statutory interpretation.

4.3 The candidate has listed the following judgments:

4.3.1 *Amrich 159 Property Holding CC v Van Wesemb Eeck* 2010 (1) SA 117 (GSJ). The candidate set aside the arrest of a person *tanquam suspectus de fuga* on factual grounds. He stated, *obiter*, that an order of arrest where a person could not provide security would offend the right to dignity, equality and freedom of movement. He refrained from declaring the practice of arrest *tanquam suspectus de fuga* unconstitutional as the parties had not sought such an order. In *Malachi v Cape Dance Academy International (Pty) Ltd and Others* [2010] JOL 25915 (CC), the Constitutional Court confirmed that an order of arrest where a person could not provide security was unconstitutional.

- 4.3.2 In *Munyai v S* [2013] ZAGPPHC 153 the candidate displayed particular insight and sensitivity into the manner in which the questioning of child witnesses ought to be conducted and the quality of their evidence evaluated.
- 4.3.3 The candidate has twice taken the opportunity in his judgments to highlight the scourge of domestic violence against women and children and to stress that such conduct is to be both deplored and severely punished (*Kekana v S* [2014] ZASCA 158 and *Mudau v S* [2014] ZASCA 43) and in *K v S* [2014] ZASCA 136) commented on the heinousness of the crime of rape.
- 4.3.4 *Print Media South Africa and Another v Minister of Home Affairs and Another* [2011] JDR 1456 (GSJ): The candidate declared sections of the Film and Publications Act invalid and unconstitutional. In *Print Media South Africa and Another v Minister of Home Affairs and Another* 2011(6) SA 443 CC, the Constitutional Court confirmed the order of unconstitutionality.
- 4.3.5 *RHI Refractions Africa v Allianz Insurance Ltd* 2008 (3) SA 425 SCA: The SCA confirmed an order of the candidate in the court *a quo* interpreting an exclusion clause in an insurance contract.
- 4.3.6 *Govender v Salgados Fruiters t/a Lyndhurst Fruit Basket and Another* 2009 (1) SA 500 (W): The plaintiff was injured in a robbery inside the defendant's store while shopping. In a claim for damages, the candidate found that the plaintiff had not shown, on the facts, that the defendant

was the cause of the shooting. On whether the defendant had a duty of care towards the plaintiff, the candidate concluded that to extend the duty of care in such circumstances would cast too wide a duty on shop owners (and banks) and is impractical.

4.3.7 *Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2013] 4 ALL SA 610 (GNP): The applicant was required to interpret the order of the SCA in which that court ordered the disclosure of recordings, transcripts and documents considered by the ANDPP in the decision to withdraw criminal charges against the President, subject to the non-disclosure of privileged or confidential representations. The candidate rejected a blanket claim of privilege and confidentiality without identification of specific items in respect of which confidentiality and privilege were claimed and the reasons therefor. He also refused an order that the ANDPP was in contempt of court for failure to provide the record within the period stipulated by the SCA. The SCA upheld the order of the candidate.

4.3.8 *Brashville Properties 51 (Pty) Ltd v Colmant* 2014 JDR 0913 (SCA), [2014 ZASCA 61]: In a unanimous judgment, the candidate found that owners of neighbouring or adjacent property had the *locus standi* to challenge the decision of a municipality to approve building plans without their comment and that such decision was reviewable in terms of PAJA.

4.3.9 *Pheiffer v Van Wyk* (267/13) 2014 ZASCA 87 (30/05/14)

(unreported): In a unanimous judgment, the candidate found that an enrichment lien could be secured by a guarantee given by a person other than the owner of property.

4.3.10 *Prinsloo v S 534 (13) 2014 ZASCA 96 (15 July 2014)*: In a unanimous judgment, the candidate found that the use of the “k” word humiliated, denigrated and dehumanised African people and that it violated the right to human dignity.

4.3.11 *Alcron Properties (Pty) Ltd v MEC for Housing, Gauteng [2013] ZAGPJHC 12*: The candidate refused to grant a declarator that the defendant was obliged to pay to the plaintiff monies stipulated in a contract, where the contract was cancelled by agreement and the parties were discharged from their obligations, the performance of which would precede the payment of stipulated monies.

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

5.1 The judgments referred to above, particularly *Amrich 159 Property Holding CC, Print Media South Africa* and *Prinsloo*, indicate a firm commitment to constitutional values.

6. Whether any judgments have been overturned on appeal

6.1 *Bridgeway Ltd v Phillip [2008] JOL 22217 (W)*, while not taken on appeal, was criticised by the Supreme Court of Appeal in *ABSA Technology Finance Solutions (Pty) Ltd v Michael’s Bid A House CC and Another [2013] JOL 30956 (SCA)* for permitting evidence in circumstances which were contrary to

the parole evidence rule.

- 6.2 In *City of Cape Town v Arun Property Developments (Pty) Ltd* [2014] ZASCA 56 the candidate wrote a judgment which was concurred in by all other members of the Supreme Court of Appeal. The Constitutional Court adopted a different interpretation of the statutory provision in issue and set aside the decision of the SCA.
- 6.3 *Gauteng Gambling Board and Another v MEC for Economic Development: Gauteng Provincial Government Corporation Ltd* [2012] JOL 29234 (GSJ) was set aside by the Supreme Court of Appeal on the basis that it found the MEC to have been motivated by an improper motive, something which the candidate had not been prepared to find. (The SCA decision is reported at *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA).)
- 6.4 In *Hlophe v Constitutional Court of South Africa and Others* [2009] 2 All SA 72 (W) the court split 3:2. The candidate concurred in the majority judgment of Mojapelo DJP which was set aside by the Supreme Court of Appeal.
- 6.5 In *Paixao and Another v Road Accident Fund* [2011] ZAGPJHC 68 the Supreme Court of Appeal interpreted the facts differently to the candidate and held that a duty of support existed where the candidate had not found such a duty. (The SCA decision is reported as *Paixão and Another v Road Accident Fund* 2012 (6) SA 377 (SCA).)
- 6.6 The Supreme Court of Appeal in *Butler and Others v Van Zyl and Others* [2014] ZASCA 81 overturned the candidate's

judgment in *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd and Others* [2013] ZAGPJHC 40 holding that he had misapplied the test relating to evidence in motion proceedings and ought to have accepted a denial of unlawfulness put up in answer by the respondent.

6.7 *SA Taxi Securitisation (Pty) Ltd v Media 24 Ltd & Others* [2011] JOL 26909 (GSJ) was overturned by the SCA in a judgment that attracted three separate concurrences. The point concerned whether it was necessary in seeking special damages for defamation to separately plead the circumstances which give rise to the wrongfulness of the defamation. (The case is reported as *SA Taxi Securitisation (Pty) Ltd (AVUSA Media Ltd and Others as Amici Curiae), Media 24 Ltd and Others v 2011 (5) SA 329 (SCA).*)

6.8 In *Bruwer v Nova Risk Partners Ltd* 2011 (1) SA 234 (GSJ) the court held that the candidate had misdirected himself by making a finding on a ground which had not been pleaded and in respect of which evidence had not been tendered. (The judgement of the Full Bench is reported as *Bruwer v Nova Risk Partners Ltd* 2011 (1) SA 234 (GSJ).)

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

7.1 The majority of the candidate's legal career was served as an attorney. The candidate was the director of his own firm. The nature of the work done by the candidate while an attorney is not evident from his application.

7.2 He has served as a judicial officer for 9 years, including a

recent stint as an Acting Judge of Appeal in the SCA.

8. The candidate's linguistic and communication skills

8.1 The candidate's judgments are all in English. They are succinct and well-written. His proficiency in other languages is not known.

9. The candidate's ability to produce judgments promptly

9.1 Our review indicates that the candidate is extremely prompt in delivering judgments, often handing down judgment within a month of the matter having been heard, if not sooner.

10. The candidate's fairness and impartiality

10.1 The candidate's judgments do not indicate any concerns regarding fairness or impartiality and no adverse comments in this regard have been received.

11. The candidate's independent mindedness

11.1 The candidate's judgments that we have reviewed do not raise any concerns regarding his ability to act independently.

11.2 No adverse comments have been received in this regard.

12. The candidate's ability to conduct court proceedings

12.1 The candidate has had a lengthy judicial career and no adverse comments have been received regarding his ability to conduct court proceedings.

13. The candidate's administrative ability

13.1 The candidate directed his own law firm for many years. This

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displays administrative ability. He has further served as a member of a number of professional committees.

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 There is nothing to suggest that the candidate lacks the appropriate judicial temperament.

15.2 No adverse comments have been received in this regard.

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

16.1 We refer to that which is set out above concerning the candidate's commitment to constitutional values and to the judgments involving vulnerable members of the community.

17. The candidate's potential

17.1 The candidate would strengthen the SCA with his broad range of experience, his promptness in delivering judgments, his skill in writing judgments and his appreciation of constitutional values.

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

18.1 The appointment of this candidate would indicate a commitment to transformation, recognition of legal experience and confirmation that the highest ranking members of the profession can be, and are, drawn from both branches of the

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practising profession.

- 18.2 The SCA, despite no longer being the apex court in all matters other than constitutional matters, continues to shape the law as the *de facto* last court of appeal in many matters. The candidate has delivered an impressive number of reported judgements, some of which are of substantial legal significance. This in turn suggests that he would have a significant role to play as a jurist on the SCA, if appointed.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED**Reported decisions**

- ABSA Bank Ltd v Van Rensburg and Another; In re: ABSA Bank Ltd v Maree and Another* 2014 (4) SA 626 (SCA) (concurrent in the judgment of Maya JA)
- Africast (Pty) Ltd v Pangbourne Properties Ltd* [2014] 3 All SA 653 (SCA) (concurrent in the judgment of Theron JA)
- Asmal v Essa* [2014] 3 All SA 115 (SCA) (concurrent in the judgment of Maya JA)
- Butters v Mncora* [2014] 3 All SA 259 (SCA) (concurrent in the judgment of Shongwe JA)
- Cao v S* [2006] 4 All SA 561 (W) (concurrent in the judgment of Labe J)
- Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* [2015] 1 All SA 261 (SCA) (concurrent in the judgment of Navsa ADP)
- De Lange v Presiding Bishop for the time being of the Methodist Church of Southern Africa and Another* [2015] 1 All SA 121 (SCA) (concurrent in the judgment of Ponnann JA)
- Hlophe v Constitutional Court of South Africa and Others* [2009] 2 All SA 72 (W) (concurrent in the judgment of Mojapelo DJP)
- LA Health Medical Scheme v Horn and Others* [2014] 3 All SA 421 (SCA) (concurrent in the judgment of Wallis JA)
- Lepogo Construction (Pty) Ltd v Govan Mbeki Municipality* [2015] 1 All SA 153 (SCA) (concurrent in the judgment of Ponnann JA)
- National Association of Broadcasters v South African Music Performance Rights Association and Another* [2012] 2 All SA 263 (SCA) (concurrent in the judgment of Navsa JA)
- Ndlanzi v S* [2014] 3 All SA 43 (SCA) (concurrent in the judgment of Bosielo JA)
- Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* [2014] 2 All SA 527 (SCA) (concurrent in the judgment of Wallis JA)
- PMG Motors Kyalami (Pty) Ltd (in liquidation) and another v Firststrand Bank Ltd, Wesbank Division* [2015] 1 All SA 437 (SCA) (concurrent in the judgment of Gorven AJA)
- Rustenburg Local Municipality v Mwenzi Service Station CC* [2015] 1 All SA 315 (SCA) (concurrent in the judgment of Ponnann JA)

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S v Nel 2013 (1) SACR 155 (GSJ) (concurrent in the judgment of Lamont J)

Skead and Others v Melco Elevator (South Africa) (Pty) Ltd and Another [2010] 3 All SA 445 (GSJ) (concurrent in the judgment of Jajbhay J)

Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others [2014] 4 All SA 600 (SCA) (concurrent in the judgment of Navsa ADP)

Van Wyk v S; Gajela v S [2014] 4 All SA 708 (SCA) (concurrent in the judgments of Swain JA and Ponnann JA)

Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company SARL [2014] 4 All SA 617 (SCA) (concurrent in the judgments of Willis JA and Gorven AJA)

Unreported decisions

Alcron Properties (Pty) Ltd v MEC for Housing, Gauteng and Another [2013] ZAGPJHC 12

Amrich 159 Property Holding CC v Van Wesemb Eeck [2009] JOL 24142 (GSJ)

Bezuidenhout v Road Accident Fund [2011] ZAGPJHC 180

Bridgeway Ltd v Phillip [2008] JOL 22217 (W)

City of Cape Town v Arun Property Developments (Pty) Ltd [2014] ZASCA 56

Democratic Alliance v Acting National Director of Public Prosecutions and Others [2013] JOL 30675 (GNP)

Director-General, Department of Home Affairs and others v Dekoba [2014] JOL 31885 (SCA) (concurrent in the judgment of Wallis JA)

Gainsford NO and Others v Jawmend Rossi Capital (Pty) Ltd [2013] ZAGPJHC 42

Gauteng Gambling Board and Another v MEC for Economic Development: Gauteng Provincial Government Corporation Ltd [2012] JOL 29234 (GSJ)

Hepple and Others v Law Society of the Northern Provinces [2014] JOL 31932 (SCA) (concurrent in the judgment of Mthiyane DP)

Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson and Another [2012] ZAGPJHC 86 (concurrent in the

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- judgment of Van Oosten J)
- K v S* [2014] ZASCA 136
- Kekana v S* [2014] ZASCA 158
- LT v VLM* [2012] ZAGPJHC 262
- Mudau v S* [2014] ZASCA 43
- Mulala v S* [2014] ZASCA 103 (concurrent in the judgment of Brand JA)
- Munyai v S* [2013] ZAGPPHC 153
- National Director of Public Prosecutions v Elran* [2012] ZAGPJHC 138
(concurrent in the judgment of Masipa J)
- “NCM” and Others v Presiding Officer of the Children’s Court, District of Krugersdorp and Others* [2013] JOL 30469 (GSJ) (concurrent in the judgment of Carelse J)
- Paixao and Another v Road Accident Fund* [2011] ZAGPJHC 68
- Pharma-Dynamics (Pty) Ltd v Bayer Pharma AG and Another* [2014] JOL 32346 (SCA) (concurrent in the judgment of Brand JA)
- Pheiffer v Van Wyk and Others* [2014] ZASCA 87
- Planet Waves 581 (Pty) Ltd v Newman* [2013] ZAGPJHC 19
- President of the Republic of South Africa and Others v M&G Media Ltd* [2014] JOL 32351 (SCA) (concurrent in the judgment of Brand JA)
- Prinsloo v S* [2014] ZASCA 96
- Print Media South Africa and Another v Minister of Home Affairs and Another* [2011] ZAGPJHC 149
- Reliant Insurance Brokers (Pty) Ltd v Independent Freight Services* [2013] ZAGPJHC 264
- S v Nicolas* [2012] ZAGPJHC 179 (concurrent in the judgment of Lamont J)
- SA Taxi Securitisation (Pty) Ltd v Media 24 Ltd & Others* [2011] JOL 26909 (GSJ)
- Seletela v South African Rail Commuter Corporation Ltd* [2012] ZAGPJHC 33
- Shila and Others v Minister of Safety and Security and Another* [2012] ZAGPJHC 100 (concurrent in the judgment of Francis J)
- Tofie v S* [2014] ZASCA 159
- Transnet Ltd v Vusa-Isizwe Security Services (Pty) Ltd* [2011] ZAGPJHC 81 (concurrent in the judgment of Wepener J)

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Twoline Trading 2 (Pty) Ltd v Brainwaive Projects 1232 C and Others [2012] ZAGPJHC 260

Unitrans Fuel & Chemical (Pty) Ltd v Dove-Co Carriers CC [2010] JOL 25743 (GSJ) (concurred in the judgment of Halgryn AJ)

Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd and Others [2013] ZAGPJHC 40

Judgments upheld on appeal

Amrich 159 Property Holding CC v Van Wesemb Eeck [2009] JOL 24142 (GSJ) was indirectly upheld on appeal in *Malachi v Cape Dance Academy International (Pty) Ltd and Others* [2010] JOL 25915 (CC)

Democratic Alliance v Acting National Director of Public Prosecutions and Others [2013] JOL 30675 (GNP)

Print Media South Africa and Another v Minister of Home Affairs and Another [2011] ZAGPJHC 149

Judgments overturned on appeal

City of Cape Town v Arun Property Developments (Pty) Ltd [2014] ZASCA 56

Gauteng Gambling Board and Another v MEC for Economic Development: Gauteng Provincial Government Corporation Ltd [2012] JOL 29234 (GSJ)

Hlophe v Constitutional Court of South Africa and Others [2009] 2 All SA 72 (W) (concurred in the judgment of Mojapelo DJP)

Paixao and Another v Road Accident Fund [2011] ZAGPJHC 68

SA Taxi Securitisation (Pty) Ltd v Media 24 Ltd & Others [2011] JOL 26909 (GSJ)

Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd and Others [2013] ZAGPJHC 40