

**CANDIDATE: MR MPN MBONGWE**

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

**1. The candidate's appropriate qualifications**

1.1. The candidate holds a BProc degree. He is suitably qualified.

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

2.1. There is nothing in the candidate's application or in the material reviewed and comments received on the candidate to suggest that he 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. As a black man, the appointment of the candidate would indicate a commitment to the racial transformation of the judiciary.

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

4.1. The candidate's legal experience to date appears from his application to be limited to criminal matters, personal injury cases, divorces and motion work of an unspecified nature.

4.2. One of the judgments under review contained findings by the candidate which raise concern:

*CANDIDATE: MR MPN MBONGWE*

- 4.2.1. In *Phakisaworld Fleet Solutions (Pty) Ltd v Mulalo Touring Services and Others* (unreported judgment of the Gauteng Local Division of the High Court, case no. 2011/21217 handed down on 2 September 2014) the candidate appears to have confused the onus on a point of prescription. He required a plaintiff to pro-actively plead, even before a defence of prescription had been raised, facts in the particulars of claim, which would indicate that the claim had not prescribed. This is a fundamental error.
- 4.3. In the same judgment the candidate refused to permit the filing of a replication to the special plea of prescription raised by the defendant on the grounds that the replication sought to introduce a new cause of action. If the replication was to be filed simply to plead facts in response to a defence of prescription (as appears likely), this would again be a fundamental error.

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

- 5.1. Based on the material available to the reviewers we were unable to form any views on the candidate's commitment to the values of the Constitution.

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

- 6.1. We were unable to find any judgments in which the candidate's decisions have been overturned on appeal.

*CANDIDATE: MR MPN MBONGWE*

6.2. The candidate states in his application that five of his decisions have been taken on appeal, of which two decisions were reversed and one upheld. The remaining two appeals have yet to be heard.

6.3. As the candidate did not indicate which of his decisions were reversed and which decision was upheld, and as we could find no record of the relevant decisions in the law reports, we have been unable to ascertain the reasons for the reversals or upholding on appeal as the case may be.

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

7.1. The bulk of the candidate's experience has been as a director of his own law firm where his practice concerned mainly family law work and personal injury matters. A broader and more diverse range of experience would be an asset in a judicial candidate.

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

8.1. Based on the judgments reviewed the candidate expresses himself in easily understandable language and has good communication and linguistic skills.

## **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. A number of complaints have been received from members of the Johannesburg Bar of the candidate descending into the arena, refusing to listen to argument, or to be persuaded by judicial authority emanating

*CANDIDATE: MR MPN MBONGWE*

from higher courts, including the Supreme Court of Appeal and the Constitutional Court. In short, the numerous complaints received from different members of the Bar suggest that the candidate, even as an acting judge, has a tendency not to act in a fair and impartial manner. Permanent appointment is unlikely to dampen that tendency. These complaints are dealt with further below.

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

11.1. The candidate was prepared to depart from a *dictum* of two experienced Supreme Court of Appeal judges, as discussed below. This may be said to indicate independent mindedness, but may also suggest an unwillingness to deal properly with judicial views which differ from his own. If the latter, this would not be a commendable trait in an aspirant judicial officer.

11.2. This approach is also contrary to the doctrine of *stare decisis*.

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

12.1. Regrettably we must record reservations, which have been expressed by a number of members of the Johannesburg Bar, regarding the manner in which the candidate has conducted court proceedings on prior occasions. Indeed the number of complaints and the number of complainants against this candidate are unprecedented in the period that the Johannesburg Bar has submitted candidate reviews to the JSC in this detailed format (the past five years).

*CANDIDATE: MR MPN MBONGWE*

- 12.2. Specifically it was noted that the candidate appeared to be unwilling to listen to the arguments of counsel in matters where he appeared to have already formed a view of the merits of the matter. If true, this is an undesirable quality in a judicial officer.
- 12.3. It was also reported that in a custody dispute, the candidate suggested removing a child from its parents and placing him or her in foster care when the candidate had not yet heard the merits of the application. It was also reported that the candidate stated in open court that he would maintain the *status quo* in the matter regarding the custody of the child as the child was “*not dead yet.*” These remarks were upsetting to the parents of the child. If true, these remarks are regrettable, unbecoming of a judicial officer, and insensitive to the parties concerned.
- 12.4. In unopposed motion court the candidate is reported to have refused to follow binding judicial precedent, displayed a poor understanding of commercial matters, and on one occasion, declined to grant judgment but instead fashioned an order which was neither sought nor competent, save by agreement between the parties. No such agreement had been reached. Based on this report the candidate effectively acted as a law unto himself.

**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. He has also served as a member of a number of committees and as chair of at least one committee. This would also suggest administrative ability.

CANDIDATE: MR MPN MBONGWE

**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. We refer to what has been recorded at paragraph 12 above.

15.2. The judgments delivered by the candidate in *Eskom Holdings Ltd v Transdeco GTMH (Pty) Ltd and Another* [2014] ZAGPJHC 89 and *Madimabe v Transdeco GTMH (Pty) Ltd and Others* [2014] ZAGPJHC 96 both disclose matters of concern:

15.2.1. In both judgments the candidate expressly declined to follow a minority concurring judgment delivered by Harms and Grosskopf JJA in *Barlows Tractor Company (Pty) Ltd v Townsend* 1996 (2) SA 869 (SCA). The two judges of appeal that were in the minority dealt with an interpretation of statute issue that was not dealt with by the majority of the court. The minority relied on their interpretation as an additional reason for concurring with the majority. While the minority judgment of the Supreme Court of Appeal might not have been binding on the candidate, one would have expected a judge sitting in the High Court to advance strong and cogent reasons for declining to follow such authority. The candidate's reasons for departing from the relevant *dictum* were not detailed and were contained in a single paragraph of the relevant judgment.

CANDIDATE: MR MPN MBONGWE

- 15.2.2. Despite the fact that the opposition to the application in *Eskom Holdings* appears to have been taken, at least in part, on the strength of the Supreme Court of Appeal *dictum* in *Barlows Tractor*, the candidate labelled the opposition “vexatious”. This was unwarranted in the circumstances.
- 15.2.3. The candidate denied leave to appeal in *Eskom Holdings* solely on the grounds that the candidate did not think that any other court would reach a different conclusion. Given that two Supreme Court of Appeal judges had reached a different conclusion and he had departed from them, it is unclear how the candidate could have reached the conclusion that he did, that no other court would find differently.
- 15.3. We note the above two cases for the concerning lack of thoroughness and open mindedness in reasoning which they appear to indicate.
- 15.4. In *Naidoo v Minister of Police and Others* (unreported judgment of the South Gauteng High Court, case no. 15245/2012 handed down on 13 November 2013) the candidate made an adverse credibility finding against a plaintiff for having hesitated in acknowledging, while under cross-examination, that a signature on a document was hers. The passage in issue reads as follows:

*“The credibility of the plaintiff was completely wrecked when she blatantly hesitated to acknowledge her signature and ultimately responded by saying: ‘It is mine. I sometimes sign like that.’”*

*CANDIDATE: MR MPN MBONGWE*

15.5. In the context of the judgement the answer which the plaintiff gave appears to have been a truthful, albeit apparently a reluctantly given answer. If the admission that the signature on the document was hers impacted upon or undermined the plaintiff's cause of action or earlier evidence, this is not apparent from the judgment. Most of the salient facts on which the plaintiff testified appear from the judgment to have been common cause. The basis for the adverse credibility finding by the candidate, particularly in such strong terms, appears to be poorly motivated.

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

16.1. The candidate's application does not allow us to draw any conclusions about his commitment to human rights and his experience with regard to the values and needs of the community.

16.2. The incident referred to in paragraph 12.3 is a potential cause for concern.

16.3. The *Naidoo* decision referred to above may also warrant questioning of the candidate by the commission. It concerned a claim for damages following alleged wrongful and unlawful conduct by the police when the plaintiff attended at the Lenasia police station to lay a charge of domestic violence against her husband. Many of the facts which gave rise to the unlawful conduct were common cause. It was, for example, common cause that a police officer had threatened to arrest the plaintiff's daughter if the domestic violence charge was not withdrawn. It was not

*CANDIDATE: MR MPN MBONGWE*

contradicted that the plaintiff had been sworn at and assaulted by certain police officers. Yet none of this conduct by the police earned any rebuke from the candidate in the judgment. The candidate further denied the plaintiff's claim on a technical basis of pleading which is not fully or properly explained in the judgment.

**17. The candidate's potential**

- 17.1. It is inappropriate to speak of potential in respect of this candidate.
- 17.2. He has been in the professional practice of law since 1985 and has spent many years as the director of his own firm. He has acted as a judge for more than a year.
- 17.3. This is a lengthy period of time for the candidate to display his full legal development.

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

- 18.1. There are significant indications, apparent from the candidate's own judgments and before taking account of several complaints concerning the candidate's temperament and conduct as an acting judge, that the candidate is not a suitable candidate for judicial appointment.
- 18.2. By contrast, there is not anything particularly commendable in the applicant's application or in the judgments reviewed which would counter-balance these negative attributes.

*CANDIDATE: MR MPN MBONGWE*

- 18.3. A number of the qualities that one would expect from any judicial officer are not exhibited by this candidate, for the reasons set out above. The message which the appointment of this candidate would send to the community, particularly the legal community, would therefore regrettably be a negative one.

CANDIDATE: MR MPN MBONGWE

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

### **Reported decisions**

None noted

### **Unreported decisions**

*Naidoo v Minister of Police and Others (unreported judgment of the South Gauteng High Court, case no. 15245/2012 handed down on 13 November 2013)*

*Eskom Holdings Limited v Transdeco GTMH (Pty) Ltd and Another (163642013) [2014] ZAGPJHC 89 (7 March 2014)*

*Sheriff of the High Court, Johannesburg East v Chetty and Others; In Re: Firststrand Bank Limited T/A FNB Home Loans (Formerly First National Bank of Southern Africa Limited v Chetty and Another (2009/3673) [2014] ZAGPJHC 352 (27 March 2014)*

*Madimabe v Transdeco GTMH (Pty) Ltd and Others (11144/2013) [2014] ZAGPJHC 96 (1 April 2014)*

*Petlane Oils (Pty) Limited v Shell South Africa (Pty) Limited and Another (28016/2013) [2014] ZAGPJHC 97 (1 April 2014)*

*Mpisi Trading 74 (Pty) Limited v Member of the Executive Council for Agriculture, Rural And Social Development and Another (43864/2012) [2014] ZAGPJHC 231 (27 June 2014)*

*Phakisaworld Fleet Solutions (Pty) Ltd v Mulalo Touring Services and Others (unreported judgment of the Gauteng Local Division of the High Court, case no. 2011/21217 handed down on 2 September 2014)*

*Perregrine v City of Tshwane Metropolitan Municipal Authority (50816/14) [2014] ZAGPPHC 758 (8 September 2014)*

*Masindi v Road Accident Fund 2015 JDR 1282 (GJ)*

### **Judgments upheld on appeal**

None noted

*CANDIDATE: MR MPN MBONGWE*

**Judgments overturned on appeal**

None noted