

CANDIDATE: MR T P MUDAU

**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 degrees:

1.1.1. B Iuris (1987) (University of Venda);

1.1.2. LLB (1992) (University of Venda); and

1.1.3. LLM (2004) (RAU).

1.2. The candidate is currently a Regional Court Magistrate.

1.3. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

2.1. The candidate has presided as a magistrate since March 1992 and was promoted to senior magistrate with effect from April 1997. He was appointed as regional court magistrate during May 2005. The candidate has acted as a Judge of the High Court on a regular basis since 2012.

2.2. The candidate is a fit and proper person.

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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. He would advance the representation of black judges on the bench. However, in our submission there is a more pressing imperative to accelerate the appointment of women – of all races – to the bench.

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

4.1. We have found 4 reported judgments in the South African Criminal Law Reports which have been authored by the candidate. A further 35 unreported judgments appear online of which 29 have been authored by the applicant.

4.2. The candidate's judgments deal mostly with criminal law and only about a third of his judgments relate to other subjects. Clearly, it is important that the candidate should gain experience in other fields of law.

4.3. The candidate lists the following reported judgments to date:

4.3.1. *Nhlapo v S* 2012 SACR 358 (GSJ);

4.3.2. *Chuir and Another v S* 2012 SACR (GSJ);

4.3.3. *S v Mgibelo* 2013 (2) SACR 559 (GSJ);

4.3.4. *S v Tlale and Others* 2015 (1) SACR 88 (GSJ).

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- 4.4. *Nhlapo v S* 2012 SACR 358 (GSJ) concerns an appeal against the sentence of the appellant to 12 years imprisonment on a charge of robbery with aggravating circumstances. The appellant was sentenced to an effective 12 years imprisonment, the trial court having found that the age and “difficult upbringing” of the appellant constituted substantial and compelling circumstances which allowed a deviation from the mandatory minimum sentence of 15 years. On appeal the candidate found that the magistrate had erred in underestimating the role played by the appellant in the robbery and commented that the appellant was fortunate that the court a quo had found substantial and compelling circumstances existed. In the light of the prevalence of the crime in question, the candidate confirmed the sentence on appeal.
- 4.5. In *Chuir and Another v S* 2012 SACR (GSJ), an appeal against the sentence of two accused on charges of kidnapping and rape, the candidate confirmed the sentences of 25 years imprisonment which had been imposed by the court a quo. The candidate took into account the personal circumstances of the appellants and concluded that the magistrate was correct in not imposing a life term and commented on the constitutional rights to dignity, privacy and integrity in the context of the entitlement of women to the protection of these rights.
- 4.6. In *S v Mgibelo* 2013 (2) SACR 559 (GSJ) the candidate convicted the accused on charges of arson, attempted murder and premeditated murder on evidence which he states to be “in the main, circumstantial”. In his judgment the candidate appears to perform a thorough analysis of the

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evidence on which the conviction is based, which analysis is followed by the application of the relevant legal principles referred to by him in the judgment to the facts which he found to have been established in evidence. The judgment is reasoned.

- 4.7. *S v Tlale and Others* 2015 (1) SACR 88 (GSJ) deals with sentencing a gang of six accused pursuant to a spate of robberies executed by them “with military precision”. The candidate failed to find any substantial and compelling circumstances on which a deviation from the minimum prescribed sentencing could be based. The candidate commented that there is a need to emphasise the interests of the community rather than those of perpetrators of crime in imposing punishment to ensure that women in South Africa can be “free to lead normal lives” unaffected by crime.

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

- 5.1. The candidate has demonstrated in his judgments in both *Chuir* and *Tlale* (*supra*) that he is particularly cognisant of the rights of women. Given the paucity of judgments dealing with other aspects of the Constitution, it is difficult to assess the candidate’s commitment to the values of the Constitution with reference to his other judgments. We note that the candidate specialised in international law in his dissertation for the LLM degree.

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6. Whether any judgments have been overturned on appeal

6.1. No judgment of this candidate could be found which has been overturned on appeal.

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

7.1. The candidate has been a magistrate in excess of 20 years and has regularly acted as a Judge in the High Court of the Gauteng Divisions.

7.2. The candidate appears to have largely gained experience in the field of criminal law and less than one third of his unreported judgments relate to other areas of the law while his 4 reported judgments all relate to criminal law. None of the candidate's judgments that relate to other areas of the law appear to have raised issues that are particularly complex and it is, therefore, not possible to assess from these judgments whether the candidate possesses the necessary skills to deal with complex issues of law and fact in fields other than criminal law.

8. The candidate's linguistic and communication skills

8.1. The candidate's judgments are in English and his command of the English language appears on the whole to be adequate. We note in this regard that it may be that judgments that deviate from this standard might be as a result of errors in typing which were regrettably not picked up or corrected. We refer, for example to *Du Toit v Sebakeng* 2015 JDR 0453 (GP) at paras 12-13, *Butsana Textile Services CC v National*

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Treasury 2015 JDR 0647 (GP) at paras 17 and 19, and *Mbovane v Minister of Police* 2013 JDR 2541 (GSJ) at para 18.

9. The candidate's ability to produce judgments promptly

9.1. The candidate lists six outstanding judgments in his application. Five of these judgments are outstanding since July 2015 and one since August 2015. There is no explanation in the application itself why there are 5 outstanding judgments since July 2015, in view of the fact that the candidate is an acting judge.

9.2. It is suggested that the candidate be given an opportunity to explain these outstanding judgments and to indicate whether any judgments have in fact subsequently been handed down.

10. The candidate's fairness and impartiality

10.1. A review of the candidate's judgments does not provide any reason to doubt his fairness and impartiality.

11. The candidate's independent mindedness

11.1. The candidate has not hesitated to apply the principle that proof of exceptional circumstances in bail proceedings cannot be set so high that even where the interests of justice require that an accused be released on bail, it must be refused.

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- 11.2. The decision of *S v Nkambule* (A134/13) is referred to extensively in *Commentary on the Criminal Procedure Act*, Du Toit et al, in this regard.
- 11.3. We emphasise that the candidate has had limited exposure to other areas of the law. This makes it difficult to assess how the candidate would apply the Constitution on contentious questions implicating the doctrine of separation of powers.

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

- 12.1. In the course of preparing this review, we have received two adverse comments concerning the candidate from members of the Bar in relation to the manner in which the candidate presided over the urgent court when acting as a Judge. One member commented:

"[Mr Mudau] presided over urgent court a couple of weeks ago and he clearly didn't have a proper understanding of how that court usually runs or alternatively he didn't have the energy to put in the work necessary. He was clearly not interested in hearing most of the applications and simply got rid of them by saying they were not urgent. One counsel for a respondent in a custody/contact matter involving small children tried to hand up an answering affidavit in an urgent application that had only recently been served on them and he refused point blank to hear her and to accept the affidavit".

- 12.2. Another member recounted an event not dissimilar to the above, also related to the manner in which the candidate had run the urgent court a

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few weeks ago. It was reported to us that in a relatively simple commercial matter that had been brought on a semi-urgent basis, the candidate heard full argument on the merits only to strike the application as not being urgent and in circumstances in which it appeared that he was simply unwilling or possibly unable to deal with the merits. While dismissal for want of urgency on its own is not a ground for objection, it is significant to note that the Deputy Judge President subsequently granted the same matter a special allocation for argument on the merits on an expedited basis, obviously with due appreciation of the need to dispose of the matter.

12.3. These comments give rise to reservations about the ability of the candidate to handle proceedings in the urgent court and about his work ethic. It is imperative that matters that are genuinely urgent are dealt with as such and are not struck from the role simply in order to lighten the judicial officer's workload.

13. The candidate's administrative ability

13.1. The candidate has in his capacity as magistrate for several years overseen staff members and also in his private capacity acts in positions as deacon of his church and member of the governing body of the Rand Park Primary and subsequently, High Schools.

13.2. These positions of responsibility suggest that the candidate possesses the required administrative capabilities.

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

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14.1. It appears that the candidate has a reputation for integrity and ethical behaviour.

14.2. No adverse comments have been received.

15. The candidate's judicial temperament

15.1. Save for the comments mentioned above, we have not received complaints about the temperament of the candidate.

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 commitment to the rights and freedoms of women has been highlighted in the analyses of the judgments referred to above.

16.2. The candidate further displays an awareness of the vulnerability of women to crime and the needs of the community at large to be protected against the effects thereof.

17. The candidate's potential

17.1. The candidate's experience as a magistrate gained over a period in excess of 20 years is a valuable asset; however this experience appears to be mainly within the sphere of criminal law.

17.2. It is plain that the candidate has potential. However, the candidate is short on experience in different fields of law. It would be of benefit for the candidate to gain additional experience in other areas of law.

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

- 18.1. The candidate is a black man and thus, while his appointment would contribute towards transformation of the judiciary, it would not improve gender representation in the judiciary.
- 18.2. The candidate does not display outstanding positive attributes which would compensate for the negative aspects identified above. Some of his more questionable attributes, including his lack of breadth of legal knowledge and experience, would not send out a positive message to the community.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Nhlapo v S 2012 SACR 358 (GSJ)

Chuir and Another v S 2012 SACR (GSJ)

S v Mgibela 2013 (2) SACR 559 (GSJ)

S v Tlale and Others 2015 (1) SACR 88 (GSJ)

Unreported decisions

S v Munyai 2015 JDR 0121 (GP)

S v Mtyala 2015 JDR 0178 (GP)

S v Mahlangu 2015 JDR 0179 (GP)

S v Msibi 2015 JDR 0193 (GP)*

S v Yaka 2015 JDR 0195 (GP)

S v Coetzee 2015 JDR 0198 (GP)*

Law Society of the Northern Provinces v Lourens 2015 JDR 0227 (GP)

Qondo v Road Accident Fund 2015 JDR 0399 (GP)

S v Mallock-Brown 2015 JDR 0433 (GP)

Global House of Accounting (Pty) Ltd v Steyl 2015 JDR 0444 (GP)*

Du Toit v Sebakeng 2015 JDR 0453 (GP)

S v Bashford 2015 JDR 0606 (GP)

Butsana Textile Services CC v National Treasury 2015 JDR 0647 (GP)

S v Ngwepe 2015 JDR 1271 (GP)*

S v Moremi 2015 JDR 1323 (GP)*

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S v Malinga 2015 JDR 1398 (GP)*

S v Modiba 2013 JDR 0255 (GSJ)

S v Elongo 2013 JDR 0388

S v Cele 2013 JDR 0691 (GSJ)

S v Nkambule 2013 JDR 1001 (GSJ)

S v Mvelase 2013 JDR 1066 (GSJ)

S v Zakwe 2013 JDR 1169 (GSJ)

S v Mgibelo 2013 JDR 1729 (GSJ)

S v Willemse 2013 JDR 2064 (GSJ)

Nedbank Limited v Potgieter 2013 JDR 2290 (GSJ)

S v Masinga 2013 JDR 2295 (GSJ)

Du Plessis v Letsheko 2013 JDR 2404 (GSJ)

S v Swart 2013 JDR 2491 (GSJ)

CE v VE 2013 JDR 2492 (GSJ)

Mbovane v Minister of Police 2013 JDR 2541 (GSJ)

Jozela v Minister of Police 2013 JDR 2550 (GNP)

S v Madonsela 2012 JDR 0693 (GSJ)

S Ramanyai 2012 JDR 0695 (GSJ)

S v Tobela 2012 JDR 0696 (GSJ)

S v Nhlapo 2012 JDR 0737 (GSJ)

Jagiban v Porthen 2012 JDR 0741 (GSJ)

S v Mathobela 2012 JDR 0746 (GSJ)

* These judgments were judgments in which the candidate concurred but which were not authored by him.

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Judgments upheld on appeal

None of the judgments by this candidate has been taken on appeal.

Judgments overturned on appeal

Not applicable.

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