

CANDIDATE : JUDGE BASHIER VALLY

APPLICANT: JUDGE BASHIER VALLY

**COURT FOR WHICH APPLICANT APPLIES: COMPETITION
APPEAL COURT**

1 The candidate's appropriate qualifications

1.1 The applicant holds the following academic qualifications:

1.1.1 B.Com (University of Witwatersrand) – 1982;

1.1.2 BA (Honours) (Industrial Sociology) (University of Witwatersrand) – 1983;

1.1.3 MA (Sociology) (University of Warwick, UK) – 1985;

1.1.4 LLB (Labour Law) (University of Witwatersrand) – 1994; and

1.1.5 LLM (University of Witwatersrand) – 1996.

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

1.2.1 Self-employed Mediator on the panel of the Independent Mediation Services of South Africa from 1991 to 1996;

1.2.2 Self-employed Arbitrator on the panel of the Independent Mediation Services of South Africa from 1993 to 1996;

CANDIDATE : JUDGE BASHIER VALLY

- 1.2.3 Advocate of the High Court of South Africa from 1996 to 2012;
- 1.2.4 High Court Judge – Gauteng – from 2012 to present;
- 1.2.5 Acting Judge of the Competition Appeal Court from April 2016 to present;
- 1.3 The candidate is appropriately qualified for appointment to the Competition Appeal Court.

2 Whether the candidate is a fit and proper person

- 2.1 There is nothing in the candidate's application or the judgments that have been considered by the reviewers that suggest that the candidate is not a fit and proper person.

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

- 3.1 The Competition Appeal Court bench currently comprises seven Justices of Appeal, of whom three are men (two white and one black) and four are women (three black and one white).
- 3.2 The candidate is a black man. The candidate's appointment as a Justice of Appeal of the Competition Appeal Court would help ensure that the racial composition of the Court is closer to the racial and gender composition of the country.

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

4.1 From the judgments reviewed, the candidate appears to possess good knowledge of various areas of the law, including constitutional law.

4.2 The reported judgments that have been reviewed also show that the candidate is able to consider and determine complex factual disputes and applies appropriate case law in his judgments.

4.3 The judgments reviewed reflect the candidate's knowledge in:

4.3.1 Delict, spanning the fields of unlawful arrest, *Actio Iniuriarum*, *Actio legis aquiliae*, Misrepresentations;

4.3.2 Competition Law: Collusive Tendering; Mergers;

4.3.3 Tax: Value Added Tax;

4.3.4 Administrative Law: Review Applications (Including matters concerning Municipal Rates and the Prerogatives of the President of the Republic of South Africa);

4.3.5 Labour Law;

4.3.6 Interdicts;

4.3.7 Protection of Confidential Information;

4.3.8 Insolvency and Liquidation;

4.3.9 Liens: Enrichment/Debtor Creditor Liens;

4.3.10 Request for Documents: Protection of Access to Information Act;

CANDIDATE : JUDGE BASHIER VALLY

- 4.3.11 Criminal Law: Criminal Procedure Act, various crimes spanning rape, robbery, murder, unlawful possession of firearm, possession of narcotics and theft;
- 4.3.12 Deceased Estates: Wills;
- 4.3.13 Company Law;
- 4.4 Save as reflected in paragraph 6.3 below, in most cases and where appropriate, the candidate sought to resolve legal issues before him by reference to the precepts of the Constitution.

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

- 5.1 Prior to joining the Advocates' profession, and prior to 1994, the candidate showed a keen interest in respect of sociological issues as well as the rights of employees in South Africa. In this regard.
 - 5.1.1 The candidate published a book entitled "*A Social Contract – The Way Forward – A Critical Evaluation*" (1992);
 - 5.1.2 The candidate has published the following articles;
 - 5.1.2.1 "*Strikes, Dismissals and Collective Bargaining: A Case for a More Rational and Constructive Approach*" in the South African Journal of Labour Relations, Volume 16, No. 1, March 1992;
 - 5.1.2.2 "*Denying the Strike: SEIFSA v NUMSA*" in Employment Law, Volume 9, No. 3, January 1993;

CANDIDATE : JUDGE BASHIER VALLY

5.1.2.3 “*Paradigms Lost – A Search for the Sociological Perspective*” (co-authored with M Sarakinsky) in Sarakinsky M (Ed) *Social Theory*, Lexicon Publishers, 1994;

5.1.3 In the judgments reviewed, the candidate has consistently been conscious of testing the legal principles before him against the precepts of the Constitution.

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

6.1 *Xstrata South Africa (Pty) Ltd and Others v SFF Association* 2012 (5) SA 60 (SCA)

In this matter, the candidate (then an acting judge) held that the respondent was entitled to be paid royalties from the appellant in terms of an agreement notwithstanding changes to the Mineral and Petroleum Resources Development Act (MPRDA).

The SCA held that the order granted by the candidate was contrary to the MPRDA and overturned his decision.

6.2 *Lekup Prop No 4 (Pty) Ltd v Wright, John Colin* 2012 (5) SA 246 (SCA)

In this matter, the appellant brought an application in the court *a quo* on the basis that the agreement for the sale of its property to the respondent had lapsed for want of fulfilment of a suspensive condition.

The matter was referred to trial by consent.

CANDIDATE : JUDGE BASHIER VALLY

The respondent alleged that the appellant had deliberately and intentionally failed to procure the required rezoning and subdivision of the property. In doing so, the purchaser relied on the doctrine of fictional fulfilment.

The candidate (then an acting judge) found in the respondent's favour and held that the agreement had not lapsed and the suspensive condition was deemed to have been fulfilled.

The SCA explained the doctrine of fictional fulfilment and upon analysing the evidence, disagreed with the candidate that the respondent had discharged its onus in relying upon that doctrine.

The SCA commented about the manner in which the trial was conducted. In particular, the SCA commented that the candidate was under a misapprehension as to the status of the affidavits in the context of the trial.

6.3 *South African Municipal Workers Union and Others v Mokgatla and Others* [2016] 2 All SA 451 (SCA)

The issue before the court was whether the High Court and the Labour Court have concurrent jurisdiction in respect of disputes relating to section 158(1)(e) of the Labour Relations Act (LRA). The candidate presiding in the court *a quo* dismissed a special plea raised by the appellants, that it lacked jurisdiction to consider the application by the respondents for their reinstatement.

The SCA found that the court *a quo* "missed" the fundamental guiding principles underlying the determination of jurisdiction of the respective courts over disputes provided for under the LRA, particularly as laid down by the Constitutional Court.

CANDIDATE : JUDGE BASHIER VALLY

The candidate's judgment was overturned on the basis that he failed to take into account that the Constitution recognises the need for specificity and specialisation under the modern rule of law and thus, when the legislature is mandated to create a detailed legislation for a particular area, like the LRA in the area of labour relations, it is preferable to use the system created by that legislation.

6.4 *De Beer v S* [2016] ZAGPJHC 184

The SCA overturned a portion of the order granted by the candidate and Judge Siwendu (sitting as the Criminal Appeal Court in the Johannesburg High Court) which imposed a life sentence upon the accused. Instead, the SCA sentenced the accused to 15 years imprisonment.

The SCA stated that the candidate and Siwendu J did not give proper consideration to whether a life sentence was in proportion to the crime, the accused and the needs of society. The candidate and Siwendu J were criticised for focusing too much on the fact that life imprisonment was the prescribed minimum sentence. Life imprisonment, the SCA held, was an injustice and the accused deserved a custodial sentence.

The SCA found that there was no reason for the candidate and Siwendu J to have interfered with the decision of the Regional Magistrate as the latter had exercised his discretion proportionately.

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

7.1 The candidate has extensive legal experience as appears from the areas of the law covered by the judgments reviewed.

CANDIDATE : JUDGE BASHIER VALLY

7.2 The candidate practised as an Advocate of the High Court for 16 years, served as an Acting Judge and then a Judge of the High Court in Gauteng for almost 6 years. He also acted as Justice of Appeal of the Competition Appeal Court for almost 2 years.

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

8.1 The candidate's judgments are in English.

8.2 From the judgments reviewed, the candidate's judgments are clear and concise.

8.3 To the best of the reviewers' knowledge, there have been no adverse comments regarding the candidate's linguistic or communication skills.

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

9.1 The reviewers have reviewed in excess of 30 reported and unreported cases by the candidate.

9.2 The candidate generally produces judgments promptly.

9.3 Many of the judgments were delivered *ex tempore* and many others within a month of the conclusion of the hearing.

9.4 The reviewers came across two judgments reviewed that were not delivered promptly, namely:

9.4.1 *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd and Another* 2011 (4) SA 642 (GSJ), which was produced almost 4 months after the matter was heard; and

- 9.4.2 *Tshuma v Minister of Safety and Security* (18147/10) [2015] ZAGP JHC 152, which was produced over 5 months after the hearing of this matter.

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

- 10.1 The candidate's judgments reflect a fair and impartial mind that was brought to bear in respect of the matters before the candidate. In many of his judgments, the candidate clearly expressed each party's arguments and the candidate's view of the merits and demerits of the arguments presented.
- 10.2 The reviewers have not received any adverse comments regarding the candidate's fairness or impartiality.

11 **The candidate's independent mindedness**

- 11.1 The judgments reviewed reflect the candidate as independent-minded.
- 11.2 While acting in the Competition Appeal Court, in *Isipani Construction (Pty) Ltd v The Competition Commission* 2017 ZACAC, the candidate penned a minority judgment in which he would have imposed a greater fine than that imposed by the majority judgment. In so doing, the candidate motivated the basis upon which the Competition Appeal Court ought to exercise its discretion in imposing a higher fine.
- 11.3 The reviewers have not received any adverse comments regarding the candidate's independence.

12 The candidate's ability to conduct court proceedings

12.1 Apart from paragraph 6.2.5 above, the reviewers have not received any adverse comments regarding the candidate's ability to conduct court proceedings.

13 The candidate's administrative ability

13.1 The candidate's experience as a tutor, junior lecturer, mediator, arbitrator, Advocate of the High Court and Judge of a busy court – coupled with his ability to deliver well-reasoned judgments promptly – demonstrate that the candidate has strong administrative abilities.

14 The candidate's reputation for integrity and ethical behaviour

14.1 No adverse comments have been received regarding the candidate's integrity or ethical behaviour.

15 The candidate's judicial temperament

15.1 Concerns have been raised by members that the candidate is often discourteous towards counsel who appear before him. However the candidate has also been commended for displaying respect and courtesy towards witnesses appearing before him.

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

16.1 Prior to joining the advocates' profession, the candidate's writings reflect a keen interest for the rights of employees and generally for social justice.

CANDIDATE : JUDGE BASHIER VALLY

16.2 The candidate's judgments consistently highlight his sensitivity and commitment to the values enshrined in the Constitution.

17 **The candidate's potential**

17.1 The candidate holds a number of academic qualifications and has a vast array of experience, both in sociology and in law.

17.2 The reviewers are of the view that the candidate holds potential to develop as a Justice of Appeal in the Competition Appeal Court if afforded the opportunity.

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

18.1 As mentioned above, the candidate:

18.1.1 holds a number of academic qualifications;

18.1.2 has a wide range of experience and expertise in the legal field;
and

18.1.3 generally displays positive qualities of a judicial officer.

18.2 Consequently, the reviewers are of the view that the candidate's appointment as a Justice of the Competition Appeal Court would send a positive message to the community at large.

CANDIDATE : JUDGE BASHIER VALLY

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd and Another 2011 (4) SA 642 (GSJ)

Peniel Development (Pty) Ltd and Another v Pietersen and Others 2014 (2) SA 503 (GJ)

Atholl Developments (Pty) Ltd v Valuation Appeal Board, Johannesburg, and Another 2014 (5) SA 485 (GJ)

Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd and Others [2014] 3 All SA 454 (GJ)

Trichart v S 2014 (2) SACR 245 (GJ)

ABSA Bank Ltd v Africa's Best Minerals 146 Ltd, In re: Sekhukhune NO v ABSA Bank Ltd [2015] 2 All SA 8 (GJ)

Mncube and Others v Januarie NO and Others [2015] 2 All SA 338 (GJ)

De Beer v S [2016] 3 All SA 746 (GJ)

Nkala and Others v Harmony Gold Mining Co Ltd and Others 2016 (5) SA 240 (GJ)

Democratic Alliance v President of the Republic of South Africa 2017 (4) SA 253 (GP)

Twine and Another v Naidoo and Another [2018] 1 All SA 297 (GJ)

CANDIDATE : JUDGE BASHIER VALLY

Unreported decisions

S v Dladla and Another (2006/22220) [2011] ZAGPJHC 233

Venter v Hauptfleisch Inc (2009/2747) [2012] ZAGPJHC 222

S v Rautenbach (164/2012) [2013] ZAGPJHC 105

S v Bayat (2013/08/05) [2013] ZAGPPHC 344

S v Majola and Others (98/2013) [2014] ZAGPJHC 421

Mokgatla and Others v South African Municipal Workers Union and Others
(21815/2014) [2014] ZAGPJHC 276

Thusi and Another v Minister of Safety and Security (1442713) [2014] ZAGPJHC
387

Urban Genesis Management (Pty) Ltd and Another v Jooste and Another
(2014/05400) [2014] ZAGPJHC 380

*Wynand NO and Another v MEC for the Department of Local Government and
Housing of the Gauteng Province and Another* (20291/2013) [2014]
ZAGPJHC 388

Tshuma v Minister of Safety and Security (18147/10) [2015] ZAGPJHC 152

Mtshali and Another v S (A319/2014) [2015] ZAGPJHC 153

A v Commissioner of the South African Revenue Services (VAT1129) [2015]
ZATC 3

Hicks and Another v S (A609/2008) [2015] ZAGPJHC 64

CANDIDATE : JUDGE BASHIER VALLY

Caxton and CTP Publishers and Printers Ltd and Others v Multichoice (Pty) Ltd and Others (140/CAC/MAR16) [2016] ZACAC 3

Davis and Another v Purple Fountain Properties 118 (Pty) Ltd (08/36380, 30457/15) [2016] ZAGPJHC 198

Kenako Consulting (Pty) Ltd v City of Johannesburg Property Company (SOC) Ltd and Others (08/36380, A5023/2015) [2016] ZAGPJHC 196

Kingdom Films and Others v Kaplan NO (14/43457) [2016] ZAGPJHC 37

Sasfin Commercial Solutions (Pty) Ltd v Firststrand Bank Ltd (08/36380, 37344/2015) [2016] ZAGPJHC 246

Isipani Construction (Pty) Ltd v Competition Commission (144/CAC/LUG16CT, 019950) [2017] ZACAC 3

Judgments upheld on appeal

Atholl Developments (Pty) Ltd v Valuation Appeal Board, Johannesburg, and Another 2015 ZASCA 55

Judgments overturned on appeal

Xstrata South Africa (Pty) Ltd and Others v SFF Association 2012 (5) SA 60 (SCA)

Lekup Prop No 4 (Pty) Ltd v Wright, John Colin 2012 (5) SA 246 (SCA)

South African Municipal Workers Union and Others v Mokgatla and Others [2016] 2 All SA 451 (SCA)

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CANDIDATE : JUDGE BASHIER VALLY