

CANDIDATE: JUDGE STEVAN ARNOLD MADJIET

CANDIDATE: JUSTICE STEVAN ARNOLD MADJIET

COURT FOR WHICH CANDIDATE APPLIES: CONSTITUTIONAL COURT

1. The candidate's appropriate qualifications

1.1. The candidate holds the following degrees from the University of the Western Cape:

1.1.1. BA (Law) obtained in 1981; and

1.1.2. LLB obtained in 1983.

1.2. The candidates work experience:

1.2.1. Advocate in private practice at the Cape Bar from 1 June 1984 to 31 December 1995;

1.2.2. Chief Provincial State Law Advisor for the office of the Northern Cape Premier from 1 January 1996 to 31 December 1999;

1.2.3. Advocate in private practice at the Northern Cape Bar from 1 January 2000 to 30 April 2000;

1.2.4. Judge of the Northern Cape High Court from 1 May 2000 to 30 November 2010;

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1.2.5. Judge of the Supreme Court of Appeal from 1 December 2000 to present; and Acting Judge of the Constitutional Court, 1 February 2014 to 31 May 2014.

1.3. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

2.1. The candidate has been a Judge of the High Court of Kimberley and is presently a Judge of the Supreme Court of Appeal.

2.2. The candidate has been a Judge of the Supreme Court of Appeal since 1 December 2010. He was appointed as a permanent Judge on 1 May 2000.

2.3. On 4 April 2017, in an article written by Jeanette Chabalala for News24, the candidate is the subject matter of the article. A copy of the article can be found at the following link: <https://www.news24.com/SouthAfrica/News/i-wont-be-trampled-on-because-people-think-im-not-black-enough-concourt-judge-candidate-20170404>.

2.4. The article pertains to an incident which occurred during 2006 involving a dispute between the candidate, Judge Lacock and Judge President Kgomo, involving a dispute over alleged racism, nepotism and discrimination.

2.5. The dispute arose after Kgomo JP allegedly overlooked the candidate, the most senior Judge in the division at the time, to act as his

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replacement while the former was acting in the Supreme Court of Appeal.

- 2.6. The dispute resulted in complaints and counter-complaints between the Judges being lodged with the Judicial Services Commission, after Kgomo JP contended that the candidate had insulted him in a text message.
- 2.7. According to a report in IOL, dated 15 October 2008, the issues had been “finalised” without the JSC finding any of them guilty of impeachable conduct.
- 2.8. The regrettable incident constitutes an insignificant blot against the otherwise exemplary professional and judicial career of the candidate. The candidate was subsequently elevated to the Supreme Court of Appeal.
- 2.9. On 4 April 2017, in a further article by Naledi Shange for DispatchLive, the candidate expressed that he felt that he was ready for a Constitutional Court position. A copy of this article can be found at the following link: <https://www.dispatchlive.co.za/news/2017-04-04-appointing-black-judges-to-meet-quota-patronising-says-concourt-judge-candidate/>.
- 2.10. This article notes that Acting Judge President Mandisa Maya commends the candidate for his work at the Supreme Court of Appeal.
- 2.11. The article further records the candidate’s view that he cannot wait for female representation to increase before applying for the position.

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2.12. The candidate should be given an opportunity to explain his viewpoints in this regard.

2.13. No adverse comments as to the candidate's fitness for appointment as a Judge of the Constitutional Court have been received.

2.14. Accordingly, the candidate is fit and proper for appointment to the position.

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

3.1. The candidate is Black man.

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 Black, male candidates would further the goals of racial transformation, but would not further the goals of gender transformation.

4. The candidate's commitment to the values of the Constitution:

4.1. As an acting justice in the Constitutional Court the candidate participated in four judgments, all of which are reported. In three of the cases, the candidate penned the judgments for the majority, whereas in the fourth judgment he co-wrote a minority judgment with Cameron J and Froneman J.

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- 4.2. *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC): the candidate, writing for the majority, refused to make an arbitration award, in respect of a building contract, an order of court. The Democratic Governance and Rights Unit (DGRU) noted that this judgment was criticised by Judge Malcolm Wallis in “The Common Law’s Cool Ideas for Dealing with Ms Hubbard”, *South African Law Journal*, Vol 132, Issue 4 [2015], pp. 940-970. Justice Wallis argues that Majiedt AJ should have resolved the case in terms of the common law, but instead created uncertainty and “cast doubt upon two long established rules that are part of the bedrock of the rule of law.”
- 4.3. *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC): The case concerned the constitutionality of affirmative-action measures and whether their implementation would amount to unfair discrimination.
- 4.4. The Judges of the Constitutional Court delivered four judgments unanimously upholding the appeal. The candidate co-wrote a minority judgment with Cameron J and Froneman J, which emphasized that the standard applicable to the individual implementation of affirmative action measures is fairness.
- 4.5. *Malan v City of Cape Town* 2014 (6) SA 315 (CC): In a judgment with which the majority of the court concurred, the candidate held that the City of Cape Town was entitled to lawfully evict the elderly Ms Malan after lawfully cancelling her lease as a result of her arrear rental and illegal activities on the property. Dissenting judgments were delivered

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by Dambuza AJ (with whom Froneman J and Madlanga J concurred), and Zondo J.

- 4.6. *National Commissioner of Police v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC). The candidate delivered the unanimous judgment, which held that the police's decision not to investigate crimes against humanity of torture allegedly committed in Zimbabwe, was wrong and had been correctly set aside. Accordingly, the court ordered the police to investigate. This judgment has been widely lauded for the principles of universal jurisdiction it entrenches and is illustrative of the candidate's commitment to the values of the Constitution.

5. The candidate's knowledge of the law, including Constitutional law

- 5.1. During his practice as an advocate for more than a decade the candidate acted in human rights and public interest cases, particularly in the mid to late 1980s during the states of emergency.
- 5.2. During his tenure at the Northern Cape High Court from 2000 until 2010, the candidate adjudicated cases in respect of a wide range of civil and criminal matters.
- 5.3. As justice of the Supreme Court of Appeal since December 2010 and as acting justice of the Constitutional Court during the first terms of 2014, the candidate demonstrated a comprehensive and thorough knowledge of the full ambit of the law, including constitutional law.

6. Whether any judgments have been overturned on appeal

- 6.1. The candidate listed eight of his judgments that were successfully appealed against. This is not unusual in a long judicial career.
- 6.2. An article that appeared in The Con titled “Patriarchy, Violence and the Judiciary” on 4 October 2016 (attached), pointed out that in 2009 the candidate’s judgment about the rapes of a minor girl in *Bothma v Els and Others* [2009] ZACC 27 was overturned by the Constitutional Court. The alleged rapes had taken place between 1968 and 1970. The candidate held that the delay in bringing the case to court was an absolute bar to the private prosecution.
- 6.3. A unanimous judgment of the Constitutional Court rebuked the candidate for ignoring precedent of the SCA and not placing appropriate weight on the nature of the offence – child rape – in coming to his decision.
- 6.4. The same article raises concern regarding a judgment by Judge Wallis in which the candidate concurred, wherein they acquitted the accused of a conviction of rape of a seven-year-old girl. In their judgment the doubt of the justices was piqued by the girl’s testimony that her uncle placed his “private parts” “on” her vagina, thereby questioning whether penetration occurred. The two judges who dissented with the aforesaid judgment noted that the girl explicitly used the word “raping” to describe what had been done to her and the medical evidence appeared to be consistent with penetration.

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

7.1. The candidate was admitted as an advocate of the High Court of South Africa in April 1984, Cape Town High Court, and practised at the Cape Bar from 1984 until 1995.

7.2. The candidate was Head: Adjudication of the Independent Electoral Commission, Northern Cape, from January until June 1994. In this capacity he dealt with litigation, electoral disputes, etc.

7.3. He worked as Chief Provincial State Law Advisor in the Office of the Premier, Kimberley for the period 1996 until 1999, where he supervised and managed ten lawyers and chaired the following Commissions of Inquiry:

7.3.1. Commission of Inquiry into the alienation and transfer of municipal land at Douglas, Northern Cape;

7.3.2. Commission of Inquiry into housing in the Northern Cape; and

7.3.3. Commission of Inquiry into the Kimberley Hospital Complex. Thereafter he practised as a member of the Northern Cape Society of Advocates from January until March 2000.

7.4. The candidate was appointed as acting judge of the Northern Cape Division of the High Court, Kimberley on 1 March 2000 and was permanently appointed as a judge of this division on 1 May 2000. As a Judge of the High Court he chaired the following Commissions of Inquiry:

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- 7.4.1. International Commission of Inquiry into allegations of racism within Zimbabwean Cricket, established by the International Cricket Council in Harare, Zimbabwe and London, 2005 (as co-chairperson with Mr Goolam Vahanvati, the then Solicitor-General of India); and
- 7.4.2. Commission of Inquiry into the sale of vehicles by the Department of Health, Northern Cape, established by the Premier of the Northern Cape, Kimberley, 2007.
- 7.5. The candidate was appointed as a Judge of Appeal in the Supreme Court of Appeal, Bloemfontein on 1 December 2010, where he continues to serve.
- 7.6. The candidate acted as a Justice of the Constitutional Court, Johannesburg from 1 February 2014 until 31 May 2014.
- 7.7. Apart from several positions of social responsibility, the candidate held the following relevant professional leadership positions:
 - 7.7.1. Chairperson of the Rules Board for Courts of Law from 2014 until present;
 - 7.7.2. Member of the Council and Executive Committee of the South African Judicial Education Institute (SAJEI);
 - 7.7.3. Co-ordinator and lead facilitator from 2013 until present of the training programme for aspirant judges and from 2015 until present of Cybercrime and Electronic Evidence for permanent judges;

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7.7.4. Member and Task Team Convenor of the Judicial Case Flow Management Committee; and

7.7.5. The candidate is the incumbent Chancellor of the Sol Plaatje University from August 2015.

8. The candidate's linguistic and communications skills:

8.1. The candidate has had substantial experience producing judgments and he shows competent linguistic and communications skills.

9. The candidate's ability to produce judgements promptly

9.1. DGRU listed five judgments of the candidate which exceeded the three-month period for the delivery of judgments envisaged by article 5.2.6 of the Norms and Standards for the Performance of Judicial Functions.

9.2. These judgments took between four and seven months to deliver, which in the context is not excessive as all the cases were heard by a panel of judges.

10. The candidate's fairness and impartiality

10.1. Adv Norman Arendse SC highlighted in his nomination letter, the rare but necessary attributes and qualities which he believes make the candidate pre-eminently suitable for appointment. He regards the candidate as a fair-minded but firm person, acutely sensitive to the plight of litigants whose causes he adjudicates.

11. The candidate's independent mindfulness

11.1. There is no record of any incidents indicating a lack of independent mindfulness.

12. The candidate's ability to conduct court proceedings

12.1. The candidate has extensive experience as a judge.

12.2. No adverse comments have been received in this regard.

12.3. The nomination letter of Adv Arendse SC states that the candidate is collegial and ready to listen. Further, the nomination letter states that the candidate conducts proceedings with a firm hand.

12.4. It can be accepted that the candidate has the requisite ability to conduct court proceedings.

13. The candidate's administrative ability

13.1. No adverse comments have been received in this regard.

14. The candidate's reputation for integrity and ethical behaviour

14.1. The articles as reference in paragraph 2 raise questions in regard to the candidate's integrity and ethical behaviour.

14.2. The candidate's comments regarding female representation in the legal field raise doubts as to the candidate's ability to advance the values of the Constitution.

14.3. The candidate's failure to disclose the articles raise doubt about the candidate's ethical behaviours and beliefs.

15. The candidate's judicial temperament

15.1. No adverse comments have been 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 involved in numerous community organisations, as is evident from his application.

16.2. The candidate acted in human rights and public interest cases during his practice as an advocate. His subsequent judgments indicate sensitivity towards human rights and the importance thereof in a developing democracy.

17. The candidate's potential

17.1. The candidate's extensive experience as a judge in both the High Court as well as the Supreme Court of Appeal demonstrate that he does have skills to fill the position of the Judge of the Constitutional Court.

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

18.1. The candidate has a wealth of knowledge and experience that would benefit him in executing his duties as a Judge of the Constitutional Court.

18.2. The candidate's appointment will send a positive message to the community at large, as not only is he well qualified, but he is also

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coloured, resulting in his appointment assisting in addressing the racial composition of the highest Court in the country.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Dorbyl Vehicle Trading & Finance Company (Pty) Ltd v Northern Cape Tour & Charter Service CC [2001] 1 All SA 118 (NC)

Laerskool Gaffie Maree and Another v Member of The Executive Council for Education, Training, Arts and Culture, Northern Cape, and Others 2003 (5) SA 367 (NC)

S v S [2004] 1 All SA 344 (NC)

Bester v Sol Plaatje Municipality and Others [2004] 2 All SA 31 (NC)

United Christian Democratic Party v Independent Electoral Commission and Others [2004] 2 All SA 336 (B)

Matroos v S [2005] 2 All SA 404 (NC)

S v Steyn 2010 (1) SACR 411 (SCA)

S v RO and Another 2010 (2) SACR 248 (SCA)

Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd [2010] 3 All SA 537 (SCA)

Opperman and Another v S [2010] 4 All SA 267 (SCA)

Minister of Safety and Security v Venter and Others 2011 (2) SACR 67 (SCA)

CONSAWU v NEDLAC and Others [2011] 3 All SA 497 (SCA)

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Mokala Beleggings and Another v Minister of Rural Development and Land Reform and Others 2012 (4) SA 22 (SCA)

Dlamini v S [2012] 2 All SA 569 (SCA)

Phillips v South African Reserve Bank and Others 2013 (6) SA 450 (SCA)

Minister of Agriculture and Land Affairs and another v De Klerk and others
[2014] 1 All SA 158 (SCA)

Lester v Ndlambe Municipality and Another [2014] 1 All SA 402 (SCA)

National African Federated Chamber of Commerce and Industry and others v Mkhize and others [2015] 1 All SA 393 (SCA)

Hendricks v Hendricks and Others 2016 (1) SA 511 (SCA)

BSB International Link CC v Readam South Africa (Pty) Ltd and Another [2016] 2 All SA 633 (SCA)

Unreported decisions

Minnie & 'n Ander v S [2009] JOL 24585 (NCK)

Commissioner, SARS v MultiChoice Africa (218/10) [2011] ZASCA 41 (29 March 2011)

Municipality of Mossel Bay v The Evangelical Lutheran Church (443/12) [2013] ZASCA 64 (24 May 2013)

Motowest Bikes & ATVS v Calvern Financial Services (138/13) [2013] ZASCA 196 (2 December 2013)

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Nevhotalu v S (692/12) [2013] ZASCA 44 (28 March 2013)

Shubane v The State (073/14) [2014] ZASCA 148 (26 September 2014)

Clifton Dunes v City Capital (169/14) [2015] ZASCA 12

Minister of Police v Dlwathi (20604/14) [2016] ZASCA 6 (2 March 2016)

Judgments upheld on appeal

None listed.

Judgments overturned on appeal

Bothma v Els 2010 (2) SA 622 (CC)

*Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd and Another [2016] 2 All SA
351 (SCA)*