

CANDIDATE : JUDGE ASHTON SCHIPPERS

APPLICANT: JUDGE ASHTON SCHIPPERS

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 BProc from Unisa in 1982;

1.1.2 LLB from Unisa in 1986;

1.1.3 LLM from UCT in 1988 (Company Law and International Law); and

1.1.4 LLM from Harvard in 1991 (Constitutional Law, International Law, Human Rights, Negotiation and Conflict Management - Fulbright Scholar).

1.2 The candidate is currently busy with a post-graduate diploma in theology and has only one subject outstanding.

1.3 The candidate records his UCT Masters thesis as a significant publication in the field of law. The topic was: *'The Extent of Rights under the Soeker Leases'* LL.M thesis UCT 1988.

1.4 The candidate is thus suitably academically qualified to hold judicial office.

2 Whether the candidate is a fit and proper person

- 2.1 Neither the application nor the judgments accompanying it suggest that the candidate is not a fit and proper person.
- 2.2 No adverse comments have been received.
- 2.3 The candidate is therefore a fit and proper person to be appointed to the Supreme Court of Appeal.

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 black man of "coloured" descent. His appointment would assist in reflecting the racial composition of South Africa, but would not address the gender imbalance in the SCA.

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

4.1 The candidate was an articled clerk in two attorneys' firms between March 1983 and April 1985. He was admitted as an attorney in May 1985.

4.2 After his articles, but before practising as an attorney, the candidate was employed as a prosecutor, senior prosecutor and a magistrate in civil and criminal courts from April 1986 to June 1988.

4.3 The candidate practised as an attorney from July 1989 to July 1990, when he left to take up a scholarship at Harvard University. Between March 1991 and June 1991 he was a research assistant at the Harvard Law School.

4.4 From September 1991 to June 1992 the candidate was employed as an associate in the International Law Department of a law firm in Washington D.C. Between July 1992 and March 1993 the candidate worked as a senior fellow at the National Institute for Dispute Resolution in Washington D.C.

4.5 He commenced pupillage at the Cape bar in March 1993 and practised as an advocate for 19 years, until February 2013 when he was appointed as a permanent judge of the Western Cape High Court. During his time at the bar he did acting duties as a judge on various occasions.

4.6 From November 2016 until the time of his application currently under review, the candidate was an acting judge in the Supreme

CANDIDATE : JUDGE ASHTON SCHIPPERS

Court of Appeal. The candidate has at least thirty five years of experience in the law.

4.7 We have considered the judgments listed by the candidate in his application form and the further reported judgments by the candidate. The reviews are annexed hereto. The candidate has written the following judgments which deal with constitutional or administrative law issues:

4.7.1 *Blastrite (Pty) Ltd v Genpaco Ltd* 2016 (2) SA 622 (WCC);
and

4.7.2 *Scalabrini Centre, Cape Town and others v Minister of Home Affairs and others* (1107/2016) [2017] ZASCA 126.

4.8 Three of the candidate's decisions in which he sat as a single judge in the Western Cape High Court were reported in the SA Law Reports, and one was reported in the All South African Law reports. These are:

4.8.1 *Business Partners Ltd v trustees, Riaan Botes Family Trust and another* 2013 (5) SA 514 (WCC);

4.8.2 *Democratic Alliance v South African Broadcasting Corporation Ltd and others* 2015 (1) SA 551 (WCC);

4.8.3 *Blastrite (Pty) Ltd v Genpaco Ltd* 2016 (2) SA 622 (WCC);
and

4.8.4 *MacPherson and others v Stoffels and others* [2014] 1 All SA 221 (WCC).

CANDIDATE : JUDGE ASHTON SCHIPPERS

- 4.9 One of the candidate's judgments as an acting judge of appeal in the Supreme Court of Appeal was reported in the SA Law Reports, and seven other judgments in which he concurred were also reported in those reports. The candidate wrote a dissenting judgment in *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 (6) SA 55 (SCA), where he found that a without prejudice letter was inadmissible to interrupt prescription. He held that the majority judgment contradicted public policy and the contractual foundations of the without prejudice rule.
- 4.10 The following judgments of the candidate as an acting judge in the Supreme Court of Appeal were reported in the All South African Law Reports:
- 4.10.1 *Nkabinde and Others v S* [2017] 4 All SA 305 (SCA);
- 4.10.2 *Brooks and Another v National Director of Public Prosecutions* [2017] 2 All SA 690 (SCA); and
- 4.10.3 *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* (1107/2016) [2017] ZASCA 126; [2017] 4 All SA 686 (SCA) (29 September 2017).
- 4.11 Various of the candidate's other judgments are available on South African Legal Information Institutes' (Saflii) database. A list thereof is annexed hereto.

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

- 5.1 The candidate's judgments demonstrate a commitment to constitutional values.

CANDIDATE : JUDGE ASHTON SCHIPPERS

5.2 In this regard specific mention is made of his judgments in the *Blastrite* and *Scalabrini* matters, both of which are discussed in the annexure hereunder.

6 Whether any judgments have been overturned on appeal

6.1 The candidate lists the following judgments that were successfully appealed against:

6.1.1 *Chapeikin and another v Mini* [2016] ZASCA 105 (14 July 2016)

This matter was an appeal against a judgment of the candidate, sitting as a single judge in the Western Cape High Court. The candidate found in favour of the plaintiff in a medical negligence claim, which finding was overturned on appeal.

The main criticism levelled at the candidate's findings by the SCA was the following:

“[33] Having found that Ms Mini suffered a further or consecutive stroke, the high court concluded that the appellants were remiss in not administering treatment aimed at preventing a further or secondary stroke. This finding was premised on the central purpose of the National Guidelines, which was the prevention of further or secondary strokes. In respect to Dr Chapeikin in particular, the high court found:

‘Chapeikin’s conduct is inconsistent with the standards set out in the National Guidelines on

Stroke – a reasonable competent general practitioner would have regarded the plaintiff’s symptoms as a medical emergency and referred her to hospital, to prevent further deterioration or a secondary stroke’.

However, on the basis of the evidence of Drs Kesler and Botha that Ms Mini suffered a ‘stroke in evolution’, there was simply no basis for a finding by the high court that further or consecutive strokes were involved. In my view, the conduct of treating medical practitioners cannot be critically examined for negligence without reference to the causal sequence or aetiology of the disease or medical condition from which a patient actually suffered at the time of presentation and treatment. For that reason, it was essential for the high court to make a firm finding in relation to the precise nature of Ms Mini’s condition.”

The SCA found that the candidate’s findings that the plaintiff suffered more than one stroke, were not supported by the expert evidence that she suffered one stroke in evolution which ran its course over three days. On negligence, the SCA comes to the following conclusion:

“[39] The high court’s finding that Dr Chapeikin’s conduct was inconsistent with the standards set out in the National Guidelines as a basis for concluding that a reasonably competent general practitioner would

have regarded her condition as a medical emergency and referred her to hospital is, therefore, not supported by the evidence. Crucially, the high court failed to consider the evidence of Drs Kesler and Botha who agreed that the diagnosis of the 'stroke in evolution' can only be made ex post facto, with the wisdom of hindsight once the stuttering stroke has come to an end. The high court also failed to have due regard to Dr Kesler's testimony that because Ms Mini was alert, able to walk and communicate with no demonstrable signs of weakness at the time she saw Dr Chapeikin, she would probably not have been admitted had he referred her to Groote Schuur or Victoria hospitals."

The candidate's findings on causality were also criticised, as was the absence of a clear ruling on a separation of issues in terms of Rule 33 (4).

6.1.2 *South African Broadcasting Corporation SOC Ltd and others v Democratic Alliance 2016 (2) SA 522 (SCA), overturned on appeal in South African Broadcasting Corporation SOC LTD and others v Democratic Alliance and others 2016 (2) SA 522 (SCA)*

The SCA was seized with several issues flowing from a judgment by the Western Cape High Court, in which the candidate adjudicated. The candidate had found that the recommendations of the public protector were not binding but that a decision to reject those findings must not be irrational.

He found that the SABC were not bound by the recommendations but that their rejection of the recommendations was irrational. The finding by the candidate that the public protector's recommendations were not binding was premised on an incorrect parallel drawn between the powers of the public protector and the courts and secondly, a judgment of the English court of appeal. The finding was overturned by the SCA in this respect.

The SCA however pointed out that the "*High Court was rightly concerned that Mr Motsoeneng should not continue to be in office with serious allegations concerning maladministration and the integrity of the SABC hanging over him.*" The SCA stated at paragraph 61, that the approach of the High Court cannot be faulted. The SCA goes further to state that it "*has not been shown that Schippers J exercised his discretion capriciously or upon a wrong principle*".

The appeal in the SABC matter was only overturned on the issue of the binding powers of the public protector's recommendations, but was otherwise dismissed by the SCA.

6.2 We could find no other judgments that were overturned on appeal.

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

7.1 The candidate's professional history is set out above.

7.2 The candidate has significant experience as a judge in the High Court, and has been acting in the Supreme Court of Appeal for a period in excess of a year. The reported judgments referred to above

CANDIDATE : JUDGE ASHTON SCHIPPERS

show that the candidate has delivered reportable judgments in both the High Court and the Supreme Court of Appeal.

8 The candidate's linguistic and communication skills

8.1 The candidate is proficient in the English language and has sound linguistic and communication skills. The candidate's judgments in English are well written.

8.2 The candidate's judgments are written in simple language and with clarity.

9 The candidate's ability to produce judgments promptly

9.1 The candidate should have no outstanding judgments. His application indicates that at the time of submitting his application he had one judgment outstanding, which judgment was due to be delivered on 12 December 2017.

9.2 From a perusal of his reported judgments and the judgments annexed to his application, it is evident that the candidate produces his judgments promptly. The judgments are usually produced within a month after the matters were heard and the longest period was just over three months.

9.3 The candidate therefore has the ability to produce his judgments promptly.

10 The candidate's fairness and impartiality

10.1 There is nothing to suggest that the candidate would not be fair and impartial to litigating parties appearing before him, as is

demonstrated by his even-handedness in his handling of the criminal appeals that came before him, particularly in the Supreme Court of Appeal.

- 10.2 The candidate indicated in his application that he had a judgment which he reserved in November 2017 to give careful consideration to, given the seriousness of the counts the accused were charged with. This is indicative of the value of fairness that the candidate has.

11 **The candidate's independent mindedness**

- 11.1 There is nothing to suggest that the candidate is not independent.

- 11.2 The candidate's dissenting judgment in two SCA judgments, demonstrates that he is willing to differ from his more senior colleagues in the SCA. There can be no better testament to his independent mindedness.

- 11.3 *Brooks and Another v National Director of Public Prosecutions* [2017] ZASCA 42; 2017 (1) SACR 701; [2017] 2 All SA 690 (SCA)

This decision concerned an appeal against a forfeiture order made under the Prevention of Organised Crime Act 121 of 1998 (POCA). The SCA was required to decide whether the home of the appellants in Kimberley, which was allegedly used in the commission of numerous offences of trading in unpolished diamonds, and which they jointly own, was an instrumentality of an offence and whether an order in terms of which the property was declared forfeited to the State under POCA was appropriately granted by the court *a quo*.

The majority of the Court (per Ponnau JA, Willis and Zondi JA concurring) upheld the appeal against the judgment of the Northern Cape Division of the High Court, Kimberley. The majority assumed, without deciding, that the property was an instrumentality of the various offences of illicit diamond-dealing. However, the majority held that the grant of a forfeiture order was disproportionate and upheld the appeal. The majority found that court *a quo* had not properly assessed the lack of culpability on the part of the second appellant, Mrs Brooks, nor the interests of the minor children when it undertook the proportionality analysis. They held that the interests of the children constituted a separate and an important consideration and cannot merely be dealt with as one of several factors weighed on the proportionality scale. The majority stated that the critical question was whether the information before the court is sufficient to consider the interests of the children.

In a minority judgment the candidate, in whose judgment Mocomie JA concurred, found that the court *a quo* was correct in holding that the NDPP had established on a balance of probabilities that the property was an instrumentality of the offences of illicit trading in unpolished diamonds. He held that once it has been established that the property was an instrumentality of an offence, a court is obliged to embark on a proportionality enquiry and that such enquiry is aimed at balancing the constitutional imperative of law enforcement and combating crime and the seriousness of the offence, against the right not to be arbitrarily deprived of property.

The candidate found that the property was the base for an ongoing, organised and well-funded criminal enterprise and that the offences

were committed in the course of a broader enterprise of criminal activity, involving the first appellant amongst others. He found that it was striking that the second appellant, who is a qualified social worker and thus who was acutely aware of the paramount rights of children had not, in her affidavit, raised that their rights would be affected and thus drew an inference that the children's rights would not be affected by the grant of a forfeiture order. The candidate found that neither of the appellants suggested that they or their children would be rendered homeless pursuant to a forfeiture order and that had that been the case, they would have undoubtedly raised it. Accordingly, the candidate found that the forfeiture order had been properly made. He found that he would, in the result, therefore have dismissed the appeal.

11.4 *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* [2017] ZASCA 98; 2017 (6) SA 55; [2017] 3 All SA 739 (SCA)

The SCA had to determine a novel question of law, namely whether an acknowledgment of indebtedness by a debtor, embodied in a letter written for the purpose of settling litigation 'without prejudice', may nonetheless be admitted in evidence for the limited purpose of showing that the period of prescription has begun to run afresh in terms of s 14 of the Prescription Act 68 of 1969.

The majority (per Lewis JA, Tshiqi and Mbha JJA and Fourie AJA concurring) answered the question in the affirmative. The majority held that the SCA had in *Absa Bank v Hammerle Group* [2015] ZASCA 43; 2015 (5) SA 215 (SCA), found that the South African law recognized that there are exceptions to the without prejudice rule

and that the exception contended for was well-founded in that where acknowledgments of liability are made such that, by virtue of s 14 of the Prescription Act, they would interrupt the running of prescription, they should be admissible even if made without prejudice during settlement negotiations, but solely for the purpose of interrupting prescription. The majority accordingly upheld the appeal with costs.

In a sole dissent, the candidate found that the exception to the rule of not permitting ‘without prejudice’ negotiations to be admitted as evidence would negate the rule, which operates to encourage parties to a dispute to settle their differences amicably in full and frank discussions, and ‘to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence’. The candidate held that the recognition of the exception sought would contradict public policy and the contractual foundations of the without prejudice rule and that the exception is at odds with the rationale for the rule as expounded in both South African and the comparative English law. He accordingly found that he would therefore dismiss the appeal with costs.

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

12.1 No concerns appear from the available judgments.

12.2 No adverse comments were received.

13 **The candidate’s administrative ability**

13.1 The candidate’s record of producing judgments promptly appears to be indicative of his ability to administer his role efficiently.

CANDIDATE : JUDGE ASHTON SCHIPPERS

13.2 The candidate's administrative ability is also evidenced by the various posts on the Cape Bar Council and NGOs which he occupied.

13.3 Save for the above, no adverse comments were received.

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 No adverse comments were received.

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

16.1 The candidate has been a member of the following organisations within the legal community, alternatively has practiced in the following capacities:

16.1.1 Part-time lecturer in Company Law and Contract Law at Peninsula Technikon (now Cape Peninsula University of Technology) between January 1987 and December 1989;

16.1.2 Research assistant, Harvard Law School, 1991;

16.1.3 Senior Fellow, National Institute for Dispute Resolution, Washington DC;

16.1.4 Vice Chairperson of the Cape Bar Council;

CANDIDATE : JUDGE ASHTON SCHIPPERS

- 16.1.5 Chairperson of the Cape Bar Council and leader of the Cape Bar;
- 16.1.6 Advocates for Transformation between 1999 and 2012; and
- 16.1.7 the New York Bar between 1996 to present.
- 16.2 The candidate has been involved in a community-based organisation for children called the Khayamandi Boys Home, Langa, Cape Town, for which organisation he served on the board of trustees between 1993 and 1996.
- 16.3 The candidate serves on various other boards of non-governmental organisations.
- 16.4 The candidate is involved in the administration and training in theology for 40 pastors and 240 women in the School of Ministry at Ushindi Baptist Church, Mombasa, Kenya.
- 16.5 His involvement with these organisations shows an interest in and commitment to the development of his community, both on a professional level and more broadly.

17 The candidate's potential

- 17.1 The candidate has been a Judge in the Western Cape High Court for a period of 5 years, following from an established practice at the bar and consistent experience in acting positions. Furthermore the candidate has been in an acting position at the Supreme Court of Appeal since November 2016.

CANDIDATE : JUDGE ASHTON SCHIPPERS

17.2 There is no reason to believe that he does not have the potential required.

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

18.1 The candidate is eminently qualified to serve on the SCA. Not only will his appointment assist with demographic representivity, but the fact that he hails from a disadvantaged community will serve to inspire others.

CANDIDATE : JUDGE ASHTON SCHIPPERS

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Sayed and Others v S (530/2017) [2017] ZASCA 156; 2018 (1) SACR 185 (SCA)
(24 November 2017)

Lourens v Premier of the Free State Province and Another (566/2016) [2017]
ZASCA 60 (25 May 2017)

Khumalo v S (62/2017) [2017] ZASCA 53 (18 May 2017)

MEC for Health, Eastern Cape v Mkhitha and Another (1221/2015) [2016]
ZASCA 176 (25 November 2016)

South African Broadcasting Corporation Soc Limited v Massstores (Pty) Ltd
(914/2015) [2016] ZASCA 174 (25 November 2016)

*City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair
Cooper NO and Others* (85/2077) [2017] ZASCA 177 (1 December 2017)

National Director of Public Prosecutions v Kalmar Industries SA (Pty) Ltd
(1146/2017) [2017] ZASCA 142; 2017 (2) SACR 593 (SCA) (2 October
2017)

Patel v National Director of Public Prosecutions: Johannesburg (838/2015)
[2016] ZASCA 191; 2017 (1) SACR 456 (SCA) (1 December 2016)

Macpherson and others v Stoffels and others [2014] 1 All SA 221 (WCC)

Judgments upheld on appeal

Mphala v RAF 9698/16) [2017] ZASCA 76 (1 June 2017)

CANDIDATE : JUDGE ASHTON SCHIPPERS

S v Malan 2013 (2) SACR 655 (WCC)

Director of Public Prosecutions, Western Cape v Malan 2014 (2) SACR 146
(WCC)

Judgments overturned on appeal

Chapeikin and another v Mini [2016] ZASCA 105 (14 July 2016);

South African Broadcasting Corporation SOC Ltd and others v Democratic Alliance 2016 (2) SA 522 (SCA)

Unreported Decisions

Granbuild (Pty) Ltd v Minister of Transport and Public Works, Western Cape and another (95456/2014) WCC (2 March 2015)

Hyde Construction CC v Blue Cloud Investments 40 (Pty) Ltd and another (8293/2010) WCC (12 August 2015)

Investec Bank Ltd v Ramurunzi and another (7230/11) WCC (17 June 2016)

Patel v National Director of Public Prosecutions 2016 JDR 2252 (SCA)

CANDIDATE : JUDGE ASHTON SCHIPPERS