

APPLICANT: JUDGE FAYEEZA KATHREE-SETILOANE

COURT FOR WHICH APPLICANT APPLIES: THE CONSTITUTIONAL COURT

1 The candidate's appropriate qualifications

1.1 The applicant holds the following academic qualifications:

1.1.1 BA (University of Natal, Durban) – 1988

1.1.2 LLB (University of Natal, Durban) – 1991

1.1.3 LLM (Georgetown University Law School, Washington DC (Fulbright Scholarship) – 1993

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

1.2.1 Research Assistant in the Labour Law Unit, Centre for Socio-Legal Studies at the University of Natal, Durban from January 1989 to December 1989;

1.2.2 Research Assistant at the Centre for Socio-Legal Studies at the University of Natal, Durban from January 1990 to December 1990;

1.2.3 Fellowship at Legal Resources Centre, Durban from January 1991 to July 1992; Lecturer, co-taught course on Women and the Law with Professor Karen Czapamskiy at University of

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Maryland School of Law, Baltimore, USA from May 1993 to December 1993;

1.2.4 Election Administrator at Independent Electoral Commission, Northern Cape Provincial Office from March 1994 to May 1994;

1.2.5 Senior Research Fellow at Gender Project, Community Law Centre, University of the Western Cape from June 1994 to December 1995;

1.2.6 Lecturer at International Human Rights Law, Department of Public Law, University of the Western Cape from June 1994 to December 1995;

1.2.7 Law Researcher for Justice Yvonne Mokgoro, Constitutional Court from January 1995, to December 1995;

1.2.8 Advocate at Constitutional Litigation Unit, Legal Resources Centre from January 1996 to March 1997;

1.2.9 Practising Advocate at the Johannesburg Bar from April 1997 to September 2006;

1.2.10 Director at Werksmans Advisory Services (Pty) Ltd, a subsidiary of Werksmans Attorneys from October 2006 to January 2010;

1.2.11 Acting Judge at South Gauteng High Court from 1 February 2010 to 30 October 2010;

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- 1.2.12 Judge at High Court of South Africa Gauteng Local and Provincial Divisions (Pretoria and Johannesburg) from 31 October 2010 to present;
- 1.2.13 Acting Judge at the Labour Appeal Court from 1 June 2014 to 13 December 2014;
- 1.2.14 Acting Judge at the Supreme Court of Appeal from 1 December 2015 to 31 May 2016;
- 1.2.15 Acting Judge at Labour Appeal Court from 1 December 2016 to 31 May 2017;
- 1.2.16 Acting Judge at Constitutional Court from 26 July 2017 to 31 December 2017;
- 1.2.17 Acting Judge at the Labour Appeal Court from 1 July 2018 to 31 December 2018;
- 1.2.18 Acting Judge at the Competition Appeal Court of South Africa from January 2018 to December 2018.

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 to 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 candidate is Black woman, of Indian descent.

3.2 At present, there are nine permanent Judges on the Constitutional Court. Of these, there are six men (comprised of four Black men and two White men) and three women (all Black).

3.3 The appointment of female candidates to senior positions in the judiciary currently lags behind the goal of equal gender representivity, and the candidate's appointment would therefore further this end.

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

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

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

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

4.3.1 Company law;

4.3.2 Constitutional Law;

4.3.3 Insolvency Law;

4.3.4 The law relating to Business Rescue;

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- 4.3.5 Administrative Law;
- 4.3.6 Public Interest Law;
- 4.3.7 Pension Law;
- 4.3.8 Labour Law;
- 4.3.9 Personal Injury Law;
- 4.3.10 Matrimonial Law;
- 4.3.11 Interpretation of the National Credit Act 34 of 2005.

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

- 5.1 The candidate practiced as an Advocate at the Constitutional Litigation Unit, Legal Resources Centre, Johannesburg for more than a year from January 1996 to March 1997;
- 5.2 The candidate has acted as a Judge in the Constitutional Court for 5 months, from 26 July 2017 to December 2017;
- 5.3 The candidate has published the following (*inter alia*):
 - 5.3.1 An article in 2017, entitled "*Moseneke and Economic Justice*" celebrating Justice Moseneke's unique understanding and vision of the transformative project of the Constitution;
 - 5.3.2 An article in 2009, entitled "*Rich Man, Poor Man: it shouldn't really matter, costs awards in constitutional litigation*";

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- 5.3.3 An article in 1999, published in the Democracy, Human Rights and Economic Development in South Africa, entitled “*Struggle for Women’s Rights in South Africa*”;
- 5.3.4 An article in 1996, published in Agenda, Journal on Women and Gender, entitled “*Have our Efforts Paid Off? A Critique of the New Constitution from a Feminist Perspective*”;
- 5.3.5 An article in 1995, published in the South African Journal of Human Rights, entitled “*Convention on the Elimination of all Forms of Discrimination against Women and Implications for South Africa*”;
- 5.3.6 “*Labour Law*” published in Handbook of Public Interest Law in 1991.
- 5.4 The candidate provided a book review entitled: “*Little more than an abstract promise*”, Review of “*Reflections on Democracy and Human Rights*”, which was published in January 2007 Issue of Focus (Helen Suzman Foundation Publication).

6 Whether any judgments have been overturned on appeal

- 6.1 *South African Equity Workers Association obo Bester v Rustenburg Platinum Mine and another* [2017] JOL 39188 (LAC)
- 6.1.1 In this matter, the candidate (sitting as an acting judge) held that Mr Bester’s dismissal was both substantively and procedurally unfair.

6.1.2 In a unanimous judgment, the Constitutional Court held that the Labour Appeal Court, like the commissioner of the CCMA, failed to take into account the totality of circumstances in this case and came to an unreasonable conclusion that “*swart man*” was used innocuously. In the result, the appeal was upheld, and the Labour Appeal Court’s order was set aside.

6.2 *Walker v Mosdel* 2012 JDR 1739 (GSJ)

6.2.1 In this matter, the candidate sitting upheld an appeal against the order of the court of first instance (Tsoka J) dismissing the respondents’ application for the setting aside of an arbitration award made in terms of ss 33(1)(a) and (b) of the Arbitration Act 42 of 1965, which allows a court to interfere with an award where an arbitration tribunal has misconducted itself or committed a gross irregularity or has exceeded its powers in relation to its duties or the award has been improperly obtained.

6.2.2 On special leave to the Supreme Court of Appeal, the primary issue between the parties was whether the award constitutes a final order encompassing the counterclaims. The Supreme Court of Appeal held that the arbitrator executed his mandate as envisaged in clause 12 of the agreement and did not breach any provisions of the Arbitration Act. The questions whether the arbitrator committed a gross irregularity or misconduct did not arise.

6.3 *Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality And Others* 2017 (4) SA 207 (GJ)

6.3.1 The matter involved an urgent appeal in terms of section 18 of the Superior Court Act 10 of 2013 against an order where the candidate put into operation an order requiring Mogale City to reinstate a security contract with Fidelity, pending a competitive bidding process.

6.3.2 On appeal to the Full Bench of the High Court, the appeal was dismissed, but for different reasons.

6.3.3 The Full Bench stated at paragraph 10: *“The court a quo addressed several dimensions of the constitutional guarantees of access to the courts and the power of the court to effectively regulate its own process and reasoned that an interpretation could be placed upon section 18 which spares a successful party from linking the lodgement of an application to execute pending an application for leave to appeal to an actual lodgement of such application for leave to appeal, and because of an absence of any express or implied injunction in the text of the section as to when such application to execute can or must be lodged, a lodgement of an application to execute, in anticipation of an actual application for leave to appeal, is action which is consistent with the procedure provided for in the section, purposively interpreted. The effect of such an interpretation is that a successful party could by pre-emptive action, preclude an order*

being suspended by a subsequent application for leave to appeal.”

6.4 *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd And Others* 2013 (6) SA 471 (GNP)

6.4.1 The candidate’s judgment was taken on appeal in a matter where she found that the 'binding offer' envisaged in s153(1)(b)(ii) of the Companies Act 71 of 2008 did not anticipate an option or an agreement in the contractual sense, but was rather a set of statutory rights and obligations, from which neither party could resile, and that the offer was automatically binding on both the offeror and the offeree once made.

6.4.2 The Supreme Court of Appeal overturned the candidate’s decision on appeal and held that the meaning of 'binding offer' falls to be considered on its own merits and separately from the merits of a business rescue plan.

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.

7.2 The candidate practised as an Advocate of the High Court for 9.5 years, a Director at a subsidiary of Werksmans Attorneys for 3 years, served as an Acting Judge and then a Judge of the High Court in Gauteng for 8 years. She has also acted at the Labour Appeal Court and Competition Appeal Court for 12 months, the Supreme Court of Appeal for 6 months and Constitutional Court for 5 months.

8 The candidate's linguistic and communication skills

8.1 The candidate's judgments are in English.

8.2 Her judgments are clear and concise. Many of the judgments were fact and law intensive, yet the candidate was able to deal with the issues before her logically and clearly.

8.3 There were no adverse comments regarding the candidate's linguistic or communication skills.

9 The candidate's ability to produce judgments promptly

9.1 The candidate has delivered a number of judgments (both reported and unreported).

9.2 The candidate generally produces judgments promptly.

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 her judgments, the candidate clearly articulated each party's arguments and the candidate's view of the merits and demerits of the arguments presented.

10.2 No adverse comments were received 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 No adverse comments were received regarding the candidate's independence.

12 The candidate's ability to conduct court proceedings

12.1 No adverse comments were received regarding the candidate's ability to conduct court proceedings.

13 The candidate's administrative ability

13.1 The candidate's experience as a lecturer, law researcher, Advocate of the High Court, Director at a law firm and Judge of a busy court, coupled with her 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 No adverse comments have been received regarding the candidate's judicial temperament. The candidate is known to be firm but fair.

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

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16.1 The candidate's judgments and published works highlight her 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.

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 displays positive qualities of a judicial officer.

18.2 Consequently, the candidate's appointment as a Justice of the Constitutional Court would send a positive message to the community at large.

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ANNEXURE: LIST OF JUDGMENTS RESEARCHED

Reported decisions

Standard Bank of South Africa Ltd v Kruger; Standard Bank of South Africa Ltd v Pretorius 2010 (4) SA 635 (GSJ)

African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others 2013 (6) SA 471 (GNP)

Absa Bank Ltd v Botha No and Others 2013 (5) SA 563 (GNP)

Metcash Seven Eleven (Pty) Ltd v Pollev Property Holding and Investment CC 2013 (4) SA 506 (GSJ)

Wright v Wright and Another 2013 (3) SA 360 (GSJ)

South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (Road Accident Fund, Intervening Party) 2013 (2) SA 583 (GSJ)

De Montlehu v Mayo No and Others 2015 (3) SA 253 (GSJ)

Nova Property Group Holdings Ltd and Others v Cobbett and Another 2016 (4) SA 317 (SCA)

BR and Another v TM 2016 (3) SA 417 (GSJ)

NCP Chlorchem (Pty) Ltd v National Energy Regulator and Others 2017 (6) SA 158 (GSJ)

Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and Others 2017 (4) SA 207 (GSJ)

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SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Ltd and Others 2019 (1) SA 370 (CC)

S v Liesching And Others 2019 (1) SACR 178 (CC) (Dissenting Judgment)

Export Development Canada and Another v Westdawn Investments Proprietary Limited and Others [2018] Jol 39819 (GJ)

Unreported decisions

SA Securitisation (Pty) Limited v Matlala 2010 JDR 1016 (GSJ)

The Road Accident Fund v Ramalebana Moses 2010 JDR 0792 (GSJ)

York International SA Incorporated v Du Preez 2010 JDR 0786 (GSJ)

Smith v Road Accident Fund 2010 JDR 0481 (GSJ)

Freeman NO v Eskom Holdings Limited 2010 JDR 0477 (GSJ)

Bhagwandas v Dr Goolam Omar Inc 2011 JDR 1413 (GSJ)

Akaai v Road Accident Fund 2011 JDR 1408 (GSJ)

CHHC Trading (Pty) Limited v Standard Bank of South Africa Limited 2011 JDR 0692 (GSJ)

Freeman NO v Eskom Holdings Ltd 2011 JDR 0226 (GSJ)

Mthetwa v Road Accident Fund 2011 JDR 0225 (GSJ)

Kelly Group Ltd v Capazorio 2011 JDR 0221 (GSJ)

Msimang NO v Katuliiba 2012 JDR 2391 (GSJ)

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AE v CE 2012 JDR 2118 (GSJ)

Walker v Mosdel 2012 JDR 1739 (GSJ)

Idowu Lateef Sikoula v The Minister of Home Affairs 2012 JDR 1034 (GSJ)

Paredes-Tarazona v Cobalt Capital (Pty) Ltd 2012 JDR 0732 (GSJ)

Hemingways Shopping Centre (Pty) Ltd v PD Naidoo & Associates Consulting Engineering (Pty) Ltd 2012 JDR 0575 (GSJ)

Freidlein Company (Pty) Ltd v Simaan 2012 JDR 0249 (GSJ)

Van Der Burgh v Eskom Holdings Soc Limited 2013 JDR 2362 (GNP)

Matthys NO v Road Accident Fund 2013 JDR 2015 (GNP)

Council for Medical Schemes v Liberty Medical Scheme 2013 JDR 1199 (GNP)

Cele v Avusa Media Limited 2013 JDR 0269 (GSJ)

De La Guerre v Ronald Bobroff & Partners Inc 2013 JDR 0213 (GNP)

Juanne Properties (Pty) Ltd v Conn-Weld Africa (Pty) Ltd 2014 JDR 1231 (GJ)

PS v GM 2014 JDR 1094 (GJ)

Leigh v Rasleigh Properties 2014 JDR 0960 (GSJ)

Afrisam (South Africa) (Pty) Limited v Paget 2014 JDR 0903 (GSJ)

*New Modder Developments (Pty) Limited v Ekurhuleni Metropolitan Municipality
2014 JDR 0902 (GSJ)*

SA Fruit Promoters (Pty) Ltd v Mercantile Bank Limited 2014 JDR 0901 (GSJ)

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Screening and Earthworks (Proprietary) Limited v Hollard Insurance Company Limited 2014 JDR 0900 (GSJ)

Absa Technology Finance Solutions (Pty) Limited v Thando Funeral Service CC 2014 JDR 0893 (GSJ)

Egoli Gas (Pty) Limited v Epic Foods (Pty) Limited 2015 JDR 2433 (GJ)

De Bruyn v Road Accident Fund 2015 JDR 2432 (GJ)

S v Nkosi 2015 JDR 1681 (GJ)

Gerber v Road Accident Fund 2015 JDR 1630 (GJ)

Factaprops 52 CC v Nedbank Limited 2015 JDR 1629 (GJ)

Zoo Lake Bowling Club v City of Johannesburg Property Company (SOC) Ltd 2015 JDR 0084 (GJ)

CH v MH 2016 JDR 2234 (GJ)

Nkomo Sizwe Nations v Road Accident Fund 2016 JDR 2191 (GJ)

Roberts NO. v Brian Kahn Inc 2016 JDR 2186 (GJ)

Madullammoho Housing Association (Pty) Ltd v Mbambo (MEC for Human Settlements & Local Government, Gauteng Province Interested Party) 2016 JDR 1930 (GJ)

Mothupi v Member of the Executive Council, Department of Health Free State Province 2016 JDR 1494 (SCA)

Feedpro Animal Nutrition (Pty) Ltd v Nienaber NO 2016 JDR 1492 (SCA)

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Tyco International (Pty) Ltd v Golden Mile Trading 547 CC 2016 JDR 1491 (SCA)

National Tertiary Retirement Fund v Mokadi 2016 JDR 1487 (SCA)

Chapeikin v Mini 2016 JDR 1324 (SCA)

Investec Bank Limited v Maruarona 2016 JDR 1251 (GJ)

Burden & Swart Attorneys v Govender 2016 JDR 1245 (GP)

Erf 322 House CC v Mogale City Local Municipality 2016 JDR 0847 (GJ)

Olckers v Road Accident Fund 2016 JDR 0268 (GJ)

Sindat spol. s r.o v Euro Diamond Products CC 2016 JDR 0040 (GJ)

McBride v Minister of Police (Council for the Advancement of the South African Constitution and Helen Suzman Foundation as Amicus Curiae) 2016 JDR 0028 (GP)

Eskom Holdings Soc Limited v Khum MK Investments and Bie Joint Venture 2017 JDR 0782 (GJ)

Silvo Transport CC v Minister of Safety and Security 2017 JDR 0777 (GP)

Browns The Diamond Store CC v Van Zyl 2017 JDR 0583 (GJ)

Teaca Properties (Pty) Ltd v John Banza and 167 Others 2018 JDR 0614 (GJ)

Du Raan v Stuart & another [2010] JOL 26476

Sikuola v Minister of Home Affairs and others [2012] JOL 29236 (GSJ)

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Minister of Safety and Security v Bouwer [2013] JOL 30066 (GSJ)

Msimang NO and another v Katuliiba and others [2013] 1 All SA 580 (GSJ)

Coca Cola Sabco (Pty) Ltd v Van Wyk [2015] 8 BLLR 774 (LAC)

Oosthuizen v Road Accident Fund [2015] JOL 32805 (GJ)

Shoko v Mabaso and others [2015] JOL 33160 (GSJ)

*ABSA Bank Limited v Thermex Carbon Technologies (Pty) Limited [2016] JOL
36847 (GJ)*

*Head of the Department of Education v Mofokeng and others [2015] 1 BLLR 50
(LAC)*

South African Breweries (Pty) Ltd v Hansen and others [2017] JOL 39191 (LAC)

*South African Equity Workers Association obo Bester v Rustenburg Platinum Mine
and another [2017] JOL 39188 (LAC)*

Judgments upheld on appeal

De La Guerre v Ronald Bobroff & Partners Inc 2013 JDR 0213 (GNP)

De Montlehu v Mayo No and Others 2015 (3) SA 253 (GSJ)

Wright v Wright and Another 2013 (3) SA 360 (GSJ)

*Nova Property Group Holdings Ltd and Others v Cobbett and Another 2016 (4) SA
317 (SCA)*

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McBride v Minister of Police (Council for the Advancement of the South African Constitution and Helen Suzman Foundation as Amicus Curiae) 2016 JDR 0028 (GP)

Absa Technology Finance Solutions (Pty) Limited v Thando Funeral Service CC 2014 JDR 0893 (GSJ)

Madullammoho Housing Association (Pty) Ltd v Mbambo (MEC for Human Settlements & Local Government, Gauteng Province Interested Party) 2016 JDR 1930 (GJ)

Glen Morare v SA Rail Commuter Corporation Limited 585/2013 (GSJ)

NS and Others v Presiding Officer of the Children's Court (2184/18) ZAGPJHC 59

Pillay v Hollard Insurance Company Ltd (Case No 07/032984)

Judgments overturned on appeal

South African Equity Workers Association obo Bester v Rustenburg Platinum Mine and another [2017] JOL 39188 (LAC)

Walker v Mosdel 2012 JDR 1739 (GSJ)

Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and Others 2017 (4) SA 207 (GJ)

African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others 2013 (6) SA 471 (GNP)