

CANDIDATE: MR MPOSTOLI LEONARD TWALA

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

1. The candidate's appropriate qualifications

1.1. The candidate holds the following qualifications:

1.1.1. Bacclalaurus Procurationis (University of Zululand) 1982;

1.1.2. Management Advancement Programme (Wits Business School)
2004; and

1.1.3. Certificate in Sports Law (University of Pretoria) 2008.

1.2. The candidate is appropriately qualified.

1.3. The candidate was admitted as:

1.3.1. an attorney in 1986;

1.3.2. a conveyancer in 1994; and

1.3.3. a notary public in 2009.

1.4. The candidate has acted as a Judge of the Gauteng Division of the High Court for 41 weeks in all, with his first stint having started in May 2013.

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2. Whether the candidate is a fit and proper person

- 2.1. The candidate has been an attorney for 29 years. He has run his own practice for 13 of those years.
- 2.2. The candidate has served intermittently as an Acting Judge of the Gauteng Division of the High Court since May 2013.
- 2.3. To the best of the reviewers' knowledge, no complaints of any type have been lodged with the JSC in respect of this candidate. There is nothing in the judgments considered that would suggest that the candidate is not a fit and proper person. There are, however, three matters of concern that arise from the disclosures made by the candidate in his application:
 - 2.3.1. In 1988, the candidate was convicted for negligent driving and sentenced to pay a fine of R300, or alternatively to spend 30 days in prison;
 - 2.3.2. In 1989, the candidate was convicted of driving whilst intoxicated and sentenced to pay a fine of R1000, or alternatively to spend 12 months in prison; and
 - 2.3.3. In 2002, the Law Society found the candidate guilty of unprofessional conduct in that the candidate failed to advise CIPRO (as it then was) of his resignation as a director of Kunene Incorporated, a charge for which the candidate was "*cautioned and discharged*".

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- 2.4. The candidate has been frank and honest in making the disclosures above. His criminal record in relation to his driving concerned two incidents that occurred more than 20 years ago. As far as his drinking and driving conviction is concerned, the candidate appears to have reformed in the light of past mistakes, in that he has indicated that he stopped consuming alcohol altogether in 1989.
- 2.5. The nature of the candidate's criminal record does not impugn his honesty or moral character. What it does suggest is a recklessness that existed over 25 years ago. In the view of the reviewers, the candidate's criminal record must be considered as an adverse factor to his appointment, but it is not a material consideration.
- 2.6. The candidate's professional misconduct, too, must be considered to be an adverse factor; however, similarly, it is not material to his candidacy. It involves a measure of negligence, but no dishonesty. The misconduct was committed 13 years ago, and, even at that time the Law Society did not impose a serious sanction.
- 2.7. These three instances of unacceptable conduct must be adverse factors in a determination as to whether the candidate should be permanently appointed. However, in the view of the reviewers, they should not be dispositive. They do not constitute, in and of themselves, a good reason to decline to appoint the applicant in what is otherwise a strong application, and the determination should be made holistically.

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

3.1. The candidate is a black African man.

3.2. There are 6 vacancies available. There are currently 76 permanent Judges, of whom 39 are African (27 men and 12 women), 3 are coloured (2 men and 1 woman), 5 are Indian (3 men and 2 women) and 29 are white (20 men and 9 women).

3.3. In the present round of appointments, there are 12 shortlisted candidates, comprising of 6 men and 6 women. The appointment of the candidate would advance transformation from a race perspective but not from a gender perspective.

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

4.1. The candidate has extensive experience in practice, having commenced his articles in 1983. He has, moreover, run his own practice since 2002. His application indicates that he appears in court frequently, *inter alia* in civil trials and motion court, and the candidate indicates that criminal work comprises 25% of his practice.

4.2. As an Acting Judge, the candidate has also demonstrated an aptitude of reasonably broad remit. The candidate has sat as an Acting Judge *inter alia* in both civil and criminal matters, and he has decided cases with both commercial and administrative dimensions.

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- 4.3. From the candidate's application, he appears to have one appellate judgment, which did not attract dissent. The candidate has not handed down a sufficient number of appellate judgments to make a general statement about the candidate's 'appeal record', but there is no reason to believe that the candidate will not be able to discharge that function adequately.
- 4.4. In respect of cases in which the candidate has appeared, he lists the following as being his most significant:
- 4.4.1. *The Federation for Sustainable Environment & Another v Minister of Water Affairs & Others* (Case No 35672/2012) (the candidate acted on behalf *inter alia* of the Minister of Water Affairs), which was an application concerning an alleged failure by the respondents under section 27 of the Constitution to provide the applicants with potable water. The candidate's clients did not oppose the application as such, but contended that the obligation arose at a local, as opposed to national, level.
- 4.4.2. *Muldersdrift Sustainable Development Forum v Mogale City Local Municipality & Others* (Case No 12005/2013) (the candidate acted *inter alia* on behalf of the Mogale City Local Municipality) in which the candidate's clients contended successfully that a declarator under section 34 of the Constitution was not an appropriate course to follow where the subject matter of the declarator concerned conduct more properly defined as administrative action.

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- 4.4.3. *Federation for a Sustainable Environment & Others v The National Nuclear Regulator & Others* (Case No 24611/2012) (the candidate acted on behalf of the Mogale City Local Municipality) which, according to the candidate's application, concerned the Mogale City Local Municipality's obligation to provide people living in an informal settlement at environmental risk with appropriate alternative accommodation, though the position taken in argument by the candidate's client is not apparent.
- 4.5. In the view of the reviewers, the cases above demonstrate that the candidate has considerable experience in litigating matters that concern constitutional and administrative law. They also demonstrate that the judgments were delivered in good time.
- 4.6. The candidate includes the following judgments as his most significant:
- 4.6.1. *Phillips, Simon G v The State* (Case No A197/2014) ("**Phillips**");
- 4.6.2. *Koprivtchin Roument Slavtchev v Victor and Another* (Case No 2483/2014) ("**Slavtchev**");
- 4.6.3. *KNS Construction (Pty) Ltd (In Liquidation) and Another v Mutual & Federal Insurance Company Ltd and Others* (Case No 42105/2012) ("**KNS Construction**")
- 4.6.4. *Anzotrax (Pty) Limited t/a Topbet Germiston v Ekurhuleni Metro Municipality* (Case No 14052/2015) ("**Anzotrax**"); and
- 4.6.5. *Habib v RAF* (Case No 37100/2012) ("**Habib**").

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4.7. The reviewers' assessment of these judgments is as follows:

4.7.1. *Phillips* concerned an appeal against sentence for a conviction on a charge of *crimen injuria*. The appeal was brought with the Roodepoort Magistrate's Court's leave. The basis of the charge was that, when the respondent had taken a long time to leave her parking space at a gym, the appellant pulled up next to her and uttered the words "*what the fuck is your problem bitch, bloody kaffir, how dare you shake your head at me bloody kaffir, baboon I will fuck you up*". The court *a quo* found the appellant guilty of the charge and sentenced him to 2 years imprisonment, wholly suspended for 5 years, on condition that the appellant performed services to the mortuary section in Chris Hani Baragwaneth Hospital for a period of 722 hours. The candidate set the sentence of the Roodepoort Magistrate's Court aside and replaced it with a sentence of 1 year, suspended for 5 years on condition of the same community-service terms. The candidate upheld the appeal. One possible flaw in this judgment is that, although the candidate set out the grounds upon which an appeal court may interfere with the exercise by a trial court of its discretion in respect of sentencing, he did not explain why in the matter before him those grounds were satisfied. At paragraph 17 of the judgment, the candidate holds that "*although the court a quo was firm in its approach, it was not fair in the sentence imposed. The court a quo did not exercise its discretion fairly and properly in the circumstances and the sentence*

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imposed is shockingly inappropriate”, but the judgment offers no further explanation than this.

- 4.7.2. In *Slavtchev*, the candidate granted an application for the eviction of a man and his family on the basis that the applicant, who had recently purchased the property, was not aware of the first respondent’s lease agreement with the erstwhile owner. The candidate found that the first respondent was in unlawful occupation of the premises for this reason, and he ordered his eviction from the premises forthwith. What is of some concern however, is that the candidate makes no reference in his judgment to section 26 of the Constitution, or to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, before doing so.
- 4.7.3. *KNS Construction* concerned the lawfulness of the calling up of a performance guarantee. In finding that the call on the performance guarantee was indeed lawful, the candidate demonstrates a strong grasp of the principles applicable to guarantees in the light of recent jurisprudence of the Supreme Court of Appeal.
- 4.7.4. In *Anzotrax*, an urgent application was brought for an order to reconnect the applicant’s electricity supply. The applicant’s electricity had been disconnected on account of the fact that the second respondent, who was the owner of the property on which the applicant did business, was itself in arrears to the first respondent. The applicant had a separate account for the payment of electricity

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with the first respondent. On an analysis of the evidence, together with the relevant municipal bylaws, the candidate held that, given the respondent's knowledge that the applicant was not the party who was in arrears, and given the fact that the applicant had a separate agreement for the supply of electricity with the first respondent, it was not permissible for the first respondent to disconnect the applicant's electricity supply, and the orders sought were justified.

4.7.5. *Habib* was an RAF matter in which the defendant fully accepted liability for all of the plaintiff's proven damages. What the candidate was required to determine in the case was whether (i) the court had jurisdiction to consider a claim for general damages, where the RAF had taken a decision to reject the claim pursuant to the RAF's power to do so under Regulations issued pursuant to the Road Accident Fund Act 56 of 1996; and (ii) whether the plaintiff suffered any past and future loss of income and, if so, whether any contingency should be applied. In the view of the reviewers, the candidate's analysis of both of these issues reflects sound knowledge of the principles applicable in administrative law as well as those concerning the law of damages.

4.8. In the view of the reviewers, and notwithstanding the flaws identified above, these judgments, together with the candidate's other judgments, indicate a sound knowledge of the law and, perhaps most importantly, the ability to apply the law to the facts of the case. Where the candidate's judicial resume could perhaps be improved is in the field of

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constitutional law specifically, especially given that the candidate's application demonstrates little engagement with 'pure' constitutional law in practice.

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

5.1. The candidate's judgments raise no suggestion that the applicant is not adequately committed to the values enshrined in the Constitution. The candidate's jurisprudence suggests that he is indeed so committed.

6. Whether any judgments have been overturned on appeal

6.1. The candidate indicates that the following judgments have been taken on appeal:

6.1.1. *South African Securitisation Program (RF) Ltd & Others v Roscher Coetzee Nortjie Mampeule & Others* (Case No 42679/2012), which concerns a suit arising from a written rental agreement, and which is still pending;

6.1.2. *KNS Construction*, which is referred to further above, and is also still pending;

6.1.3. *Ghandi Square Property Holding (Pty) Ltd v The Pension Fund Adjudicator & Others* (Case No 62575/2013) ("**Ghandi**"), in which an appeal against the candidate's decision to dismiss an application to review the decision of the adjudicator was upheld; and

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- 6.1.4. *Tenitor Properties (Pty) Ltd v Nyathi S & Others* (Case No 06579/2015), which was dismissed by a full Bench of the Johannesburg High Court.
- 6.2. The appellate judgment in *Ghandi* is not available to the reviewers and has not been attached to the candidate's application. However, in the court *a quo*, the candidate's decision in *Ghandi* turned upon whether or not the second respondent, an erstwhile employee of the applicant, knew or ought reasonably to have known that the applicant had not registered as a participating employer with the first respondent until 2012. In the judgment of the candidate, no prescription issue properly arose. Whilst it cannot be said that the reasoning of the candidate is faultless, in the view of the reviewers, it does not present a glaring error of such significance as to warrant legitimate concerns.
- 6.3. In the reviewers' view, in as far as the candidate's appeal record is concerned, no significant concerns arise.

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

- 7.1. The candidate, as set out further above, has practiced as an attorney since 1986, has been a conveyancer since 1994 and a notary public since 2009.
- 7.2. In the view of the reviewers, the candidate's application demonstrates a reasonably broad level of professional experience.

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8. The candidate's linguistic and communication skills

- 8.1. The judgments of the candidate are clearly written and well reasoned. They are well articulated and written in plain language.
- 8.2. The candidate is also proficient in 4 other languages (Zulu, Sotho, Xhosa and Afrikaans), which would be a boon for a permanent appointment to the Bench.
- 8.3. No adverse comments have been raised about the candidate's communication skills. In fact, comments received from colleagues at the Bar are consistently positive.

9. The candidate's ability to produce judgments promptly

- 9.1. The candidate has no outstanding judgments. His record indicates an ability to work efficiently and to produce judgments promptly.
- 9.2. The reviewers regard this as an important point in the candidate's favour, as the interests of justice are best served by the prompt and efficient delivery of judgments.

10. The candidate's fairness and impartiality

- 10.1. No adverse comments have been received.
- 10.2. To the contrary, comments received from colleagues at the Bar are that the candidate is fair and impartial in the manner in which he conducts proceedings. He is, in short, a pleasure to appear before.

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11. The candidate's independent mindedness

11.1. There is no record of any complaint or incident indicating a lack of independent mindedness on the part of the candidate, and the candidate's judicial record does not suggest otherwise.

12. The candidate's ability to conduct court proceedings

12.1. The candidate has received positive reviews from colleagues at the Bar in this regard. Comments received are to the effect that it is a pleasure to appear before the candidate in court.

13. The candidate's administrative ability

13.1. No adverse comments have been received.

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

14.1. No adverse comments have been received in this regard.

14.2. Save for what is stated above, there is nothing else on record to indicate that the candidate's integrity or ethics have ever been compromised.

15. The candidate's judicial temperament

15.1. Comments received from colleagues at the Bar are that the candidate has a good judicial temperament.

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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. The application itself does not disclose any extra-curial basis from which the reviewers can comment upon this issue.
- 16.2. The reviewers refer to their comments at paragraph 4 and 5 above, which relate to the candidate's commitment to the values of the Constitution as expressed in his judgments.

17. The candidate's potential

- 17.1. In the view of the reviewers, the candidate has good potential and is likely to become a strong contributor to the jurisprudence of the Division if permanently appointed. He has extensive experience in practice and has acted as a Judge in both Johannesburg and Pretoria.
- 17.2. Although the candidate has not acted for a lengthy period, the response from members of the Bar who have appeared before him indicates that he is an appropriate candidate at this stage for a permanent appointment to the judiciary. He has the appropriate decorum and is able to handle his cases in a firm but dignified manner.

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

- 18.1. The candidate's appointment would further the following important objectives:
- 18.1.1. ensuring that racial transformation occurs within the judiciary;

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- 18.1.2. demonstrating that a career on the bench is not limited solely to members of the Bar; and
- 18.1.3. ensuring that persons with demonstrated knowledge and sound temperament are appointed to the bench of the High Court
- 18.2. Taking all the circumstances into account the view of the reviewers is that the candidate would make a fitting permanent appointment.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

The candidate does not have any reported judgments.

Unreported decisions

S v Doma 2013 JDR 1116 (GSJ)

S v Matewane 2013 JDR 2755 (GNP)

S v Mogane 2014 0038 (GNP)

Credit Smith Capital Partners (Pty) Ltd v Holiasmenos 2015 JDR 0083 (GJ)

Wireless Business Solution (Pty) Ltd v Mobile Telephone Network (Pty) Ltd 2015 0342 (GJ)

Law Society of the Northern Provinces v Mabaso 2014 JDR 0017 (GNP)

S v Mogane 2014 JDR0038 9 (GNP)

Ghandi Square Property Holding (Pty) Ltd v Pension Fund Adjudicator 2014 JDR 0183 (GNP)

Strydom v Nick Brytenbach Incorporated 2014 JDR 1598 (GP)

Vela v Rainbow Shuttle Services CC 2014 JDR 2632 (GL)

Margo v Amalgamated Beverages Industries 2014 JDR 2634 (GJ)

Jack v Minister of Justice 2013 JDR 2781 (GNP)

KNS Construction (Pty) Ltd and another v Mutual and Federation Insurance Company Limited and others 2015 JOL32725 (GJ)

Tobo T v Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government ZAGPJHC 141

Mbuyane Communal Property Association v Sibiyi NO and Others ZAGPPHC 395

Nedbank Limited v Maloka ZAGPPHC 391