

CANDIDATE : JUDGE TREVOR RICHARD GORVEN

APPLICANT: JUDGE TREVOR RICHARD GORVEN

COURT FOR WHICH APPLICANT APPLIES: SUPREME COURT OF APPEAL

1 The candidate's appropriate qualifications

1.1 The candidate holds the following academic qualifications:

1.1.1 BA – University of KwaZulu-Natal – 1976;

1.1.2 LLB – University of KwaZulu-Natal – 1978;

1.1.3 Certificate in Theology – St John's College, Nottingham, United Kingdom – 1985;

1.1.4 BTh – University of South Africa – 1986; and

1.1.5 Certificate in Labour Law – University of Natal – 1994.

1.2 The candidate has worked in the following capacities in the legal field.

1.2.1 Public Prosecutor – Department of Justice December - 1978 to 31 January 1980;

1.2.2 Advocate – KwaZulu-Natal Bar - 1 December 1988 to 16 November 2008; and

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1.2.3 Judge of the High Court, KwaZulu-Natal - 17 November 2008 to date.

1.3 The reviewers consider that the candidate is appropriately qualified and experienced for appointment as a Judge of the SCA.

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

2.1 The candidate has extensive experience in the legal field, having worked as a public prosecutor for about a year, as an advocate for approximately 20 years and as a permanent Judge of the High Court for almost 10 years.

2.2 The reviewers are unaware of any complaints:

2.2.1 lodged with the General Council of the Bar of South Africa or the Society of Advocates of KwaZulu-Natal in respect of the candidate during his tenure as an advocate; or

2.2.2 lodged with the Judicial Service Commission in respect of the candidate during his tenure as Acting Judge or Judge of the High Court.

2.3 There is nothing in the candidate's application or the judgments considered by the reviewers that suggests that the candidate is not a fit and proper person.

2.4 On the contrary, the application and judgments provide strong support for the conclusion that he was a fine practitioner and is a fine jurist.

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

3.1 Currently, the SCA comprises of twenty-two permanent Judges. Five are black women, eleven are black men, one is a white woman and five are white men.

3.2 It is apparent, therefore, that while strides have been taken to address racial representivity, the Court is not representative of either the racial or gender composition of South Africa. In particular, gender representivity still lags behind. While a positive step was taken in the appointment of a black woman as the President of the SCA, there remains a significant gender imbalance in the ranks of permanent Judges of the SCA.

3.3 The candidate is a white man. His appointment to the SCA would not enhance the racial or gender composition of that Court.

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

4.1 The candidate has served as a Judge of the High Court for almost a decade. The candidate has an enviable breadth of knowledge about different aspects of the law. His judgments demonstrate a subtle understanding of various areas of the law.

4.2 The candidate's judgments are detailed, balanced and thoroughly researched. The candidate cites considerable case law in support of his decisions. The candidate is especially well versed in the rules of interpretation, which results in clear and comprehensive judgments.

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Furthermore, his application of the law to the facts of each case is generally clear and concise.

4.3 The reported judgments considered by the reviewers show that the candidate is able to consider and determine complex factual disputes and applies considerable case law and academic work in the preparation of his judgments. See, for example, *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 (1) SA 103 (KZP); *Ex Parte Arntzen (Nedbank Ltd as intervening creditor)* 2013 (1) SA 49 (KZP); *PMG Motors Kyalami (Pty) Ltd and Another v Firstrand Bank Ltd Wesbank Division* 2015 (2) SA 634 (SCA); *Premier Foods (Pty) Ltd v Manoim and Others* 2016 (1) SA 445 (SCA) and *Standard Bank of South Africa Ltd v Hales and Another* 2009 (3) SA 315 (D).

4.4 Of the judgments considered by the reviewers, the following table reflects the areas of law concerned:

Field of Law	Cases
Administrative Law	2
Civil Procedure	6
Contract Law	1 (NCA), 1
Criminal Law	4

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Competition Law	1
Law of Delict	1
Company law / Insolvency	3
Property Law	2
Other (Interpretation)	5

4.5 The reviewers consider the candidate’s knowledge of the law to be suitable for his appointment as a Judge of the SCA.

4.6 Indeed, considered on the strength of his experience and expertise, the candidate’s knowledge of the law and commitment to applying it in a manner that gives effect to constitutional values would strongly commend his appointment.

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

5.1 The candidate appears to have played a significant role in the development and training of junior, female colleagues at the KwaZulu-Natal Bar, including Andrea Gabriel SC, during her early years as an advocate. She commends him for his generosity, having “*always had time to assist [her] and debate through aspects of a brief that [] perplexed [her]*”.

5.2 In addition, his employment at the YMCA, membership of Nadel, participation in Bar affairs (including the training of pupils) and

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application of constitutional rights and values in his judgments indicates to the reviewers that the candidate has a deep commitment to the peoples of this country and the values of its Constitution.

6 Whether any judgments have been overturned on appeal

6.1 The candidate has delivered a great many judgments.

6.2 Of these, the candidate has delivered few judgments that have been overturned on appeal. All such judgments pertain to criminal matters where the candidate, sitting together with another Judge, refused to uphold or partially upheld appeals from the Regional Magistrate's Court. Two such judgments are of concern to the reviewers as they involved serious misapplications of law resulting in unfair sentences for the convicted persons:

6.3 *Ngcamu and Another v S* 2011 (1) SACR 1 (SCA)

The appellants had been convicted in the regional court, Durban, on one count of robbery with aggravating circumstances, two counts of attempted murder and two counts of unlawful possession of firearms.

The appellants appealed to the KwaZulu-Natal High Court, Pietermaritzburg (Gorven J and Pillay AJ) against their convictions and sentences. The appeal succeeded partially. The convictions and sentences in respect of robbery with aggravating circumstances and attempted murder were confirmed but the convictions for the possession of firearms were set aside because sections 4 and 5 of

the Firearms Control Act 60 of 2000 had not come into effect at the time of the incidents.

On further appeal to the SCA, the appellate court refused the appeal against the convictions on the counts of robbery with aggravating circumstances and one of the attempted murder convictions. However, the SCA found that there was no evidence to sustain the second count of attempted murder as the victim had testified that the shots fired were not directed at him.

The SCA therefore set aside one of the convictions of attempted murder against the appellants.

6.4 *Scott and Others v S* [2011] ZASCA 121

The appellants (Scott and the brothers Beaton) appeared in the Durban Regional Court on charges of the murder of Mostert and the attempted murder of Meyer. The regional magistrate had found, on the basis of the evidence of eyewitnesses and Dr Bana, the pathologist who conducted a post-mortem examination on the deceased, that Scott had stabbed the deceased to death and that another, Singh, had stabbed Meyer. Scott and the Beatons were convicted as charged.

An appeal to the KwaZulu-Natal High Court (Gorven J and Luthuli AJ) against these convictions and sentences was unsuccessful. The Court found that the magistrate had not misdirected himself and confirmed the convictions and sentences.

The SCA upheld the findings and approved the magistrate's decision to convict Scott. However, the SCA set aside the convictions and sentences of the Beatons on the basis of common purpose because there was no evidence proving that they had associated themselves with the commission of the offences apart from the fact that they were with Scott and Singh when the offences were committed.

The SCA therefore found the Beatons not guilty but upheld the conviction of Scott.

6.5 *S v Mchunu* 2013 JDR 2103 (SCA)

The candidate formed part of a quorum of the appellate court, whose decision was appealed to the SCA. On 25 May 1999 the appellants were convicted on charges of murder and robbery with aggravating circumstances and sentenced to 55 and 50 years' imprisonment.

On 10 February 2012 the appellants appealed to the full bench of what was then known as the Natal Provincial Division. The appellate court, Gorven J concurring, increased the sentences of the appellants to life imprisonment on both counts of murder. The appellate court directed that the appellants serve a minimum period of 20 years' imprisonment before being eligible for parole. In fixing the non-parole period, the appellate court relied on section 276B of the Criminal Procedure Act 51 of 1977. However, that provision was not in operation at the time of commission of the offences.

In setting aside the finding of the appellate court, the SCA referred to the well-established principle set out in *R v Mazibuko* 1958 (4) SA 353 (A) that the liability for a penalty arises when the crime is

committed and not when a person is either convicted or sentenced. It found that an increase in penalty will ordinarily not operate retrospectively in circumstances where that additional burden did not apply at the time when the offence was committed.

In the absence of special circumstances, recognised in our law, which would permit a departure from the general principle that sets its face against the retrospective operation of a penalty, the SCA found that the decision of the court below was incorrectly made.

6.6 *S v Dlamini* 2012 (2) SACR 1 (SCA)

This case concerned an appeal to the SCA to reduce an effective sentence of 43 years' imprisonment imposed on the appellant on three counts of robbery arising from the same incident in 2002 and two unrelated charges for the unlawful possession of a firearm and ammunition. The question before the SCA was whether there had been duplication of convictions. The SCA applied the principles in *S v Maneli* 2009 (1) SACR 509 (SCA) and found that there was in substance a single offence. The SCA found that presiding officers have a duty, not discharged in this case, to satisfy themselves that there is no duplication of offences when sentencing an accused.

The SCA found that the High Court was incorrect to conclude that the sentences, even if viewed individually, should run consecutively and that the offence was sophisticated, justifying the severest sentence, since there was no evidence to support the inference. The reasoning of the High Court had been flawed. The SCA reduced the

appellant's sentence to an effective 17 years' imprisonment, taking into account that the appellant had served 1 year in prison.

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

7.1 During his time at the KwaZulu-Natal Bar, the candidate was involved as a member (and, for a period, executive member of the Pietermaritzburg branch) of the National Association of Democratic Lawyers (Nadel), as a Bar Council committee member, Pupillage Coordinator and Chairperson of the Pietermaritzburg branch of the Society of Advocates of KwaZulu-Natal.

7.2 He has considerable professional experience as a public prosecutor, as as a junior and senior advocate and as a Judge of the High Court. (It appears that the candidate practised as junior counsel for some 27 years and as senior counsel for some three years before his appointment to the Bench.).

7.3 The candidate's contribution to the legal profession is substantial.

7.4 The reviewers consider that the candidate has more than adequate experience to merit a position on the SCA Bench.

8 The candidate's linguistic and communication skills

8.1 The candidate's judgments are penned in English and demonstrate that he is a fluent and elegant writer with a strong command of the language.

8.2 The judgments considered by the reviewers show that the candidate has the ability to –

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- 8.2.1 distil the issues in dispute;
 - 8.2.2 apply the relevant principles of law to the material facts;
 - 8.2.3 determine the disputed issues; and
 - 8.2.4 articulate his reasoning clearly and persuasively.
- 8.3 In addition, the candidate is able to articulate complex legal principles (that span various disciplines) in understandable terms.

9 The candidate's ability to produce judgments promptly

- 9.1 The candidate has no outstanding judgments or part-heard matters and appears to manage his work load efficiently.
- 9.2 His judgments appear to have been delivered within an admirably short period following the hearings.

10 The candidate's fairness and impartiality

- 10.1 The candidate's fairness and impartiality are demonstrated in his judgments, which resonate with humanity and a determination to do justice to the parties. See, for example, *Prefix Properties (Pty) Ltd and Others v Golden Empire Trading 49 CC and Others* 2011 (2) SA 334 (KZP). There is nothing in the candidate's application or elsewhere to suggest that he does not perform his duties as a judicial officer with fairness and impartiality.
- 10.2 No adverse comments have been received regarding the candidate's fairness or impartiality.

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10.3 The candidate is highly regarded as a Judge. Counsel who appear before him have reported that the candidate treats all before him in a fair manner.

11 **The candidate's independent mindedness**

11.1 Equally, the candidate's independence is demonstrated in his judgments. There is nothing in the candidate's application or judgments that would suggest that the candidate does not bring an open and independent mind to his work as a Judge of the High Court.

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

12.1 The candidate has numerous reported and unreported cases. The candidate appears to have conducted proceedings efficiently and delivered judgments timeously.

12.2 See, in addition, his evident proficiency in interpreting and applying the Uniform Rules of Court in judgments such as *Potpale Investments (Pty) Ltd v Mkhize* 2016 (5) SA 96 (KZP).

13 **The candidate's administrative ability**

13.1 The candidate has held and holds several positions of leadership of bodies and committees, within and outside the legal profession, whilst managing a demanding professional life.

13.2 The candidate is known as a Judge who prepares diligently for hearings and has a thorough knowledge of the records of proceedings before him. This evinces his administrative ability, managing a

heavy case load and yet remaining on top of the facts of the matters that serve before him.

14 The candidate's reputation for integrity and ethical behaviour

14.1 The candidate has been described as demonstrating, throughout the course of his career, an "*unwavering commitment to the ethics of the profession*".

14.2 The reviewers know of nothing that detracts from this description.

15 The candidate's judicial temperament

15.1 The candidate has been described as a "*fair and decent*" presiding officer, despite the burdensome workload at the Bench.

15.2 The reviewers know of nothing that detracts from this description.

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 values of the Constitution is demonstrated in the manner he discharges his duties as a judicial officer.

16.2 For example, in November 2017, a case served before him concerning the right of children to basic education. The case concerned impoverished learners from far-flung rural schools in KwaZulu-Natal who had no choice but to walk in excess of 10 kilometres to and from school. On three occasions learners had been raped on their way to school. These learners qualified for a government assisted school transport system, in terms of provincial

policy. The candidate encouraged the parties to the litigation to resolve the matters through meaningful engagement. As a result of his intervention, the parties settled the matter in a manner that acknowledged the rights of the learners.

16.3 This demonstrates the candidate's commitment to fairness and equity and the role of courts in resolving social injustices that confront our society. Further, the candidate gave effect to the Constitutional Court's jurisprudence on meaningful engagement between litigants in constitutional matters.

16.4 The applicant was instrumental in the decision to include (at the time, on a trial basis) Advocates for Transformation as a 50% representative on the leadership structures of the KwaZulu-Natal Bar Council. This structure has since been adopted by Bar Councils across the country on a permanent basis.

17 **The candidate's potential**

17.1 During his time as an advocate at the KwaZulu-Natal Bar, the candidate appears to have enjoyed the respect and admiration of his colleagues, having been described as an "*acute legal mind and a formidable opponent amongst advocates.*"

17.2 The reviewers know of nothing that detracts from this description.

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

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- 18.1 The candidate's appointment as a Justice of the SCA would send a positive message to the community at large for the following reasons:
- 18.1.1 he is a senior Judge with considerable experience and expertise;
 - 18.1.2 besides his practice as a public prosecutor and junior and senior advocate and service as a Judge, he has acted in the SCA and written a number of unanimous and majority judgments;
 - 18.1.3 he has a wide understanding of various aspects of the law;
 - 18.1.4 he is well regarded by those who appear before him;
 - 18.1.5 he displays a range of qualities and values that lie at the core of judicial endeavour, including fairness, impartiality and a strong work ethic; and
 - 18.1.6 considered on the strength of his experience and expertise, the candidate's knowledge of the law and commitment to applying it in a manner that gives effect to constitutional values would strongly commend his appointment as such.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

ANC Umvoti Council Caucus and Others v Umvoti Municipality 2010 (3) SA 31
(KZP);

Chetty v Road Accident Fund 2009 (5) SA 193 (N);

Coetzee and Another v Nedbank Ltd 2011 (2) SA 372 (KZD);

DH Brothers Industries (Pty) Ltd v Gribnitz No and Others 2014 (1) SA 103
(KZP);

Ex Parte Arntzen (Nedbank Ltd as intervening creditor) 2013 (1) SA 49 (KZP);

Firststrand Bank Ltd v Mdletye and Another 2016 (5) SA 550 (KZD);

Gowrie Mews Investments CC v Calicom Trading 54 (Pty) Ltd and Others 2013
(1) SA 239 (KZD);

Griffiths v Janse van Rensburg and Another NNO 2016 (3) SA 389 (SCA);

Lander v O'Meara and Another 2011 (1) SA 204 (KZD);

Mahaeane And Another v Anglogold Ashanti Ltd 2017 (6) SA 382 (SCA);

Minister of Home Affairs and Others v Saidi and Others 2017 (4) SA 435 (SCA);

*PMG Motors Kyalami (Pty) Ltd and Another v Firststrand Bank Ltd, Wesbank
Division* 2015 (2) SA 634 (SCA);

Potpale Investments (Pty) Ltd v Mkhize 2016 (5) SA 96 (KZP);

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Prefix Properties (Pty) Ltd and Others v Golden Empire Trading 49 CC and Others 2011 (2) SA 334 (KZP);

Premier Foods (Pty) Ltd v Manoim and Others 2016 (1) SA 445 (SCA);

Silver Falcon Trading 333 (Pty) Ltd and Others v Nedbank Ltd 2012 (3) SA 371 (KZP);

Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality and Others 2011 (4) SA 406 (KZP);

South Coast Furnishers CC v SECPROP 30 Investments (Pty) Ltd 2012 (3) SA 431 (KZP);

Standard Bank of South Africa Ltd v Hales and Another 2009 (3) SA 315 (D);

Stols v Garlicke & Bousfield Inc 2012 (4) SA 415 (KZP);

Thomas v Minister of Defence and Military Veterans 2015 (1) SA 253 (SCA);

Visser v Visser 2012 (4) SA 74 (KZP);

Wishart and Others v Blieden NO and Others 2013 (6) SA 59 (KZP);

Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL 2015 (1) SA 345 (SCA)

Judgments overturned on appeal

S v Mchunu 2013 JDR 2103 (SCA)

S v Dlamini 2012 (2) SACR 1 (SCA)

S v Ngcamu and Another 2011 (1) SACR 1 (SCA)

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Scott and Others v S [2011] ZASCA 121

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