

CANDIDATE: JUDGE JBZ SHONGWE

POSITION FOR WHICH CANDIDATE APPLIES: ELECTORAL COURT

1. The candidate's appropriate qualifications

- 1.1. The candidate holds a BProc degree from the University of Zululand which he obtained during 1974.
- 1.2. The candidate was registered for the LLB degree at the University of Zululand during the period of 1975 – 1976. The final year of this degree was not completed due to political unrest.
- 1.3. The candidate has been awarded a Doctor of Laws degree (*Honoris Causa*) from the University of Venda during 2007.
- 1.4. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

- 2.1. Following the completion of articles of clerkship, the candidate was admitted, during 1979, as an attorney. The candidate then practised as a professional assistant for three years and thereafter practised for 20 years as an attorney for his own account. During this time the candidate specialised in human rights law amongst other areas of law.
- 2.2. The candidate has a long history of judicial service having:
 - 2.2.1. acted during 2000 and thereafter having been elevated to the bench of the North Gauteng High Court, Pretoria

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- (January 2001 to September 2005);
- 2.2.2. acting as a Judge of the Supreme Court of Appeal from February to June 2003 and acting as the Deputy Judge President of the North Gauteng High Court from August 2005 to October 2005;
 - 2.2.3. serving as the Deputy Judge President of the North Gauteng High Court from November 2005 to 2009; and
 - 2.2.4. serving as a Judge of the Supreme Court of Appeal from December 2009 to date.
- 2.3. The candidate's long and established career as a Judicial Officer, as well as as an attorney, and his commitment to human rights, indicate that he is a fit and proper person for judicial appointment to the Electoral Court.
- 2.4. Neither the application nor the judgments accompanying it suggest that the candidate is not a fit and proper person. No adverse comments or professional complaints have been received.
- 2.5. The candidate's family links to the current President (referred to below), however, should be considered in light of this being an appointment to the Electoral Court.
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. The candidate is seeking appointment to the Electoral Court

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which currently has a majority composition of Judges and Members from previously disadvantaged backgrounds.

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

4.1. The candidate practiced law since admission as an Attorney in 1979 until 2000. During this period the candidate records that he specialised in human rights amongst other areas of law. It is unclear what these areas of law refer to.

4.2. The candidate acted as a Judge of the South Gauteng High Court during 1999 to 2000 and was elevated to the bench as a permanent Judge of the North Gauteng High Court during January 2001. Thereafter, he was the Deputy Judge President for the North Gauteng High Court from 2005 until his elevation to the Supreme Court of Appeal during 2009.

4.3. To date, and since December 2009, the candidate has been a Judge of the Supreme Court of Appeal.

4.4. As such, it is accepted that the candidate has the requisite knowledge of the law.

4.5. The judgments listed by the candidate in his application have been considered as well as further judgments handed down by the candidate.

4.6. The candidate has written several judgments dealing with civil matters:

4.6.1. *in Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading*

(Pty) Ltd and Another 2011 (1) SA 8 (SCA), the candidate wrote a judgment in which the approach to lower courts to disputes of fact were set out. In his judgment, the candidate highlighted the fact that courts should, in deciding disputes of fact, be cautious of deciding the probabilities on the face of conflicting affidavits. This is because, as the candidate emphasised, affidavits are settled by legal advisors of varying degrees of experience and skill, and a litigant should not pay the price for his advisor's shortcomings; and

4.6.2. in *Arendsnes Sweefspoor v Botha* 2013 (5) SA 399 (SCA), a judgment provided in the candidate's application, the candidate dealt with the notion of substantial compliance with the Uniform Rules of Court in effecting service on a close corporation.

4.7. The candidate has also handed down the following dissenting judgments in the SCA:

4.7.1. *Lombaard v Droprop CC and Others* 2010 (5) SA 1 (SCA), in which Heher JA and the candidate differed from the majority (Navsa, Malan and Mhlantla) as to when a matter brought on application should be referred to oral evidence.

4.7.2. *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others* 2011 (3) SA 148 (SCA), in which the candidate dissented from the majority decision of Mpati P, Lewis JA, Mhlantla JA and Ebrahim AJA.

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The matter involved the interpretation of a statute and required application of constitutional principles. The decision of the majority was overturned on appeal to the Constitutional Court.

4.8. In recent constitutional matters:

4.8.1. the candidate concurred in the unanimous decision of the SCA in *General Council of the Bar and Another v Mansingh and Others* 2013 (3) SA 294 (SCA), which considered whether the President of the Republic of South Africa has the power in terms of the Constitution of the Republic of South Africa to confer the status of senior counsel on an advocate. The decision was upheld on appeal to the Constitutional Court.

4.8.2. the candidate also concurred in the judgment in *Governing Body, Rivonia Primary School and Another v MEC for Education, Gauteng Province and Others* 2013 (1) SA 632 (SCA) in which the court had to decide who had the power to determine a school's capacity: the governing body or the Gauteng Department of Education in terms of the South African Schools Act 84 of 1996. This decision was partially upheld on appeal to the Constitutional Court.

4.9. The candidate has written a number of judgments developing and applying criminal law, procedure and evidence:

4.9.1. in *S v Bruintjies* 2003 (2) SACR 575 (SCA), the candidate, whilst acting in the SCA, was responsible for

writing the judgment of the court. The case concerns the test to be applied for bail pending appeal, following conviction, in relation to a conviction of a Schedule 6 offence under the Criminal Procedure Act 51 of 1977;

4.9.2. in *S v Mahlangu and Another* 2011 (2) SACR 164 (SCA) the candidate wrote the judgment for the court. This case concerned an appeal against the appellant's conviction and sentence for contravention of section 3 of the Corruption Act 94 of 1992. The appellants were police officers who had allegedly, during the course of a homicide investigation, demanded a sum of money for the withdrawal of a criminal case. The court dismissed the appeal and emphasised that corruption is a serious offence especially when committed by police officers for the purposes of sentencing (paragraphs 25 and 26 of the judgment);

4.9.3. in *S v Combrink* 2012 (1) SCAR 93 (SCA), the court dealt with the both the principle of *dolus eventualis* and sentencing. In this matter a farmer had fired two shots at an unidentified person who died as a result thereof. In relation to the sentence to be imposed, the court emphasised that, without suggesting that the murder was racially motivated, that courts must be sensitive and conscious to cases where the facts appear have racial and discriminatory connotations. In this regard, public interest is a factor to be taken into account when sentence is imposed. The candidate further noted that the public

interest and discrimination are not necessarily between black and white people but rather between people in general who perceive others, with prejudice, to be inferior or different; and

- 4.9.4. the candidate has also handed down a judgment, whilst sitting as a Judge of the Supreme Court of Appeal, dealing with the imprisonment of juvenile offenders and the constitution: *S v BF* 2012 (1) SACR 298 (SCA). This judgment concerned an appeal of a convicted juvenile offender who had been sentenced to 25 years imprisonment for robbery with aggravating circumstances and rape. The court emphasised that the attention to be given by a court in imposing sentence on a juvenile offender is not to be done in a vacuum. The seriousness of the offence and its impact on the victim must be taken into account. The court also emphasised the role that section 21(1)(g) of the Constitution plays in such sentencing. The appellant's sentence was reduced.

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

- 5.1. The candidate has demonstrated a strong commitment to the values of the Constitution during his time on the bench. This is emphasised in the candidate's judgments.
- 5.2. The candidate is an executive committee member of the Black Lawyer's Association and a member of the International Association of Refugee Law Judges.
- 5.3. The candidate's commitment to the values of the Constitution

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is complimented by the candidate's award of excellence from the Gauteng Law Council for recognising the candidate's contribution to the Attorney's profession particularly in defending and protecting the human rights of the underprivileged and the poor.

- 5.4. There is nothing to indicate that the candidate is not committed to the values of the Constitution.

6. Whether any judgments have been overturned on appeal

- 6.1. As noted, in paragraph 4.8.2 above, the decision in *Governing Body, Rivonia Primary School and Another v MEC for Education, Gauteng Province and Others* 2013 (1) SA 632 (SCA) was only partially upheld on appeal to the Constitutional Court.

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

- 7.1. The candidate has had extensive professional experience as an attorney having practised for 22 years (20 of which were on his own account). The candidate also has extensive judicial experience, having served as a permanent High Court Judge, Deputy Judge President, and Judge of the Supreme Court of Appeal.
- 7.2. The candidate has further been actively involved, since 2004, in the mentoring of aspirant and newly appointed judges. In this regard the candidate is a member of the faculty which provides training to newly appointed judges.

8. The candidate's linguistic and communication skills

8.1. The candidate is fluent in English and his judgments are well written.

9. The candidate's ability to produce judgments promptly

9.1. The candidate has no judgments outstanding.

10. The candidate's fairness and impartiality

10.1. There is nothing to suggest that the candidate is not fair or impartial.

10.2. No adverse comments have been received.

11. The candidate's independent mindedness

11.1. There is nothing to suggest that the candidate is not independently minded. Examples of his independence include:

11.1.1. the dissenting judgments written in the SCA, referred to above;

11.1.2. the candidate heard the urgent application by Mr Jacob Zuma (as he was then) in September 2003 to gain access to documents which allegedly implicated him in the arms deal. According to available media reports, the candidate dismissed the application for lack of urgency.

11.1.3. the candidate was one of three judges who heard the matter of *African National Congress v Congress of the People and Others* 2009 (3) SA 72 (T), in which the ANC sought to interdict COPE from using the phrase

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“Congress of the People” in its name. The candidate concurred with the majority dismissing the application.

12. The candidate’s ability to conduct court proceedings

12.1. The candidate has a wealth of judicial experience in presiding over numerous proceedings as a permanent High Court Judge, Deputy Judge President as well as sitting as a Judge of the Supreme Court of Appeal.

12.2. No adverse comments have been received.

13. The candidate’s administrative ability

13.1. The candidate has considerable administrative experience having been the acting Deputy Judge President, and thereafter as the Deputy Judge President for the North Gauteng High Court.

13.2. Further, the candidate has been the Deputy Chairperson of the Carletonville Attorney’s Association, during 1997, and has been appointed the Chairperson of the National Archives Advisory Council and is a member of the International Association of the Refugee law Judges. The candidate is also a member of the Black Lawyer’s Association and was elected an Executive Committee Member in 1998.

13.3. No adverse comments have been received.

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

14.1. A complaint against the candidate was allegedly made to the JSC by Billy Masetlha – the allegation being that the

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candidate and a fellow judge removed documents from an appeal record. There does not appear to have been any adverse finding made.

14.2. No other adverse comments have been received.

15. The candidate's judicial temperament

15.1. No adverse comments have been received.

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

16.1. From the cases detailed above, it is apparent that the candidate has a commitment to human rights.

16.2. Furthermore the candidate's membership with the International Association of the Refugee Law Judges and the Black Lawyer's association reflect the candidate's commitment to human rights.

17. The candidate's potential

17.1. The candidate has extensive judicial experience and will bring value to the Electoral Court.

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

18.1. The appointment is likely to send a positive message to the community at large.

18.2. The candidate is from a previously disadvantaged background who had practiced as an Attorney before accepting an

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appointment to the Bench. He was the Deputy Judge President of one of the busiest courts in the country and has served as an appeal judge of the Supreme Court of Appeal (which position the candidate currently holds).

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

S v Bruintjies 2003 (2) SACR 575 (SCA)

S v Mathoho: In Re Da Silva Pressegueiro v Tshinanga 2006 (1) SACR 388 (T)

Meintjes v Coetzer and Others 2010 (5) SA 186 (SCA)

Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another 2011 (1) SA 8 (SCA)

S v Kruger 2012 (1) SACR 369 (SCA)

S v Combrink 2012 (1) SCAR 93 (SCA)

S v Mahlangu and Another 2011 (2) SACR 164 (SCA)

S v BF 2012 (1) SACR 298 (SCA)

Director of Public Prosecutions, North Gauteng, Pretoria v Thusi and Others 2012 (1) SACR 423 (SCA)

Fourie and Another NNO v Edkins 2013 (6) SA 576 (SCA)

Arendsnes Sweefspoor CC v Botha 2013 (5) SA 399 (SCA)

S v Makgatho 2013 (2) SACR 13 (SCA)

S v Matshiva 2014 (1) SACR 29 (SCA)

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S v EN 2014 (1) SACR 198 (SCA)

Lombaard v Droprop CC and Others 2010 (5) SA 1 (SCA)

South African Airways (Pty) Ltd v Aviation Union of South Africa and Others 2011 (3) SA 148 (SCA)

General Council of the Bar and Another v Mansingh and Others 2013 (3) SA 294 (SCA)

African National Congress v Congress of the People and Others 2009 (3) SA 72 (T)

Governing Body, Rivonia Primary School and Another v MEC for Education, Gauteng Province and Others 2013 (1) SA 632