

**CANDIDATE: JUDGE BM MBHA**

**COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL**

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

1.1 The candidate has the following degrees and qualifications:

1.1.1 B.Juris (1981, University of Fort Hare);

1.1.2 LLB (1985, University of Witwatersrand);

1.1.3 Advanced Diploma in Labour Law (1996, University of Johannesburg);

1.1.4 Diploma in Tax Practice (1999, University of Johannesburg);

1.1.5 Advanced Military Law course (2003, SANDF); and

1.1.6 LLM (Tax) (2010, University of Johannesburg)

1.2 The candidate is appropriately qualified.

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

2.1 There is nothing in the candidate's application or to our knowledge suggesting he is not a fit and proper person.

2.2 A review of his judgments and information in the public domain provides no indication that he is unfit for the position applied for.

**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 (African) man.

3.2 Currently, the Supreme Court of Appeal comprises twenty members, consisting of five black women, nine black men, two white women and four white men. Fifteen members are men (four are white and eleven black) and seven are women (two white and five black).

3.3 All the shortlisted candidates for the Supreme Court of Appeal for the present JSC sitting are men. This may well be a reflection of the fact that women are relatively poorly represented on the benches of the various High Courts.

3.4 Whilst the appointment of a male candidate – which is unavoidable in the present round of appointments – will not advance the cause of gender representation, the reviewers do not, in the light of the current racial composition of the Supreme Court of Appeal, consider the candidate's race to be material.

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

4.1 The candidate appears to have experience in a number of areas of law.

4.2 He describes his work as a professional assistant at Bowman Gilfillan Attorneys as “*involvement in all forms of litigation at both Magistrate and Supreme Court level, and specialising in*

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*corporate litigation in the Supreme Court”.*

4.3 He operated his own attorneys firm for 13 years. He states that the firm practised in “*commercial law, matrimonial law, labour law, tax law and litigation, mediation and arbitration and civil litigation.*”

4.4 The candidate has completed an advanced diploma in Labour law, an advanced military law course, a diploma in tax practice, and a Master’s degree in tax law.

4.5 The candidate has handed down judgments that cover areas of tax law, constitutional law, administrative law, company law, contract law, and criminal law.

4.6 To the extent that the candidate deals with questions of constitutional law in his judgments, he shows a clear grasp of the applicable principles.

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

5.1 The candidate asserts that his commitment to constitutional principles is evident in the judgments that he hands down. In particular, he refers to the cases of *Governing Body, Rivonia Primary School and Another v MEC for Education, Gauteng Province and Others* 2012 (1) All SA 576 (GSJ) (where he emphasized the right of children to education) and *Baroque Medical (Pty) Ltd v Medtronic Africa (Pty) Ltd and Others* Case no. 1578/13 (GSJ) (unreported) (where he emphasized a person’s right to work and compete freely in the workplace).

5.2 In addition, a review of a sample of judgments handed down

by the candidate confirms his commitment to the values and principles of the Constitution. The candidate shows respect for, and careful consideration of, the provisions of the Constitution and constitutional jurisprudence.

5.3 The candidate's extra-curricular involvements show a commitment to the development of the judiciary. The candidate has been a member of the Committee of Continuing Legal Education for Judicial Officers (Johannesburg High Court) from 2012 to date and is currently the co-chairperson of the committee. The committee coordinates and runs continuing legal education for judges in the South Gauteng High Court.

5.4 The candidate participates in training and mentoring aspirant judges (i.e. candidates who have been identified for possible invitation to act as judges in the division). He has also conducted advocacy training workshops and seminars for the Law Society and the Johannesburg Bar as a member of the BLA Legal Education Centre.

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

6.1 *Giesecke and Devrient South Africa (Pty) Ltd v Tsogo Sun Holdings (Pty) Ltd* 2010 JDR 0566 (GSJ) was partly upheld on appeal. The SCA confirmed the approach of Mbha J that rulings on the admissibility of hearsay evidence in civil proceedings should be made at the end of the plaintiff's case. The SCA, however, overturned the judgment of Mbha J on the basis that "*the court a quo failed to exercise the discretion*

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*bestowed upon it by section 3(1)(c) [of the Law of Evidence Amendment Act 45 of 1988] properly.”*

6.2 *Income Tax case 11283 (2007) JDR 1095 (JSpCrt)* concerned the interpretation of the Income Tax Act 58 of 1962, and specifically whether deductions under section 11(a) of the Act fell under capital or revenue. Mbha J held that the appellant’s intention was to make a capital investment. In his reasoning, Mbha J held that the appellant acquired and held the shares “*as a capital investment*” and not as trading stock and, therefore, that the appellant was not entitled to a deduction in terms of section 11(a) of the Income Tax Act. Mbha J went on to say that even if the shares were acquired and held as part of a scheme of profit-making and were part of the appellant’s trading stock, “*the expense of the purchase of R300 million, incurred in 1994, cannot nevertheless be claimed as a deduction in the 1999 year of assessment*” because the appellant “*did not in the 1994 tax year and in the ensuing years take the expense into account, whether as opening stock, purchases or closing stock*”. The learned Judge held that “*it was imperative for [the appellant] to have claimed the deduction in its tax returns for the purpose of assessment in any given year, even if the shares were not sold in that year.*” Mbha J also made adverse findings pertaining to the credibility of witnesses, and declined to rely on their evidence. On appeal to the SCA in *Anglovaal Mining Ltd v Commissioner, SARS* [2010] 1 All SA 187 (SCA), 2010 (2) SA 299 (SCA), these findings were all held to be incorrect as they were based upon an incorrect summary of

the evidence, a failure to appreciate the facts and the documents, and an incorrect interpretation and application of sections 11 and 22 of the Income Tax Act. Most importantly, the SCA relied on the witnesses' evidence (in relation to which Mbha J had made adverse credibility findings) and found that there was no reason why the learned Judge should not have done so. Such a complete repudiation of the findings and conclusions of Mbha J's factual, credibility and legal findings calls into question his suitability as an appellate judge.

6.3 *Mokoena v Road Accident Fund* 2012 JOL 28219 (GSJ) concerned the interpretation of "serious injuries" within the meaning of section 17(1A) of the Road Accident Fund Act 56 of 1996. Mbha J found that the plaintiff had met the threshold of proving that he had sustained serious injuries and that there was no need for him to appear before a medical tribunal for the assessment of such injuries. The SCA overturned the decision, finding that in order for the court to consider a claim for general damages, the third party must satisfy the Fund, not the court, that his or her injury was serious.

6.4 A number of his judgments have also been upheld on appeal (see below).

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

7.1 The candidate was an articled clerk with R.N. Bhoolia Attorneys from 1983-1986. Thereafter he was a professional

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assistant with Bowman Gilfillan Attorneys from 1986-1990. The candidate started his own legal practice, B.H. Mbha Attorneys, and practiced from 1990-2003.

7.2 The candidate was a Senior Military Judge in the SANDF (reserve army) in 2003. Thereafter he was a judge in the Court of Military Appeals from 2007 to date.

7.3 The candidate was an Acting Judge in the Gauteng High Court (Pretoria and Johannesburg) from 1 October 2003 to 1 October 2004 and a permanently appointed judge in the Gauteng High Court (Johannesburg) from 1 October 2004. He was an Acting Judge in the Supreme Court of Appeal from October 2012 to May 2013.

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

8.1 The candidate's judgments are well-structured (although at times somewhat repetitive) and are generally competently written.

**9. The candidate's ability to produce judgments promptly**

9.1 Of the judgments provided and sourced, the rate of delivery varies between less than 1 month (9), 1-2 months (17), 2-3 months (5), 3-4 months (3), and 5.5months (2).

9.2 The candidate states that he has one outstanding judgment, *Gainsford NO and Others v Rees*. Judgment was reserved on 11 December 2013 after 18 days of hearing the case.

**10. The candidate's fairness and impartiality**

10.1 The candidate's judgments are well reasoned and considered. They suggest that he has a sound sense of fairness and acts impartially.

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

11.1 The candidate's judgments indicate that he is able to apply himself with due independence and impartiality in reaching his decisions.

11.2 He has made comments in his judgments that indicate that he is independently minded. These include statements in the *Rivonia Primary* case where he recommended that the Minister of Basic Education promulgate norms and standards for school capacity. These comments were made at a time when the Minister was facing criticism from civil society for failing to promulgate binding norms and standards for school infrastructure.

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

12.1 The candidate has had over 8 years of experience as a judge of the High Court and has had one year's experience as an Acting Judge in the Supreme Court of Appeal.

12.2 The candidate has sufficient experience to conduct proceedings in the Supreme Court of Appeal.

**13. The candidate's administrative ability**

13.1 The candidate's application does not specifically indicate his

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level of administrative ability. However, he was a council member of the Transvaal Law Society and is the co-chairperson of the Committee for Continuing Legal Education for Judicial Officers. In addition, he was an executive member of the Gauteng and South African National Boxing Control Commissions and an executive member and Vice-President (African region) of the World Boxing Association. He was appointed Commissioner for the International Boxing Organisation.

13.2 It would appear, therefore, that he should present with reasonable administrative experience.

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

14.1 The candidate's application does not indicate what his reputation for integrity and ethical behaviour is. No adverse comments have been received in this respect.

**15. The candidate's judicial temperament**

15.1 No adverse comments have been received in this respect.

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

16.1 Please see the comments regarding the candidate's commitment to the values of the Constitution, at paragraphs 5.1 and 5.2 above.

**17. The candidate's potential**

17.1 The reviewers believe that the candidate has potential.

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- 17.2 The candidate has considerable judicial experience and has dealt with cases in a number of areas of law.
- 17.3 His judgments are well reasoned and lucidly written. In addition, his judgments show that he is committed to the values of the Constitution.
18. **The message that the candidate's appointment would send to the community at large**
- 18.1 The appointment of an African candidate would reflect a commitment to racial equality in judicial appointments.

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

### **Reported decisions**

*Governing Body, Rivonia Primary School and Another v MEC for Education, Gauteng Province and Others* 2012 (1) All SA 576 (GSJ)

*Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ)

*S v Kolea* 2013 (1) SACR 409 (SCA)

*Nedbank v Master of the High Court, Witwatersrand Local Division, and Others* 2009 (3) SA 403 (W)

*Louw v SA Rail Commuter Corporation Ltd and Another* 2005 JDR 0711 (W)

*Income Tax Case 11283* (2007) JDR 1095 (JSpCrt)

*S v Sekgobela and Others* 2006 (2) SACR 309 (W)

### **Unreported decisions**

*Baroque Medical (Pty) Ltd v Medtronic Africa (Pty) Ltd and Others* Case no. 1578/13 (GSJ)

*Donald and Richard Curie (Pty) Ltd v Growthpoint Properties (Pty) Ltd* 2011 JDR 0432 (GSJ)

*XYZ CC v Commissioner for the South African Revenue Service* 2013 JDR 0352 (Tax)

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*S v Zondo 2013 JDR 0653 (SCA)*

*S v Mnisi 2013 JDR 0655 (SCA)*

*Louisvale Pirates v South African Football Association 2012 JDR 0739 (GSJ)*

*Nkosi v Minister of Safety and Security 2012 JDR 0870 (GSJ)*

*T M L Consultancy CC v The Commissioner for The South African Revenue Service 2012 JDR 1061 (TAX)*

*S v Jeki 2012 JDR 1551 (GSJ)*

*Strata Mining Supplies CC v Fourie 2012 JDR 1885 (GSJ)*

*Buena Vista Trading 15 (Pty) Limited v Gauteng Department of Roads and Transport 2012 JDR 2198 (GSJ)*

*S v Mudau 2012 JDR 2319 (SCA)*

*City of Johannesburg Metropolitan Municipality v International Parking Management (Pty) Ltd 2011 JDR 0127 (GSJ)*

*Standard Bank of South Africa Ltd v Margalit 2011 JDR 0790 (GSJ)*

*Seshoka v Road Accident Fund 2011 JDR 1164 (GSJ)*

*Specialised Utility and Management Services (Pty) Ltd v Dimant 2011 JDR 1165 (GSJ)*

*Specialised Utility and Management Services (Pty) Ltd v Dimant 2011 JDR 1165 (GSJ)*

*Guman NO v Ansari 2011 JDR 1166 (GSJ)*

*Lebeko v Road Accident Fund 2011 JDR 1167 (GSJ)*

*Smith v Road Accident Fund 2011 JDR 1858 (GSJ)*

*Mitchell v Road Accident Fund 2011 JDR 1859 (GSJ)*

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*Giesecke and Devrient South Africa (Pty) Ltd v Tsogo Sun Holdings (Pty) Ltd* 2010 JDR 0566 (GSJ)

*Mokoena v Road Accident Fund* 2012 JOL 28219 (GSJ)

*KRB Electrical Engineers v Jyoti Structures Africa (Pty) Ltd* 2010 JDR 0794 (GSJ)

*TWP Projects (Pty) Ltd v Old Mutual Life Assurance Company (South Africa) Ltd* 2010 JDR 0858 (GSJ)

*The Central Authority for the Republic of South Africa v OI* 2010 JDR 0967 (GSJ)

*Geodis Wilson South Africa (Pty) Ltd v ACA (Pty) Ltd* 2010 JDR 0976 (GSJ)

*Lob v Carribean Estates (Pty) Ltd* 2010 JDR 1019 (GSJ)

*Tactical Reaction Services CC v Beverley Estate II Homeowners' Association* 2010 JDR 1365 (GSJ)

*Donough v Road Accident Fund* 2010 JDR 1371 (GSJ)

*Lambert v The Road Accident Fund* 2010 JDR 1372 (GSJ)

*Nkosi v Road Accident Fund* 2009 JDR 0787 (GSJ)

*The Registrar of Medical Schemes v Solvita Medical Scheme* 2009 JDR 0788 (GSJ)

*Lushaka Investment (Pty) Ltd v National Home Builders Registration Council* 2009 JDR 0789 (GSJ)

*Income Tax Case No: 11286* 2007 JDR 1096 (JSpCrt)

*Keylite Chemicals v Harmony Gold Mining Ltd* 2007 JDR 1097 (W)

*Kahlberg v Road Accident Fund* 2007 JDR 1309 (W)

*S v Chabangu* 2006 JDR 0170 (W)

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*Oosterbroek v Josephes NO 2005 JDR 0700 (W)*

*B M W Financial Services (SA) (Pty) Ltd v Nolan and Another 2005 JDR 0702 (W)*

*Louw v The South African Rail Commuter Corporation Ltd and Another 2005 JDR 0711 (W)*

*Income Tax Case No 11398 2005 JDR 1161 (JSpCrt)*

### **Judgments upheld on appeal**

*Governing Body, Rivonia Primary School and Another v MEC for Education, Gauteng Province and Others 2012 (1) All SA 576 (GSJ)*  
upheld by the Constitutional Court

*Louw v SA Rail Commuter Corporation Ltd and Another 2005 JDR 0711 (W)*

*Donald and Richard Curie (Pty) Ltd v Growthpoint Properties (Pty) Ltd 2011 JDR 0432 (GSJ)*

### **Judgments overturned on appeal**

*Giesecke and Devrient South Africa (Pty) Ltd v Tsogo Sun Holdings (Pty) Ltd 2010 JDR 0566 (GSJ) (partly upheld on appeal)*

*Income Tax case 11283 (2007) JDR 1095 (JSpCrt)*

*Mokoena v Road Accident Fund 2012 JOL 28219 (GSJ)*