

APPLICANT: JUDGE NAMBITHA DAMBUZA-MAYOSI

COURT FOR WHICH APPLICANT APPLIES: CONSTITUTIONAL COURT

1 The candidate's appropriate qualifications

- 1.1 The candidate holds BProc (1987), LLB (1989) and LLM (1990) degrees.
- 1.2 The BProc and LLB degrees were conferred by the University of Natal, Durban (now known as the University of KwaZulu-Natal).
- 1.3 The LLM degree was conferred by Tulane University, New Orleans, Louisiana, United States of America.
- 1.4 The candidate has the requisite qualifications for the position for which she has applied and is well qualified academically.

2 Whether the candidate is a fit and proper person

The candidate is a fit and proper person. The candidate:

- 2.1 acted as Judge of the High Court, Eastern Cape Division (2003 to 2005);
- 2.2 was a Judge of the High Court, Eastern Cape Division (2005 to 2015);
- 2.3 acted as Judge of the Competition Appeal Court (2009);
- 2.4 has been a Judge of Appeal in the Competition Appeal Court (2010);
- 2.5 acted as Judge in the Constitutional Court (2013 to 2014);

- 2.6 acted as Judge of Appeal in the Supreme Court of Appeal (2014 to 2015);
- 2.7 has been a Judge of Appeal in the Supreme Court of Appeal (2015 to the present); and
- 2.8 has been a Judge of Appeal in the Competition Appeal Court (from 2009 to the present).

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

- 3.1 The candidate is a black woman.
- 3.2 There are currently only eight permanent members of the Constitutional Court (five men and three women, of which only one is white, being a white man).
- 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 The candidate practised as an attorney (1992 to 2003), was a part-time lecturer at the School for Legal Practise, East London (2000 to 2001) and was a part-time lecturer at the University of Fort Hare, Bisho (2002 to 2003).
- 4.2 The candidate is vastly experienced across the legal field and has adjudicated cases across the spectrum.

- 4.3 The candidate's judgments reveal a thorough understanding and knowledge of the law.
- 4.4 The candidate has been a judge for many years, has acted with distinction at provincial level and in the Supreme Court of Appeal, and has acted as a Judge of the Constitutional Court.
- 4.5 The candidate has a firm understanding of jurisprudence and the proper approach thereto.

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

- 5.1 The candidate's firm commitment to the values of the Constitution and to the rule of law appears from her judgments and from her being a member of the Council of Schools, of the Law Society of the Cape of Good Hope (1992 to 2004), of the Black Lawyers Association (1996 to 1999), of the South African Judicial Institute (2014), of the Council of the Walter Sisulu University (2014 to the present, from 2015 to 2017 as Chair), as council member and facilitator of the SA Judicial Education Institute (from 2014 to the present), as member of the International Association of Women Judges (2019), as trustee of the Heatherbank Farm School (2015 to the present), and as board member of the Diocesan School for Girls (2015 to 2018).

6 Whether any judgments of the candidate have been overturned on appeal

Judgments of the candidate have been overturned on appeal in the following judgments:

6.1 *Passenger Rail Agency of South Africa v Mashongwe* [2014] ZASCA 202

6.2 *Bakgatla Ba Kgafela Communal Property Association v Bakgatla Ba Kgafela Tribal Authority and Others* 2015 (10) BCLR 1139 (CC)

6.3 *Competition Commission v Yara and Others* [2012] ZACC 14

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

7.1 The candidate has extensive experience as a practising attorney (for 11 years), as a lecturer (for approximately 4 years), as Acting Judge of the Eastern Cape Provincial Division and thereafter as Judge of the Eastern Cape Provincial Division (for approximately 13 years), as Acting Judge and later Judge of Appeal of the Competition Appeal Court (for 2 years), as lecturer at the Black Lawyers Association Legal Education Institute (for 2 years), as Acting Judge and later Judge of the Supreme Court of Appeal (from 2014 to the present, more than 6 years) and as Acting Judge of the Constitutional Court (for 2 years).

7.2 The judgments of the candidate reflect extensive and broad professional legal experience.

8 The candidate's linguistic and communication skills

8.1 The candidate has excellent linguistic and communication skills, as appears from her judgments.

9 The candidate's ability to produce judgments promptly

9.1 Judgments in the Eastern Cape Provincial Division were found to have been delivered promptly, some as quickly as two weeks after argument.

9.2 Judgments in the Supreme Court of Appeal were delivered promptly and in many instances on the same day of argument.

9.3 Judgments in the Constitutional Court were found to have been handed down promptly.

10 The candidate's fairness and impartiality

10.1 The candidate is fair and impartial, as appears from her judgments.

10.2 No counsel who have appeared before the candidate have complained about the candidate's fairness and impartiality. On the contrary, counsel speak highly of the candidate's fairness and impartiality in Court.

11 The candidate's independent mindedness

11.1 The candidate is independently minded. This is evident from the dissenting judgments written by the candidate, including a dissenting judgment in the Constitutional Court.

12 The candidate's ability to conduct Court proceedings

12.1 The candidate has been a Judge for many years and evidently has the ability to conduct Court proceedings.

13 The candidate's administrative ability

13.1 The candidate has served on the management bodies of Schools, Universities, the Law Society of the Cape of Good Hope, the Rules

Board for the Courts of South Africa (as Chairperson from 2018 to the present) and she has proven administrative ability.

14 The candidate's reputation for integrity and ethical behaviour

14.1 The candidate has an excellent reputation for integrity and ethical behaviour.

14.2 The reviewers are unaware of any aspect which may impugn the candidate's reputation.

15 The candidate's judicial temperament

15.1 The candidate has an excellent reputation and has an even temperament and has never been rude or impatient with colleagues or counsel who have appeared before her.

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

16.1 The candidate is clearly committed to human rights and has experience with, and promoted, the values and needs of the community.

16.2 The judgments of the candidate likewise reflect a deep understanding and commitment towards these rights, values and needs.

17 The candidate's potential

17.1 The candidate is highly experienced and has been a valuable asset of the Provincial Division of the High Court, of the Supreme Court of Appeal and of the Competition Appeal Court.

17.2 The candidate has excellent potential as a permanent appointment to the Constitutional Court.

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

18.1 The candidate is a black woman who was a successful attorney, lecturer, Judge of the Provincial Division of the High Court, Judge of the Supreme Court of Appeal and of the Competition Appeal Court.

18.2 The candidate's diligence, legal insight and experience would send a positive message to the community at large.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Eastern Cape Provincial Division

Page v First National Bank & Another 2009 (4) SA 484 (E)

This case concerned an action in delict for pure economic loss arising from advice from a banker which induced an offshore investment. The bank relied on a clause in an agreement which stipulated that it does not assume responsibility for the performance of investments and that it was not on the bank's advice but rather on subsequent advice of other financial advisors, that the investment was made.

It was held that the bank had a duty of care towards the plaintiff, that the bank had to consider the needs and circumstances of the plaintiff prior to giving advice. It would have revealed that an offshore investment was unsuitable. Judgment was granted in favour of the plaintiff.

The judgment shows a thorough understanding of the law of delict, pure economic loss and vicarious liability. The matter was heard in November 2006 and June 2008 and judgment was handed down on 16 October 2008.

FirstRand Bank Limited v Woods and Similar cases 2011 (5) SA 536 (ECP)

This case concerned banks, relying on the wording of a particular rule of court to prevent property owners from applying for the rescission of default judgments granted by the Registrars of High Courts.

It was held that the banks did not have standing to apply for the relief as they were not dissatisfied parties in terms of the rule. The judgment shows a clear understanding of procedural law. The case was heard on 17 May 2011 and judgment was handed down on 31 May 2011.

BC v CC & Others 2012 (5) SA 562 (ECP)

This case concerned the proprietary rights of spouses in a divorce where assets were held by the husband in an inter vivos trust.

A point was raised that no averment was made by the wife that the trust assets were in fact the husband's property, or deemed to be such, resulting therein that it could not be considered in determining the accrual of his estate.

It was held that provided the required allegations were made, the Court was obliged to determine whether the spouse in question was the de facto or beneficial owner of the trust assets.

The judgment shows a clear understanding of matrimonial law and trust law. The matter was heard on 1 September 2010 and judgment was handed down on 11 January 2011.

Supreme Court of Appeal

African Banking Corporation of Botswana Limited v Kariba Furniture Manufacturers (Pty) Limited and Others 2015 (5) SA 192 (SCA)

This case concerned the business rescue provisions and the meaning of "binding offer" in the Companies Act 71 of 2008. It was held that a "binding offer" was an offer as understood in the common law, save that it was binding in the sense that it could not be withdrawn until it was considered.

In the judgment, the conduct of a business rescue practitioner was also considered.

The judgment shows a clear understanding of company law and interpretation of legislation.

The appeal was heard on 3 March 2015 and judgment was handed down on 20 May 2015.

Richter v Absa Bank Limited 2015 (5) SA 57 (SCA)

This case also concerned business rescue and whether it was competent to apply for business rescue after final liquidation of a company.

It was held that it was competent for business rescue after final liquidation, until deregistration of the company.

The judgment shows a clear understanding of company law. The appeal was heard on 18 May 2015 and judgment was handed down on 1 June 2015.

South African Municipal Workers Union and Others v Mokgatla and Others 2016 (5) SA 89 (SCA)

This case concerned the jurisdiction of the High Court and Labour Court in determining a dispute concerning non-compliance with the constitution of a trade union.

It was held that the determination of such dispute fell exclusively within the jurisdiction on the Labour Court. The relevant question in determining whether the Labour Court's jurisdiction was exclusive depended on whether it was a review of the exercise of a power under the Labour Relations Act.

The judgment shows a clear understanding of labour law. The appeal was heard on 18 February 2016 and judgment was handed down on 18 March 2016.

Serengeti Rise Industries (Pty) Limited and Another v Abubaker N.O. and Others
2017 (6) SA 581 (SCA)

The case concerned the validity of a demolition order granted by a High Court. An application was brought that decisions of the Municipality be reviewed and set aside and that a just and equitable remedy be granted.

The High Court had approached the matter on the basis that it was bound by the operation of the legality doctrine.

It was held that the demolition order was unsustainable. The order was set aside.

The judgment shows a clear understanding of administrative law, the operation of the doctrine of legality and the exercise of a Court's discretion to grant a just and equitable remedy in considering the order to be made.

The appeal was heard on 2 June 2017 and judgement handed down the same day.

Commissioner, South African Revenue Services v Marshall N.O. and Others 2017
(1) SA 114 (SCA)

This appeal concerned the interpretation of provisions in the Value-Added Tax Act, and more particularly whether certain services were a "deemed supply" of services and whether payments received in respect thereof qualified to be zero rated.

It was held that the services fell within the provisions of the VAT Act, were a deemed supply and did not qualify to be zero rated.

The judgment shows a clear understanding of tax legislation and tax issues.

The appeal was heard on 26 August 2016 and judgment was handed down on 3 October 2016. The judgment was upheld on appeal to the Constitutional Court.

South African National Parks v MTO Forestry (Pty) Limited and Another
2018 (5) SA 177 (SCA)

This appeal concerned whether SANParks had an obligation to consult Parkscape prior to allowing MTO Forestry (Pty) Limited to vary a previously agreed tree felling programme in the Tokai Forest, Cape Town, in terms of a lease agreement.

The primary issue for determination was whether the approval of SANParks of the accelerated harvesting plan, constituted administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000. It was held that it was an administrative action.

The second issue was whether Parkscape had a legitimate expectation of a hearing, before that decision. It was held that it did.

The judgment shows a clear understanding of administrative law and its effect on certain contracts. The appeal was heard on 17 May 2008 and judgment handed down on the same day.

Ratlou v MAN Financial Services (SA) (Pty) Limited 2019 (5) SA 117 (SCA)

This appeal concerned the interpretation of the National Credit Act 34 of 2005 and whether it applied to settlement agreements.

In this instance, it did not apply as it was not designed to regulate a settlement agreement where the underlying agreement, or cause, would not have been considered by that Act. The judgment shows a clear understanding of consumer law.

The appeal was heard on 1 April 2019 and judgment handed down on the same date.

Western Cape Department of Social Development v Barley and Others 2019 (3) SA 235 (SCA)

This appeal concerned the law of delict. The owner of a day-care facility had put a baby on a bed to sleep. The child rolled off the bed and damages were claimed from the owner due to wrongful death. Damages were also claimed from the relevant Department. The High Court held in favour of the claimant.

The appeal of the Department was upheld but the owner of the day care was ordered liable for damages due to the wrongful death of the child.

The judgment shows a clear understanding of delictual law. The appeal was heard on 30 November 2018 and judgment handed down on the same date.

Road Accident Fund v Kerridge 2019 (2) SA 233 (SCA)

This appeal concerned compensation due to damages sustained in a motor vehicle accident. The role of experts was considered.

It was held that the opinions that experts provide can only be as reliable as the facts on which the experts relied for their opinion. Courts accepted the assumptions and figures provided by expert witnesses in personal injury matters too readily, without demur.

The appeal was upheld. The appeal was heard on 1 November 2018 and judgment handed down on the same date.

Masuku and Another v South African Human Rights Commission 2019 (2) SA 194 (SCA)

This appeal concerned constitutional law, more particularly the right to freedom of expression and limitations thereto.

It was held that certain expressions were not excluded from protection, but that the utterances of the appellant did not transgress the boundaries, however hurtful or distasteful they may have seemed.

The appeal was upheld. The appeal was heard on 4 December 2018 and judgment handed down on the same date.

Salem Parry Club and Others v Salem Community and Others [2017] All SA 712 (SCA)

This case concerned an appeal against a judgment of the Land Claims Court. The Land Claims Court granted a declaratory order that there was dispossession of a right in land.

There was a pronounced disagreement in this judgment between the majority and minority which rested almost entirely on the weight to be attached to evidence.

The judgment of the majority, penned by the candidate, was upheld by the Constitutional Court.

The appeal was heard on 19 February 2016 and judgment was handed down on 13 December 2016.

Orica Mining Services SA (Pty) Ltd v Elbroc Mining Products (Pty) Ltd [2017] 2 All SA 796 (SCA)

This was an appeal against the judgment of the Court of the Commissioner of Patents.

The appeal concerned a claim for patent infringement.

The judgment shows a clear understanding of the law of patent.

Constitutional Court

Malan v City of Cape Town 2014 (6) SA 315 (CC)

In this case, the candidate wrote a minority judgment in the Constitutional Court.

The majority dismissed the appeal, holding that the High Court was correct in finding that it was just and equitable to order eviction.

The candidate would have upheld the appeal and found that the City failed to give the tenant a proper opportunity to rectify her breach and that the cancellation was invalid.

The judgment shows the independent mindedness of the candidate.

Mdodana v Premier, Eastern Cape and Others 2014 (4) SA 99 (CC)

This case concerned an application for declaration of constitutional invalidity of an ordinance. It was held that confirmation of constitutional invalidity was not required, as the ordinance was not a provincial act and lacked province-wide effect. The Provincial Legislature did not express itself on the ordinance.

The matter was heard on 13 November 2013 and judgment was handed down on 25 March 2014.

National Union of Public Service & Allied Workers obo Mani and Others v National Lotteries Board 2014 (3) SA 544 (CC)

This case concerned labour law. At issue was the fairness of the dismissal of employees for insubordination and disrepute and in light thereof they lodged a petition against the Chief Executive Officer.

It was held that the employees had the right to participate in lawful union activities and it would be automatically unfair to dismiss them for exercising it. The employees were entitled to reinstatement.

The appeal was upheld. The matter was heard on 19 November 2013 and judgment handed down on 14 March 2014.

Judgments upheld on appeal

Salem Party Club and Others v Salem Community and Others [2017] ZACC 46

Marshall NO and Others v Commissioner for the South African Revenue Service
[2018] ZACC 11

Sigcau and Another v Minister for Cooperative Governance and Traditional Affairs
and Others 2018 (12) BCLR 1525 (CC)

Federation of Governing Bodies for South African Schools v Member of the
Executive Council for Education, Gauteng and Another [2016] ZACC 14

Judgments overturned on appeal

Passenger Rail Agency South Africa v Mashongwe [2014] ZASCA 202

Bakgatla Ba Kgafela Communal Property Association v Bakgatla Ba Kgafela Tribal
Authority and Others 2015 (10) BCLR 1139 (CC)

Competition Commission v Yara and Others [2012] ZACC 14