CANDIDATE : JUDGE MARGARET VICTOR

APPLICANT: MARGARET VICTOR

COURT FOR WHICH APPLICANT APPLIES: COMPETITION APPEAL COURT

1 **The candidate's appropriate qualifications**

1.1 The candidate holds the following academic qualifications:

1.1.1 B.Soc. Sc (University of Cape Town) – 1971

1.1.2 LLB (University of Kwa-Zulu Natal) – 1982

1.1.3 Diploma in Arbitration (University of Pretoria) – 1996

1.1.4 Diploma in Advanced Tax Law (University of Witwatersrand) – 2000.

1.2 The candidate possesses the requisite qualifications for the position applied for.

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

2.1 The candidate has been a judge of the High Court since 2008. From 2014, she has been invited by the Judge President to act as a Judge of the Competition Appeal Court on several occasions. She has also been an acting Judge of the Supreme Court of Appeal (in 2016).

2.2 There is nothing in the application or the judgments considered by the reviewers that would suggest that the candidate is not a fit and proper person.

2.3 To the best of the reviewers' knowledge, no complaints of any type have been lodged with the JSC in respect of this candidate and concerning her tenure as a judge.

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 white woman. The candidate's appointment as a Justice of Appeal of the Competition Appeal Court would not help ensure that the racial composition of the Court is closer to the racial and gender composition of the country, as that bench is already well-represented from a gender perspective.

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

4.1 As noted above, the candidate has been a judge of the High Court since 2008. She has also been an acting Judge of the Competition Appeal Court. The candidate has written numerous judgments in various areas of the law, including competition law, tax law, administrative law, criminal law as well as in the broad area of commercial law.

4.2 Before being elevated to the bench in 2008, the candidate was an advocate at the Johannesburg Bar for 25 years. She also qualified as an attorney in 1984. While at the Bar, she acted extensively (in the late 1980s and early 1990s) in various public interest matters, including treason trial litigation, defending young members of communities accused of public violence and civil work.

4.3 Of particular relevance for the current application is the candidate's knowledge of competition law, and the judgments that she has written in that area during her acting appointments in the CAC.

4.4 The candidate is a relatively experienced judge in matters of competition law. The competition law judgments that she has written for the Court are summarised in the annexure. These judgments are:

4.4.1 *Oceana Group Limited and Another v Competition Commission* [2014] 2 CPLR 372 (CAC)

The candidate wrote the judgment of the Competition Appeal Court (Davis P and Ndita AJA concurred). The appeal concerned the conditions imposed by the Competition Tribunal ("the Tribunal") in the intermediate merger between Oceana Group Limited ("Oceana") and Foodcorp Proprietary Limited ("Foodcorp") ("the merging parties"). In particular, the merging parties appealed against the condition imposed by the Tribunal which required that Foodcorp's small pelagic fish total allowable catch quota ("TAC") be disposed of together with the Glenryck brand to an independent third party. The Tribunal had found that the potential competitive effect brought about by Oceana's acquisition of Foodcorp's TAC

would substantially lessen competition in the market. The Tribunal had relied on two theories of harm in making its decision. Firstly, it had found that that the proposed transaction would result in increased barriers to entry for smaller players in the market, including players with BEE credentials and Oceana's existing vertically integrated competitors in the downstream canned pilchards market. Second, it had found that the Glenryck brand post-merger, without its own TAC, would be competing at a significant disadvantage to the dominant Lucky Star brand which would have further entrenched its already dominant position with additional access to local small pelagic fish quota.

The candidate reconsidered the evidence before the court, found that the CAC could not uphold the decision and conditions imposed by the Tribunal. The CAC noted that the Tribunal had failed to answer a critical question in relation to its second theory of harm. The question was what effect the absence of the Foodcorp quota in the general pool would have on existing competitors. There was no evidence supporting the view that there would be foreclosure of new entrants post-merger or a finding that the merger may allow Oceana to reduce the price it pays to the smaller quota holders who sell their quota. The candidate found that exchange rates and import price fluctuations are a constant factor irrespective of the merger and that there is no evidence that brand loyalty and access to shelf space would change. With regards to the smaller participants, the candidate noted that they had

experienced problems pre-merger and that there was no evidence that the situation would change dramatically post-merger. The candidate also noted a significant public interest issue which the Tribunal had overlooked in coming to its decision. The continued existence of Foodcorp's fishing rights together with its fishing business, if sold to Oceana would result in the survival of some of Foodcorp's processing facilities and the employment associated therewith of approximately 1000 employees. If the merger were not approved in terms of selling the quota to Oceana along with the fishing business, there would be large-scale retrenchments which would impact the entire Laaiplek community.

The order of the Tribunal was set aside and replaced with the order that the merger between Oceana and Foodcorp be conditionally approved subject to Foodcorp retaining and continuing to operate the Glenryck brand.

The candidate's judgment demonstrates a commendable appreciation of the complex principles involved in the assessment of mergers.

4.4.2 *Lekoa Fitment Centre v Altech Netstar (Pty) Ltd and another* [2015] 1 CPLR 51 (CAC)

The candidate wrote the unanimous decision of the Competition Appeal Court (with Davis JP and Rogers AJA concurring). This was an appeal against the decision of the Competition Tribunal upholding an exception raised by Netstar. Lekoa Fitment Centre ("Lekoa") filed a complaint

with the Competition Commission in terms of section 49B(2)(b) of the Competition Act, 89 of 1998 alleging that Netstar had engaged in a number of unfair commercial practices. It then self-referred the complaint after the Commission declined to prosecute. Mr Sibanda, a layperson, prosecuted the complaint referral on behalf of Lekoa. The relief sought amounted to a variation of a contract between the parties and which had already been cancelled by Netstar; the setting aside of the termination of the contract by Netstar; the substitution in its place of a contract that would be mutually beneficial to the parties; the setting aside of a restraint of trade and financial redress for losses suffered by Lekoa as a result of its relationship with Netstar. The candidate was empathetic to the unrepresented lay litigant, but upheld the Tribunal's finding that the complaint referral did not contain the jurisdictional facts necessary to found a cause of action in terms of section 5(1) of the Competition Act (which prohibits restrictive vertical practices).

4.4.3 *Council for Medical Schemes and Another v South African Medical Association and Others* [2015] 2 CPLR 376 (CAC)

This was an appeal by the Council for Medical Schemes ("the CMS") against a decision of the Competition Tribunal ("the Tribunal"). The Tribunal had stayed complaint referral proceedings which had been referred to it pending the determination of a High Court review instituted by the South African Medical Aid Association (SAMA). The primary question on appeal before the Competition Appeal Court ("the

CAC") was whether the decision to stay proceedings was appealable or not. The CAC, in a unanimous judgment authored by the candidate, considered the CAC's decision in *Allen's Meshco (Pty) Ltd and Others v Competition Commission and Others Case Number 155/CAC/January 15 (Allen's Meshco)* and found that *Allen's Meshco* was distinguishable. The CAC found that the grant of the stay of proceedings by the Tribunal was appealable. The candidate then proceeded to apply the test for a stay. She found the Tribunal should not avoid considering the prospects of success because it believes it cannot deal with public law issues. This assessment is not usurping the High Court jurisdiction of making a final determination on public law issues and should be an integral part of its consideration when adjudicating the question of a stay. The candidate found that there were little to no prospects of success in the review. It was also held that the decision to stay proceedings would be detrimental to consumers, given that the conduct was alleged to be ongoing, and that once cartel behaviour was investigated the case must be expeditiously determined and a decision to stay proceedings hampers the objectives of the Competition Act 89 of 1998. The appeal was upheld and the decision to stay the complaint referral proceedings was set aside.

While the judgment cannot be faulted in its final conclusion, in certain paragraphs, the candidate appears to conflate the respective roles of the Commission and the Tribunal. The CAC correctly held that the process of laying a complaint with

the Commission did not amount to instituting litigation; it was a preliminary or investigative step. But the candidate appears to have gone further, unnecessarily, to hold that "*The second step taken by CMS to self-refer the complaint to the Tribunal does also not amount to the initiation of litigation. CMS in self-referring a complaint to the Tribunal is requesting the Tribunal to investigate and consider whether SAMA has breached a potential restrictive horizontal practice relating to fixing purchase or selling prices of medical services to the public. The stage of the initiation of litigation has not been reached*." (para 34) And "*This indicates that the investigative process of the Tribunal can never be regarded as the initiation of litigation*" (para 35). It is, with great respect, doubtful whether this proposition is correct. The Tribunal does not *investigate* a complaint referral; it *adjudicates* the dispute in a manner no different from a court of law. Nor does the finding appear to be clearly relevant to the issue that the CAC was called upon to decide (i.e. whether the requirements for a stay had been met in this case).

4.4.4 *Omnico (Pty) Ltd and another v Competition Commission and others* [2016] 2 CPLR 398 (CAC)

This matter is concerned with whether a firm's silence constitutes "agreement" for purposes of section 4(1)(b) of the Competition Act 89 of 1998, and if it does, what a firm is required to do in order to disassociate from the cartel in order to avoid liability. The candidate found that once the Competition Commission had adduced sufficient evidence to

conclude that an agreement was reached amongst the firms, it was for the firms to adduce evidence to successfully rebut the finding that an agreement had been reached. The candidate went on to find that where an entity does not abide by the outcome of meetings which have a manifestly anti-competitive purpose, this does not relieve this entity from full responsibility for its participation in the cartel if it had not publicly distanced itself from what was agreed at those meetings. Regarding the appropriateness of the penalty imposed by the Tribunal, the candidate found that the quantum of affected turnover which must be considered when imposing an appropriate administrative penalty is to be considered in light of the products or services which have been affected by an increase in price, and those which have not been increased must be excluded from the determination of the affected turnover.

The judgment was handed down on 19 December 2016. It is not, however, clear when the appeal was heard. Davis JP and Boqwana AJA concurred in the candidate's judgment.

4.4.5 *Isipani Construction (Pty) Ltd v Competition Commission* (144/CAC/Aug16CT, 019950) [2017] ZACAC 3 (14 September 2017) (Majority judgment by the candidate, dissenting from Vally J)

This was an appeal from the Competition Tribunal to the CAC. It was common cause between Isipani Construction (Pty) Ltd ("Isipani") and the Competition Commission ("the Commission") that Isipani had, on two occasions, been

involved in bid rigging in contravention of section 4(1)(b) of the Competition Act, 89 of 1998. The only issue, therefore, was the quantum of an appropriate penalty. The Tribunal imposed a single penalty of almost R22 million. Isipani appealed, contending that that amount was inappropriately high. The Commission cross-appealed, arguing that the imposition of a single penalty was inappropriate when more than one contravention had been proved or admitted.

The bench was split 2:1, with the candidate penning the majority judgment (Davis JP concurred). Ultimately, the candidate held that the penalty imposed by the Tribunal was "*startlingly inappropriate*". The CAC imposed an administrative penalty of approximately R10 million, less than half of that imposed by the Tribunal. In reducing the administrative penalty by more than 50%, the candidate demonstrated a rather high degree of tolerance towards the appellant's conduct, with remarks such as "*cover pricing was … pervasive throughout the industry*", "*companies were fearful of being taken off the tender list*", "*at no stage was the Commission able to establish that the infringement was intentional*", "*while cover pricing is clearly an infringement … it ranks low in the pantheon of anti-competitive offences*" and "*the high point of the evidence established that the conduct was committed negligently and not intentionally*".

The decision could be characterised as a somewhat lenient approach to bid rigging (i.e. collusive tendering) which, up until this decision had been considered comparable to price

fixing, which is generally viewed as hard-core anti-competitive conduct.

The candidate also dismissed the Commission's cross appeal, simply holding that there was no basis to overturn the Tribunal's finding on the issue which was the subject of the cross-appeal. Unfortunately, the reasoning on this aspect (i.e. the Commission's cross appeal) appears to be very thin.

4.4.6 *Hosken Consolidated Investments Limited & Another v The Competition Commission* Case No. 154/CAC/Sept 17

Victor AJA writing the judgment together with Mnguni AJA, upheld the appeal against a Tribunal decision and issued a declaratory order to the effect that the appellants did not require the Competition Commission's approval for a restructuring. The matter essentially centred around an advisory opinion issued to the Commission.

The CAC was required to deliberate on two key issues: (1) whether the Tribunal had jurisdiction to entertain a matter in circumstances where a party has not notified a transaction in terms of section 13 of the Competition Act; and (2) whether an acquiring company that has already obtained an unconditional prior approval from the Commission to acquire sole control of an entity over which it exerts control, must still obtain merger approval before entering into a subsequent transaction with that entity.

The Tribunal had concluded that that appellants could not approach the Tribunal directly for the order they sought. It dismissed the application on the grounds that it lacked jurisdiction. The appellants, aggrieved at the outcome, approached the CAC. The essence of its argument on appeal was that the Tribunal ought to have found that it had jurisdiction to grant the appellants their declaratory relief on the same basis that it has jurisdiction to interdict the implementation of notifiable mergers and to order their notification to the competition authorities for approval under the Act (especially in terms of section 27(1)(d)).

Mnguni and Victor AJJA, co-writing the judgment, upheld the appellants' submission that it would result in an incomprehensible reading of the Act to conclude that if the Act conferred upon the Tribunal the power to declare that a transaction constituted a merger, to order the parties to notify the merger, and to order the parties not to implement the transaction (pending approval) yet at the same time preclude the Tribunal from being able to issue declaratory relief that a transaction does not constitute a merger when approached by the parties for such relief. The acting appeal court judges concluded that the jurisdictional basis had been established such that the Tribunal's powers indeed include declaratory orders for relief.

The CAC was then required to determine whether the Tribunal ought to have exercised its discretion in favour of the

appellants. The CAC again upheld the appellants' submissions that at the time the competition authorities had conducted a merger assessment in terms of section 12A of the Act and were aware that in time the first appellant would exert sole control over the gaming interests of the second appellant and Niveus. At the same time the first appellant also enjoyed sole control of Niveus gaming interests. Accordingly, it became clear that, in analysing section 12(2), the section does not purport to define control in terms of an exhaustive list as details may very often be unclear at the time of the notification. Accordingly, held the court, section 12(2) does not list different kinds of control, each of which is separately notifiable but illustrates different ways in which control could be acquired within the meaning of section 12(1). Once sole control has been approved and acquired in one of the ways envisaged in section 12(2), it does not require separate approval if it is later implemented in one of the other ways contemplated in 12(2).

The court finally concluded that the Commission cannot demand the notification of a transaction. The effects of an acquisition of control must be considered when the merger approval is sought; and the Tribunal has (based on the particular circumstances of the case) jurisdiction to grant declaratory relief (where the requirements were met).

4.5 But the candidate has also sat in other Competition Appeal Court Appeals, in which she concurred in the judgment written. This has included one of the more complex cases that has been decided by the

CAC, *Sasol Chemical Industries Limited v Competition Commission* 2015 (5) SA 471 (CAC)

4.6 A number of the candidate's judgments which we have reviewed demonstrate that the candidate is able to grapple with complex factual matters and undertake substantial case law research in preparing judgments.

4.7 The candidate does not claim to have particular experience or expertise in constitutional law. The candidate is, however, clearly familiar with constitutional court jurisprudence. Some of the judgments penned by the candidate reviewed by us concern constitutional matters. Most notable is the decision of *City of Cape Town v Khaya Projects (Pty) Ltd and Others* 2016 (5) SA 579 (SCA); [2016] 4 All SA 1 (SCA). In this matter, the City of Cape Town sought a declarator that Khaya, a private construction company, had obligations under section 26 of the Constitution not to build defective low-cost housing funded by the state. The Western Cape High Court dismissed the application with costs. On appeal, the candidate found that the principle of subsidiarity prevented the City from seeking the constitutional declarator directly – it must first exhaust its statutory and contractual remedies against Khaya, which it failed to do. The candidate also concluded that Khaya did not bear these obligations as an organ of state: it was not controlled by the City; it did not perform a nationwide public function; it did not directly contract with the City; nor did it undertake to effectively achieve the City's positive constitutional obligations. The City also sought an order that the arbitration between Khaya and the project developer had lapsed. In relation to this claim, the candidate held that

the City had no standing in the arbitration. The candidate also set aside the High Court's order of costs in favour of the amicus curiae because amici are generally not entitled to costs. The appeal was dismissed with costs.

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

5.1 The candidate's judgments reveal that she is very committed to the values of the Constitution. This is particularly evident in the following judgments:

5.1.1 *Gani NO v S* 2012 (2) SACR 468 (GSJ)

This case involved a young girl under the age of 18 years. She was a refugee who had stolen soap from a supermarket on two different occasions. This resulted in two criminal convictions. The candidate set aside the second conviction and referred the matter back to the court a quo for proper implementation of the relevant provision of the Child Justice Act. This would entail diversion of the matter away from the formal criminal court procedures by means of the mechanisms established by Chapter 6 and Chapter 8 of the Child Justice Act. The candidate also advised that the *curator ad litem* apply to have the first conviction set aside as well.

Significantly, the candidate ensured that someone who is underage would not have criminal convictions by the time she reaches 18 years of age.

5.1.2 *Ex Parte Tlotlego* (2017/34672) [2017] ZAGPJHC 376 (8 December 2017)

The candidate delivered a judgment in an application for the admission of an advocate who, on account of owing monies to the institution of higher learning where she had obtained her LLB degree, did not have the original LLB degree certificate for inclusion in her papers for admission. The candidate, granting an order admitting the applicant, held that the relevant provisions of the Admission of Advocates Act did not expressly state that the original LLB degree certificate must be handed to court albeit that would be the best evidence. The candidate observed that the practice in the Gauteng divisions has been to insist on an original degree certificate and, in its absence, proof of a payment proposal with the University to show that provision has been made for the payment of fees. In a perceptive analysis the candidate's reasoned that: "*The question for determination is what happens to those law graduates who have passed and who may not benefit from the transformation and social initiatives of the Bar*". The candidate found that "*The dignity of the legal graduate is impaired and results in a situation where the poverty of the individual results in a form of culpability of that individual or a form of blameworthiness because the person is too poor to pay. In my view this results in unequal treatment of a student too poor to pay and amounts to a form of victimising those graduates who are too poor to pay.*" And further that "*It calls into question whether our court directives to insist that the*

applicant must have made satisfactory arrangements to pay their outstanding fees with the university may result in the problems referred to above. Can the admission of a law graduate to the profession be conditional upon our courts acting as an overseer of the debtor / creditor relationship between student and the University?" The candidate concluded the judgment by finding that "*It can never be that the courts must act as a gatekeeper against the interests of a student in poverty.*"

5.2 While an advocate at the Johannesburg Bar, the candidate was a member of Nadel as well as Advocates for Transformation (AFT).

5.3 The candidate is also dedicated to the mentoring of historically disadvantaged lawyers. She has done extensive mentoring of aspirant judges, and is involved in the mentoring of women in legal practice to strengthen their legal skills.

6 Whether any judgments have been overturned on appeal

6.1 The candidate has had a number of judgments overturned on appeal during her tenure as a judge of the High Court. These are summarised in the annexure and include:

6.1.1 *Mobile Telephone Networks Holdings (Pty) Ltd v Commissioner for the South African Revenue Service* (A5033/10) [2011] ZAGPJHC 190 (8 July 2011)

This is a tax matter which was taken on appeal to the full bench by MTN Holdings from the Tax Court. The candidate wrote the judgment of the full bench (Horn J and Wepener J

concurred). The case involved the deductibility of audit fees and fees paid by MTN Holdings for the training of employees on how to operate a new accounting package. According to section 11(a) of the Income Tax Act, an expenditure must have been incurred in the production of income for it to qualify for deduction. The company was audited over four years (2011, 2002, 2003, 2004).

SARS disallowed the deduction of any of the audit fees. The Tax Court ordered a deduction of 50% of the audit fees. The full bench allowed a deduction of 94% of the audit fees. The SCA overturned the decision of the candidate and allowed a deduction of only 10% of the audit fees on the ground that the company's operations related largely to non-income producing activities. While the full bench allowed a full deduction of the employee training expenses, the SCA disallowed the deduction of any portion. The evidence was that the holding company did not have any employees, and did not own the new accounting package. It therefore had no right to a claim deduction of the employee training expenses.

6.1.2 *Telkom Directory Services (Pty) Ltd v Kern* [2011] 1 All SA 593 (SCA) (22 September 2010)

The reviewers could not locate the candidate's judgment. The Supreme Court of Appeal upheld the appeal against her judgment, replacing the candidate's order with one dismissing the plaintiff's claim, with costs. The matter concerned the interpretation of a contract under Californian Law, in circumstances where the applicable principles of

interpretation had been agreed between experts for the parties, and the candidate was required to apply them. The SCA found that that the candidate had erred in admitting and relying only on the evidence of witnesses, and in failing to consider the actual terms of the contract, as required by Californian law.

6.1.3 *Hubbard v Cool Ideas 1186 CC* (580/12) [2013] ZASCA 71 (28 May 2013)

Cool Ideas, a property developer, had performed certain work that it was not registered to perform. When Cool Ideas approached the court, seeking to have an arbitral award in its favour made an order of court, Hubbard opposed, contending that the court would be condoning conduct expressly prohibited by the Housing Consumers Protection Measures Act ("the Act"). The candidate granted the order, making the arbitral award an order of court. She placed much reliance on the fact that Cool Ideas had, in the interim, registered in terms of the Act.

Hubbard appealed. The Supreme Court of Appeal (in Hubbard v Cool Ideas 2013 (5) SA 112 (SCA); [2013] 3 All SA 387 (SCA) (28 May 2013)) was very critical of the candidate. The majority remarked that: "*In this court neither counsel sought to support the reasoning of the [candidate]. Nor, I daresay, could they*." The SCA essentially held that the candidate had not taken adequate account of the intention of the legislature when interpreting the relevant sections in the Act. It held: "[t]*hat* is *the clearest indicator that the legislature did not intend a relaxation of those prohibitions*".

Ultimately, the SCA held that the candidate had erred in relaxing the prohibition in the Act and should not have made the arbitral award an order of court. It is necessary to note, however, that Willis AJA penned a dissenting judgment and in fact came to the same conclusion as the candidate.

There was a subsequent appeal to the Constitutional Court. Four justices in the Constitutional Court came to the same conclusion as the candidate, albeit with quite dissimilar views to that of the candidate. That notwithstanding, the majority in the Constitutional Court, found for Hubbard, i.e. upheld the SCA's majority decision overturning of the candidate's judgment.

6.1.4 *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (2 December 2013)

The primary issue in this matter is whether the law of Mauritius or of South Africa governed the parties' proprietary rights upon divorce. The proper law of the marriage had to be determined. The matter was taken on appeal to the SCA from the South Gauteng High Court, where the candidate sat as the court of first instance. The reviewers were unable to find the candidate's judgment.

According to the SCA's judgment:

> "*[6] In adjudicating M...'s claims, Victor J considered the evidence of Bundhan and somewhat confusingly, under the heading 'The Separation of Goods Matrimonial Regime Does Not Preclude the Application*

> *of the Logical Rules of Evidence', concluded that it had been the intention of the parties at the time of the marriage that any property acquired after the marriage would be common property. The learned judge then went on to consider under the heading, 'Domicile of Choice', where P... was domiciled at the time of the marriage. She accepted M...'s evidence that P... had intended to move to South Africa permanently even before the marriage. She rejected his evidence that he had always considered Mauritius to be his permanent home and that he was never domiciled in South Africa….*
>
> *[7] Victor J made an order in terms of which she declared M... to be entitled to 50 per cent of the value of each of the properties mentioned above. She appears to have arrived at that conclusion on the dual basis that, Mauritian law, even under the separation of goods regime, allowed a party to claim ownership of assets in proportion to which he or she made a contribution and, that M... was entitled to such a division on the basis of community of property. P... was ordered to pay M...'s costs of trial. It is these orders that are before us with the leave of this court.*"

The SCA upheld the appeal, finding that the parties were domiciled in Mauritius, and that the candidate erred in concluding otherwise. The SCA went on to apply the Mauritian law in relation to the separation of goods regime.

6.1.5 *South Africa Congo Oil Company (Pty) Ltd v Identiguard International (Pty) Ltd* 2012 (5) SA 125 (SCA)

The reviewers could not locate the candidate's judgment. The candidate presided in the court *a quo*, the South Gauteng High Court and the matter was taken on appeal to the Supreme Court of Appeal. In this case the Respondent was awarded default judgment against the Appellant in the amount of US$576 000 and US$1 395 000 or the equivalent of these sums in South African currency, together with interest as well as the cost of suit. On the strength of the default judgment a writ of execution was issued and the Respondent sold in execution an aircraft owned by the Appellant. The sale yielded R1,766,007.72, with the result that the Respondent secured only partial satisfaction of the debt and the remainder was unpaid. The Respondent then invoked garnishee proceedings in terms of rule 45(12). The Respondent issued two notices in terms of rule 45(2)(a). The first directed Sheriff to attach the debt whilst the second called upon the Appellant to pay the amount of the debt to the respondent. After the Appellant refused to the pay, the Respondent approached the court *a quo* for an order in terms of rule 45(12)(b), requiring the Appellant show cause why it should not pay the Sheriff the amount of the debt in satisfaction of the respondent's writ of execution. This application was opposed. The Appellant contended that the Respondent was not entitled to invoke the provisions of rule 45(12)(b) in the circumstances. The candidate *a quo*

dismissed this and other contentions and granted an order authorising the garnishee notice.

The case involved the proper construction and legal effect of garnishee proceedings brought under rule 45(12) of the Uniform Rules of Court and its inter-relationship with the provisions of rule 45(8). The parties were in agreement that it is a requirement of rule 45(12)(a) that a debt owed by the garnishee to the judgment debtor ought to be attached, however they differed as to the manner in which such attachment was to be achieved. The SCA found that it is a requirement of rule 45(12)(a) that the Sheriff attach the debt in accordance of rule 45(8)(c). Such attachment coupled with service of the garnishee notice has the effect, of prohibiting the person upon whom the garnishee notice is served from parting or dealing with the debt pending the outcome of garnishee proceedings. Since no notice was given to the Appellant and no endeavour made by the Sheriff to effect an attachment in accordance with rule 45(8)(c), the garnishee proceedings were rendered ineffective. The appeal succeeded with costs and the order of the candidate *a quo* was set aside.

6.1.6 *Hemmingways Shopping Centre (Pty) Ltd v P D Naidoo & Associates Consulting Engineers (Pty) Ltd and Another* (2013/42685) [2017] ZAGPJHC 377 (11 June 2017)

The matter concerned the entitlement of a party to proceed with the leading of the evidence of an expert witness in chief, at the resumption of a hearing where the party had indicated

at a previous hearing, that there were no further questions for that witness. The arbitrator, who was the second respondent, ruled against Hemmingways, in an application made by it at the commencements of the resumed hearing of the arbitration, for the continuation of leading the evidence of the witness in chief. Between the time that the evidence of the witness in chief had been presented and the time that the arbitration had resumed, numerous procedural steps of relevance and importance to the issues, which affected the evidence presented to the arbitrator had taken place. Hemmingways launched an application to Court for the review and setting aside of the ruling which was heard by the candidate, who dismissed the application with costs. The candidate dismissed the application.

In the application for leave to appeal judgment which we have reviewed, the candidate acknowledged that the references in her judgment to re-opening of cases was in error, as was the "*comment that Mr Ellmer's evidence would not '*bring an end to the case*' when in fact the context is that the evidence would not curtail or be dispositive of the ambit of Mr Ellmer's evidence because I found that the applicants approach to amendments has no boundaries*". On appeal the decision was overturned by the full bench, which remarked that despite the court *a quo* quoting and heavily relying on a number of cases dealing with an application to re-open a case, the approach adopted by the candidate in the circumstances of this particular case was wrong. The full bench held that the real

issue for the court *a quo* to decide became obfuscated by the errors that were made.

The candidate had further held that interference with the arbitrators ruling by the court would not be appropriate as the parties had chosen an arbitrator who had considerable and admirable expertise in matters of this kind, that no level of unfairness in regard to the ruling was discernible and, finally that a "limit had to be placed on the applicant's ever evolving claim". The full bench disagreed with this approach and remarked that the court is "now enjoined to consider and adjudicate the issue afresh." The appropriate point of departure was whether the arbitrator properly exercised his discretion in refusing the further evidence in chief. The full bench found that refusing further evidence in this instance constituted a failure to ensure the fair administration of justice and that the ruling was "grossly unfair" and fell to be set aside.

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

7.1 The candidate began her professional career as a nurse and social worker, after completing a Bachelor of Social Science (B.Soc. Sc) degree in 1971. She then turned to law in approximately 1980 (completing her LLB in 1982). Since then, she has qualified as an attorney (in 1984) and spent 25 as an advocate before being elevated to the bench in 2008. As noted above, from 2014, she has been invited by the Judge President to serve as an acting Judge of the Competition Appeal Court. She has also been an acting Judge of the Supreme Court of Appeal (in 2016).

7.2 The candidate is plainly comfortable in a wide variety of legal fields, including tax, competition law, commercial and public interest law.

7.3 Notably, for present purposes, she is an experienced appeal judge.

7.4 She is presently the Vice President of the South African Chapter - International Association of Women judges.

8 The candidate's linguistic and communication skills

8.1 The candidate's judgments, apart from a few typographical errors, reveal that she has excellent linguistic skills in English. Her proficiency in any other language is unknown to the reviewers.

8.2 The candidate's judgments are, however, sometimes lacking in clarity. Portions of one of her judgments taken on appeal were described as "*somewhat confusing*" by the SCA in *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (2 December 2013), and the reviewers have noted a similar tendency in some (but by no means all) of her other judgments.

9 The candidate's ability to produce judgments promptly

9.1 It is not always possible to determine how quickly some of the candidate's judgments have been produced, as the date of hearing of the matter is not provided.

9.2 Generally, however, the reviewers' sense is that the vast majority of her decisions are promptly delivered within a month or two after the hearing.

9.3 At the time of submitting the application in December 2017, the candidate had only one reserved judgment (*Shoreline Properties v Unlawful Occupiers and others*, which was reserved on the question of costs on 19 November 2017).

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

10.1 There is no indication that the candidate is unfair or lacks impartiality in the judgments that she has delivered.

10.2 No adverse comments have been received.

11 **The candidate's independent mindedness**

11.1 The candidate has written a number of judgments in which she has disagreed with the decisions of the Competition Commission and Competition Tribunal on appeal to the CAC.

11.2 She has also demonstrated her independence in writing a dissent (which became the majority judgment, with the concurrence of Davis JP) in *Isipani Construction (Pty) Ltd v Competition Commission* (144/CAC/ Aug16CT, 019950) [2017] ZACAC 3 (14 September 2017) (discussed in paragraph 4.4.5 above).

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

12.1 The candidate is plainly an experienced judge.

12.2 No adverse comments have been received.

13 **The candidate's administrative ability**

13.1 Under this heading, it should be noted that the candidate was elected onto the Bar Council of the Johannesburg Society of Advocates for five years (indeed she was the first woman to be elected to the Bar Council).

13.2 While an advocate, she acted as the secretary that distributed *pro bono* work to other advocates.

13.3 No adverse comments have been received on the candidate's administrative ability.

14 The candidate's reputation for integrity and ethical behaviour

14.1 The candidate notes in her application, in relation to her ethical behaviour, that whilst practicing as an advocate she appeared on behalf of a black businessman who was evicted from his business premises. His stock was thrown into a street which had pools of oil and grease and this destroyed his imported Italian men's clothing stock. The landlord locked him out of his shop. A letter that the candidate wrote to an attorney friend describing this event and in which she called the landlord racist became public. The candidate says that she was cautioned for describing the landlord as racist.

14.2 The reviewers do not believe that there is any basis to question the candidate's integrity and ethical behaviour.

15 The candidate's judicial temperament

15.1 As already noted, the candidate is an experienced judge of 10 years calling.

15.2 No adverse comments have been received on the candidate's judicial temperament.

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

16.1 While at the Bar, the candidate acted extensively (in the late 1980s and early 1990s), in various public interest matters, including treason trial litigation, defending young members of communities accused of public violence and civil work.

16.2 It should also be noted that the candidate has also been honoured by the Johannesburg Bar for her contribution to its work and its members.

16.3 The candidate is clearly committed to the transformation of our society, the mentoring of historically disadvantaged lawyers, as well as the protection of human rights. Her judgments reflect an appreciation of the difficulties confronted by people living in poverty, as well as an understanding of the role that a judge can play in alleviating those difficulties and protecting human dignity.

17 **The candidate's potential**

17.1 The candidate is an intelligent and conscientious legal professional.

17.2 She has demonstrated an ability to deal with the most complex issues which arise in competition law.

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

18.1 The candidate is a woman applying for a permanent position in the CAC, in a field which has historically been dominated by men.

18.2 It is the reviewers' assessment that her appointment will send a positive message to the community at large.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Oceana Group Limited and Another v Competition Commission [2014] 2 CPLR 372 (CAC)

Lekoa Fitment Centre v Altech Netstar (Pty) Ltd and another [2015] 1 CPLR 51 (CAC)

Council for Medical Schemes and Another v South African Medical Association and Others [2015] 2 CPLR 376 (CAC)

S v Motloung 2016 (2) SACR 243 (SCA) (2 June 2016)

Omnico (Pty) Ltd and another v Competition Commission and others [2016] 2 CPLR 398 (CAC)

City of Cape Town v Khaya Projects (Pty) Ltd and Others 2016 (5) SA 579 (SCA); [2016] 4 All SA 1 (SCA)

Gani NO v S 2012 (2) SACR 468 (GSJ) (14 October 2011)

Botha v Road Accident Fund 2015 (2) SA 108 (GP) (16 April 2013).

Unreported decisions

Gonya v S (891/15) [2016] ZASCA 34 (24 March 2016)

Du Toit NO v Thomas NO and Others (635/15) [2016] ZASCA 94 (1 June 2016)

Isipani Construction (Pty) Ltd v Competition Commission (144/CAC/ Aug16CT, 019950) [2017] ZACAC 3 (14 September 2017)

Hosken Consolidated Investment Limited and Tsogo Sun Holdings Limited v The Competition Commission (154/CAC/Sep17, decision of 30 October 2017)

Ex Parte Tlotlego (2017/34672) [2017] ZAGPJHC 376 (8 December 2017)

Absa Bank Limited v Lekuku (32700/2013) [2014] ZAGPJHC 274 (14 October 2014)

University of Johannesburg v Auckland Park Theological Seminary (Pty) Ltd and Others (39717/2012) [2017] ZAGPJHC 382 (10 March 2017)

Black Eagles Project Roodekrans v Netrac Investments 72 (Pty) Ltd and Another (16256/15) [2015] ZAGPJHC 341 (2 December 2015)

Phika v S (A112/2015) [2015] ZAGPJHC 333 (11 December 2015) (marked reportable)

Member for the Executive Committee Department of Local Government and Housing Gauteng Province v Kolombea (9509/2011) [2011] ZAGPJHC 179 (30 November 2011)

SA Point of Purchase (Pty) Ltd and Another v Hatton-Jones and Others (30429/13) [2014] ZAGPJHC 297 (7 August 2014)

Letlapa and Another v Moloto and Others (25045/2013) [2014] ZAGPJHC 302 (28 August 2014)

Johannesburg Society of Advocates v Van Blankenberg 2015 JDR 0140 (GJ) (2012/29828) [2015] ZAGPJHC 340 (21 January 2015)

Rham Equipment v Samancor Ltd (26820/04) [2015] ZAGPJHC 332 (12 February 2015)

DBT Technologies (Pty) Limited v August General Servicing South Africa (Pty) Limited and Others (2015/04987) [2015] ZAGPJHC 337 (16 March 2015)

Pholile Business Solutions CC v Sidas Security Guards (Pty) Ltd (A5051/14) [2015] ZAGPJHC 216 (12 June 2015)

Masstores (Proprietary) Limited v South African Broadcasting Corporation Limited (A5071/2014, 3294/2012) [2015] ZAGPJHC 192 (31 August 2015)

Seevnarayan v Ramjathan (13710/2012) [2016] ZAGPJHC 386 (28 October 2016)

Holloway and Another v Padi Emea Limited (38785-2014) [2017] ZAGPJHC 381 (8 March 2017)

Judgments upheld on appeal

Afriforum v Minister of Trade and Industry and Others [2013] 3 All SA 52 (GNP) (28 February 2013)

Metralark v Stamford Sales (18472/11) [2013] ZAGPJHC 124 (5 June 2013).

Nedbank v Gossayn and Others (33795/12) [2015] ZAGPJHC 335 (7 July 2015)

Kwikspace Modular Buildings Ltd v Sabodala Mining Company Sarl and Another [2010] 3 All SA 467 (SCA); 2010 (6) SA 477 (SCA)

Master Currency (Pty) Ltd v Commissioner for South African Revenue Services (155/2012) [2013] 3 All SA 135 (SCA); 2014 (6) SA 66 (SCA)

First Rand Bank v National Stadium South Africa 2010 JDR 1112 (GSJ).

Fedgroup Participation Bond Managers (Pty) Ltd v Trustee of the Capital Property Trust Collective Investment Scheme in Property (unreported GSJ judgment, case no 41882/12, 10 December 2013)

Judgments overturned on appeal

Mobile Telephone Networks Holdings (Pty) Ltd v Commissioner for the South African Revenue Service (A5033/10) [2011] ZAGPJHC 190 (8 July 2011), overturned on appeal in *Commissioner for the South African Revenue Service v Mobile Telephone Networks Holdings (Pty) Ltd* 2014 (5) SA 366 (SCA) (7 March 2014)

Telkom Directory Services (Pty) Ltd v Kern [2011] 1 All SA 593 (SCA)

Hubbard v Cool Ideas 1186 CC (580/12) [2013] ZASCA 71 (28 May 2013).

Lenferna v Lenferna (120/13) [2013] ZASCA 204 (2 December 2013)

South Africa Congo Oil Company (Pty) Ltd v Identiguard International (Pty) Ltd 2012 (5) SA 125 (SCA)

Hemmingways Shopping Centre (Pty) Ltd v P D Naidoo & Associates Consulting Engineers (Pty) Ltd and Another (2013/42685) [2017] ZAGPJHC 377 (11 June 2017)

Hemingways Shopping Centre (Pty) Ltd v PD Naidoo & Associates Consulting Engineers (Pty) Ltd and Another (A5064/2015) [2017] ZAGPJHC 57 (13 March 2017)

CANDIDATE : JUDGE MARGARET VICTOR