APPLICANT: JUDGE MAJAKE MESHACK MABESELE

COURT FOR WHICH APPLICANT APPLIES: CONSTITUTIONAL COURT

1 **The candidate's appropriate qualifications**

1.1 BA (Social Sciences - University of Limpopo1982);

1.2 BA Hons (Comparative African Government - University of Limpopo1984);

1.3 MA (Development studies - University of Limpopo1987); and

1.4 LLB (University of Limpopo1990).

1.5 The candidate has also been awarded a Doctor of Technology degree in Human Sciences from the Vaal University of Technology (VUT). It is not stated in the application when this degree was conferred on the candidate nor if same had been awarded honoris causa.

1.6 In addition to formal qualifications, the candidate has held a permanent judicial appointment since 28 July 2008 and since 1 May 2010 as a judge in the Gauteng Local Division of the High Court, Johannesburg.

1.7 The candidate held ad hoc acting appointments during 2001, 2004 to 2009 and held appointments in the Gauteng Local Division, Johannesburg, and the Free State Division, Bloemfontein.

1.8 The candidate has also served as a Military judge in Limpopo from 2008 to 2010 and as a judge in the Equity Court since 2019.

1.9 Noteworthy to the candidate's application for appointment to the Constitutional Court bench, is the fact that the candidate acted in that Court for two terms during 2015.

1.10 The candidate also held acting appointments in the Labour Appeal Court (2012 to 2014), the Competition Appeal Court and the Supreme Court of Appeal (December 2016 to September 2017).

1.11 The candidate's judicial and legal background is set out in section 2 of his completed questionnaire to the Judicial Service Commission. It is to be noted from the questionnaire that the information provided by the candidate, under paragraph 11 thereto, appears to be contradictory. For example, the candidate asserts that from 1 June 2018 to date he continues to hold a permanent appointment to the bench of the Supreme Court of Appeal (which is not the case).

1.12 In any event it is apparent that the candidate does have the necessary experience and qualifications for the holding of judicial office.

2 Whether the candidate is a fit and proper person

2.1 Besides what is stated below there is nothing in the candidate's application or to the knowledge of the reviewers that suggests that the candidate is not a fit and proper person.

2.2 He has substantial judicial experience, having been appointed as a permanent Judge of the High Court, since 28 July 2008.

2.3 However, it must be noted that on 7 February 2013 the High Court committee of the Johannesburg Bar Council received a complaint about the candidate's conduct.

2.4 The complaint related to the manner in which junior counsel present in Court at the South Gauteng Local Division (as it then was), on Tuesday 15 January 2013, were treated and addressed by the candidate when they were called or attempted to make submissions in their matters.

2.5 The complaint details that the candidate's behaviour in court was "rude and offensive" towards junior counsel.

2.6 The Johannesburg Bar Council minutes of February 2013 record that the High Court committee planned to discuss the complaint with the Deputy Judge President Mojapelo.

2.7 It was resolved that the Deputy Judge President Mojapelo would address the candidate informally and no formal complaint was made against the candidate.

2.8 There have been no other complaints from the Bar Council against the candidate.

2.9 Concerns have further since been raised as to the manner in which the candidate continues to conduct Court proceedings. This is elaborated on below.

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 man.

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 the candidate would therefore not materially affect the racial or gender composition of the bench.

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

4.1 The candidate has written three books on human rights addressing, inter alia abuse of women, social injustice, unequal education, land issues and humanity.

4.2 The candidate's title of his MA dissertation was "*The Administrative Problems Experienced by Blacks in the Urban Areas in the Eighties and their Conditions of Employment*". The research highlights the extent to which the apartheid laws in the eighties adversely affected the rights of Black people to freedom of movement, housing, equality and employment.

4.3 The candidate lectured at the University of Limpopo from 1985 – 1997. He was appointed at the University of Limpopo as Deputy Dean 1995 – 1997 and then Deputy Registrar 1998 – 2001.

4.4 The candidate has sat as a High Court Judge since 28 July 2008. His judgments reflect an understanding of procedure and substantive law. However, where the issues to be determined are novel and are complicated, some of the candidate's judgments reflect less clear reasoning, as dealt with below.

4.5 It is to be noted that in paragraph 16 of the candidate's application (Section 2) where he lists the cases where he has written judgments which he regards as being significant and why, the candidate listed two Constitutional Court cases and one case in the Free State High Court, Bloemfontein.1 However the candidate did not act as a judge in any of these matters. The listing by the candidate of these matters under this particular heading raises the question whether the candidate understood what he was required to list in this particular paragraph. These judgments are dealt with in detail in paragraph 7 below.

4.6 A consideration of the candidate's judgments further demonstrates a paucity of decisions by the candidate that deal with constitutional questions.

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

5.1 The candidate notes that during 1991 he was part of the delegation that attended a two-day summit in Durban concerning political tolerance in preparing for the first democratic elections in 1994. In 1994 the candidate was appointed by the IEC, in Limpopo, as a mediator during the first elections. In addition, during 2004 – 2005 the candidate was a member of the ward committee of Flora Park which was established in terms of local government regulations.

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[1] *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2016 (1) SA 325 (CC); *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others* 2015 (6) SA 115 (CC) and *Tsoaeli and Others v S* (A222/2015) [2016] ZAFSHC 217; 2018 (1) SACR 42 (FB) (17 November 2016)

5.2 Apart from the judgments reviewed in the candidate's experience, the candidate has delivered papers and lectures on human rights. He has:

5.2.1 delivered a paper during 2018 at the seminar organised by SAJEI titled "*Forced Prostitution as a Form of Human Trafficking and its Psychological Effect on the Victim*";

5.2.2 delivered a paper during 2019 at the International Conference of Judges organised by IOJT titled "*The Proper Approach to Cases involving Unrepresented Gays and Lesbians*";

5.2.3 lectured to law students and the academic staff at the University of Fort Hare on "*Law Students as Custodians of The Constitution: Their role during students' protests*". This was during 2018; and

5.2.4 delivered a paper at a seminar organised by the South African Judicial Education Institute (SAJEI) jointly with the International Commission for Justice during 2019 entitled "*Constitutional Imperatives on Rights to Housing*".

5.3 The candidate has also written 5 books on morality and humanity and is currently authoring a textbook for students of sociology and development studies entitled "*Development and Democracy*". The title of the books published are "*Farewell to Xenophobia*" (2009), "*Stillborn Child Is Better Than Oppression*" (1989), "*how Long? Not Long*" (1990), "*Meokgo e a oma*" (2008), and "*Dithethefatsi ha di lefe*" (2009).

5.4 Although these books have not been reviewed, the candidate indicates that these books concern human rights and ought to be considered protest literature.

6 Whether any judgments have been overturned on appeal

6.1 *Ruth Christine Visser v 1 Life Direct Insurance Limited* Case No: 1005/13 (SCA) – Not reported.

6.2 Appeal Court overturned the decision of the candidate and upheld the appeal with costs. The issue was whether an insurer had succeeded in establishing the requisite elements in order to avoid liability in terms of an insurance policy by reason of the non-disclosure of facts by the insured.

6.3 The SCA made *inter alia* the following comments about the candidate's court a quo's judgment:

6.3.1 "*scant regard was paid in the court a quo to the admissibility of this evidence, as well as proof of the evidence contained in this documentation*.";[2]

6.3.2 "*It appears the learned judge in the court a quo was uncertain of the status of evidence contained in the hospital records*"; and[3]

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[2] At para 7

[3] At para 12

6.3.3 "*The court a quo also laboured under the misconception that the contents of the hospital records were not in issue between the parties*.[4]

6.4 *Devonport v Premier of the Free State Province and Others* [2009] ZAFSHC 136. – Not Reported.

6.4.1 The Appeal Court overturned the decision of the candidate in dismissing the appellant's claims for damages arising out of loss of support as a result of the death of her husband, Mr Robin William Devonport ("the deceased").

6.4.2 The deceased sustained fatal injuries when he fell whilst cycling. The appellant's case was that the deceased's death was caused by the negligent failure of the first and second respondents (the province) to maintain the road or to exercise proper control thereover.

6.4.3 The candidate found that the appellant had failed to prove negligence on the part of the respondents and that the deceased was "the creator of his own misfortune"; this was the only issue challenged on appeal.

6.4.4 The Appeal Court applied the three-pronged test for negligence to the evidence presented to the candidate and found that negligence on the part of the respondents had in fact been proved

[4] At para 13

and therefore, the candidate had erred in his finding that the respondents were not negligent, as alleged or at all.

6.4.5 In addition, the Appeal Court held that it was not clear on what exact ground the candidate found against the appellant. When determining the contributory negligence of the deceased (whom the candidate found to be wholly negligent and thus dismissed the appellant's claims), the Appeal Court held that the deceased could reasonably have avoided the incident with a simple manoeuvre (given that the deceased was an experienced cyclist) and accordingly applied a 60/40 apportionment (which the candidate appeared not to have considered).

6.5 *Topham v Member of Executive Committee for the Department of Health, Mpumalanga* [2013] ZASCA 65 – Not Reported.

6.5.1 The SCA overturned the decision of the candidate in dismissing the appellant's claim for damages arising out of the failure by a medical practitioner to diagnose a hip dislocation.

6.5.2 The only issue to be determined was the respondent's liability. The appellant was involved in a motor vehicle collision, in which she dislocated her right hip. She was taken and admitted into the casualty section at the Rob Ferreira Hospital, where she was examined by Dr Molete (a newly admitted intern). The appellant's case was that the failure, on the part of the medical practitioner, to diagnose her dislocated right hip, resulted in a complication known as "avascular necrosis".

6.5.3 The candidate found that even though the medical practitioner "misdiagnosed" the appellant's right hip dislocation, he had performed the correct procedures to determine the problem and adhered to the standard of care that was required of him and therefore his conduct was not negligent nor the cause of the appellant's damages. The SCA, in upholding the appeal, found that the candidate had not only disregarded the evidence presented by and on behalf of the appellant, he had also failed to consider the evidence of the medical practitioner who examined the appellant and in this regard the SCA made reference to the general level of skill, care and diligence possessed and exercised by medical practitioners when diagnosing and treating patients.

6.5.4 The SCA found that such evidence overwhelmingly supported the conclusion of negligent conduct on the medical practitioner's part in failing to diagnose the appellant's dislocation and treat her accordingly.

6.6 *M Schneider & Hans Schneider Investments (Pty) Ltd v Renasa Insurance Company Ltd* [2019] ZAGPJHC 231

6.6.1 The candidate dismissed the appellant's claim for damages on the basis that: the appellant had failed to prove its locus standi, in that it failed to prove ownership over a motor vehicle which was involved in a collision and the defendant had failed to discharge its onus in respect of its defence that the appellant was driving under the influence of alcohol and therefore the exception contained in the insurance agreement was applicable.

6.6.2 The appellant appealed the candidate's finding that it failed to discharge its onus in respect of ownership of the motor vehicle and the respondent's cross-appealed the candidate's finding that it had not discharged its onus in its reliance on the exception.

6.6.3 The Appeal Court, in dismissing the appeal, held that the candidate had erred in finding that the appellant failed to prove its locus standi and that with all the evidence before the candidate, the plaintiff had proved the same on a balance of probabilities.

6.6.4 In upholding the cross-appeal, the Appeal Court found that the candidate had erred in his application of *Incorporate General Insurances v Boonzaaier* 1974 (4) SA200 (C) at 203 F-H to his factual findings and that he had failed to take into consideration certain facts which would evidence the appellant having been under the influence of alcohol.

6.6.5 The candidate had accepted the evidence of the respondent's witnesses that the appellant was under the influence of alcohol and that the candidate had concluded that the appellant was not a credible witness. Therefore, the Appeal Court found that the court a quo had misdirected itself in finding that the respondent had failed to discharge its onus in regard to its reliance on the exception. The Appeal Court, in dismissing the appeal, concluded that it did so for reasons which differed to the candidate.

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

7.1 The candidate was appointed as a permanent judge in July 2008 and prior to that held ad hoc acting positions since 2005.

7.2 In so far as the candidate's Constitutional Court experience is concerned, it has been difficult to gauge the candidate's breadth of professional experience when one considers the various cases listed in paragraph 16 (Section 2) of the completed questionnaire of the Judicial Service Commission.

7.3 In this regard at paragraph 16 (Section 2) the candidate was requested to list the cases in which he has written the judgment, considered to be his most significant. Insofar as the candidate's answer is concerned, the candidate did not author the judgments in:

7.3.1 *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2016 (1) SA 325 (CC). This was a judgment by Molemela AJ (with Mogoeng CJ, Moseneke DCJ, Froneman J, Khampepe J, Madlanga J and Thereon AJ concurring);

7.3.2 *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others* 2015 (6) SA 115 (CC). This judgment was written by Molemela AJ: (with Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Theron AJ and Tshiqi AJ concurring); and

7.3.3 *Tsoaeli and Others v S* (A222/2015) [2016] ZAFSHC 217; 2018 (1) SACR 42 (FB) (17 November 2016). This was a full bench decision by Molemela JP (with Moloi ADJP and Lekale J concurring).

8 The candidate's linguistic and communication skills

8.1 The fact that the candidate has published several books, and has presented several papers, demonstrates that the candidate has sufficient linguistic and communication skills.

8.2 The judgments written by the candidate are understandable and it appears that the candidate possesses the necessary linguistic and communication skills.

9 The candidate's ability to produce judgments promptly

9.1 No adverse comments have been received, however Wallis JA notes in paragraph 9 of the matter *Educated Risk Investments 165 (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality and Others* 2016 (6) SA 434 (SCA) (20 May 2016)[5] that "*The application was argued before Mabesele J early in 2014 and dismissed on 6 May 2014. The learned judge granted leave to appeal to this court on 25 March 2015. The reason for the delay in hearing the application for leave to appeal does not appear from the papers. It was unfortunate given the interests affected by that delay*."

10 The candidate's fairness and impartiality

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[5] Dealt with in this review under: ANNEXURE: LIST OF JUDGMENTS CONSIDERED

10.1 There is nothing to suggest that the candidate would not be fair and impartial to litigating parties appearing before him.

11 **The candidate's independent mindedness**

11.1 There is nothing to suggest that the candidate is not independent.

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

12.1 Amongst practitioners at the Johannesburg Bar, a number of negative comments were recorded. Specifically:

12.1.1 the candidate has been known to avoid dealing with the matters on his roll by unnecessarily postponing matters and striking matters off his roll;

12.1.2 the candidate's manner with counsel is often abrupt and he stands accused of not listening to the submissions of counsel;

12.1.3 he is said to have drawn conclusions without properly engaging in the merits of the matter and arriving at his conclusions on the matter without adequately having regard to the facts and nature of the matter; and

12.1.4 the candidate stands accused of being too quick to dismiss counsel or tell counsel to sit down, instead of properly hearing counsel's submissions.

12.2 The candidate's quick dismissal of counsel and his disregard of evidence that was led in matters, is an issue which the Appeal Court has raised in the decisions overturned.

13 **The candidate's administrative ability**

13.1 The candidate comments that he encourages collegiality amongst his fellow judges and discourages racism amongst the bench of the Gauteng Local, Division. Regrettably, the candidate doesn't provide further particulars in this regard.

13.2 The candidate also comments that he has assisted in resolving differences between fellow judges arising from work allocation and has further assisted acting judges who were unable to cope with the work allocated to them and also provided advice to other judges on how to cope with the work. Again, regrettably, no further particulars have been given.

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

14.1 Besides the points stated above in respect of the candidate's conduct towards junior counsel, no adverse comments were received.

15 **The candidate's judicial temperament**

15.1 Some negative comments have been received concerning the candidate's judicial temperament, as noted above.

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

16.1 The candidate's commitment to human rights is highlighted in his judgment *Mapodile v Minister of Correctional Services* 2016 (2) SACR 413 (GJ). In this matter an application was brought by a homosexual prisoner seeking order directing that the Minister of correctional

services houses him in a single cell or in a cell with inmates of the same sexual orientation. The applicant had complained that whilst he was accommodated in a cell with heterosexual inmates, the inmates regarded him as a woman and continually harassed him.

16.2 The application was however not opposed by the respondent and the State Attorney representing the respondent in Court advised the Court that accommodation was available for the applicant in a cell which was occupied by inmates of the same sexual orientation as the applicant, provided the applicant was prepared to sleep on the floor (due to insufficient beds in the cell). The applicant did not have difficulties with the proposal as he had already been sleeping on the floor of his current cell.

16.3 The candidate in this matter granted an order compelling the respondent to accommodate the applicant in a single cell or to a cell with inmates of the same sexual orientation and advised the parties that his reasons would follow.

16.4 Importantly, apart from the fact that the candidate was quick to grant an order in this matter, the candidate refused the request for a postponement by the respondent owing to the fact that the applicant was suffering continuous harassment and humiliation by the inmates and that the respondent was unwilling to address the legitimate concern raised by the applicant (see [11]).

16.5 In relation to the candidate's commitment to human rights, the candidate commented in his judgment that people with gay and lesbian sexual orientation have been part of society for many years and that they

are not associated with a particular race as perceived by some members of society. The candidate then goes on to explain in his judgment how, in the pre-democracy era which preferred Christianity to other religions, there was a promotion of stereotypical societal behaviour which denied gay and lesbian people freedom of expression which includes freedom to express feelings (see [12] – [14]).

16.6 The candidate was however quick to reiterate the jurisprudence that has been established by the Constitutional Court regarding the discrimination of gay and lesbian people in society and the supremacy of the Constitution including the Bill of Rights (see [15] – [23]) in light of the applicable regulations concerning correctional services wherein it is established that male prisoners and female prisoners are to be separated from each other (see [25] – [28]).

16.7 The candidate concludes in his judgment that it is beyond debate that gay people, too, have their own particular status and that they are entitled to the same protection as afforded to the other categories of prisoners and that such protection not be limited to dignity and privacy but should also include equality. The prison authorities are obliged to protect those rights (see [30] – [31]).

16.8 The candidate's judgment in this matter reflects his knowledge of the jurisprudence that has developed regarding the quality of gay and lesbian people in society and reinforces the current legal position.

17 **The candidate's potential**

17.1 The candidate has been a permanent judge since 2008 and has held acting positions before his permanent appointment.

17.2 There is no reason to believe that the candidate does not have the potential required.

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

18.1 The candidate is someone from a disadvantaged community who has been appointed to the bench. He has a number of years' experience as a judge. He shows a commitment to human rights and constitutional values.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Mahapa v Honourable Minister of Higher Education and another [2017] 2 All SA 254 (GJ)

Listed as one of the candidate's cases that he regards as significant on constitutional rights, in this instance with regard to the right to education.

The matter concerns an urgent application by an inmate who applied for a bursary from the Department of Education to pursue his studies in law while incarcerated. The application was ultimately dismissed.

The candidate refers to sections 29 and 36 of the Constitution in his judgment. He analyses section 29(1)(a) that deals with the right to basic education with reference to his own books and to numerous judgments delivered in respect of the right to basic education. The candidate expounds on this right by highlighting that it is considered an immediately realisable right within the context of previous limitations on education for African learners and as it is a right essential to addressing the imbalances of South Africa's past.

He gives a brief explanation at paragraph 32 why section 29(1)(b) has an internal limitation that requires the State to make further education "*progressively available and accessible*." He finds that the first respondent has no obligation to provide the applicant with further education by providing him with funds to do so.

It might have assisted in the further development of authority on section 29(1)(b) if the candidate had explained in broader terms what he meant with the internal or perhaps inherent limitation to section 29(1)(b) within the context

of, for example, the Fees must Fall movement, which was specifically relevant at the time of the judgment.

Unreported decisions

Ulrike Manse // Forensic Department of Health, Germiston and Gladness Makhosazana Lebogo (GLD, case number 23299/19)

Judgment listed as candidate's contribution to the development of customary marriage at paragraph 6.1 of the candidate's curriculum vitae.

The matter was an urgent application in terms of which the applicant wanted the right to bury the deceased, her husband. The application was opposed, apparently only by the second respondent who was the deceased's mother. An order was granted in favour of the applicant.

In the reasons for the judgment, the candidate evaluates the background to the matter which, broadly spoken, revolves around the fact that the second respondent did not accept the applicant as her daughter-in-law as the marriage between the applicant and deceased fell short of the legal requirements of customary marriage. The candidate gives a short explanation of the origins and development of customary marriages, and an explanation of section 3(1)(b) of the Recognition of Customary Marriages Act.

It is not evident from the judgment how the issue of the handing over of a woman in customary marriage or in African culture is relevant to the material facts of the application, which concerned the rights of a widow to be recognized as the wife of the deceased and to be vested with the rights that fall to a widow in the burial of her husband in customary law. It appears not to address the reason why the applicant should bury her husband as it does to the applicant's

more general rights within the family of her husband and her possible future remarriage.

South African Breweries (Pty) Ltd v Professional Transport and Allied Workers Union of SA aka PTWAWU (GLD) (Case No: 16060/2017)

An urgent application brought to interdict the first respondent generally from encouraging its members to, *inter alia*, interfere with, threaten, harass or intimidate the applicant's employees, from encouraging the first respondent's members from placing placards and signs on the applicant's premises, and from encouraging the first respondent's members to damage or unlawfully interfere with the applicant's property, equipment, assets or employees.

Relief was also sought against the second respondent individually, in the form of interdicting him from acting in concert with others or encouraging others to interfere unlawfully with the business operations of the applicant and from threatening and committing any acts of violence against the applicant and its employees, amongst others.

The second respondent raised a point in *limine* in respect of the jurisdiction of the Court, holding that the application should have been brought in the Labour Court. The candidate dismissed the point in *limine*, for various reasons.

The order as sought in the application was granted by the candidate.

The dispute was between the truck drivers and their employees, and not with the applicant itself. The question was whether the applicant was entitled to effectively interfere with a labour dispute between the members of the first respondent and their employers if the dispute adversely affected the business operations of the applicant.

The second respondent claimed that the applicant was interfering in the labour dispute on behalf of the truck owners, or the employers. The second respondent claimed that the applicant's product was not damaged.

The candidate had regard in this matter to sections 17 and 23 of the Constitution. Section 17 broadly protects the right to demonstrate and present petitions, while section 23 protects the right to fair labour practices. The candidate did not do an overt analysis of the application of the facts of the matter to the respective sections.

The candidate found that the product of the applicant was destroyed on numerous occasions, resulting in substantial financial costs for the applicant arising from the employment of private security to protect its product.

Fli – Afrika Travel (Pty) Ltd v South African Football Association (GLD) (Case No. 2013/12184, Appeal Case No. 12184)

This matter is an appeal to a full bench. Coram was Carelse J, Mabesele J and Malungana AJ, and the judgment is written by the candidate. The judgment set aside the judgment of the court a quo.

The matter concerned the interpretation of a "*service level agreement*" concluded by the appellant with the respondent in preparation for the World Cup Soccer Tournament held in 2010, and whether a "*full and final settlement agreement*" concluded in respect of certain obligations of the service level agreement substituted the service level agreement as a whole. The appellant had also claimed damages from the respondent for its failure to reimburse the appellant for hotel accommodation that the appellant had booked in terms of the service level agreement.

The judgment deals in passing with an objection raised by counsel for the appellant during the cross-examination of a witness during the trial that a witness cannot be cross-examined on a pleading that he did not draw. The objection was allowed by the court of first instance, but the Full Bench did not agree with this ruling. The judgment affirmed that if a cross-examiner intends to cross-examine a witness on a pleading, he / she needs first to establish whether the witness made statements of fact to his / her legal adviser which informed the pleading.

The candidate held that the witness had in any event demonstrated the loss that had been suffered by the appellant due to the defendant's breach of the service level agreement (which was not substituted in its entirety or terminated by the settlement agreement). The candidate applied the principles set out in inter alia *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) in respect of the interpretation of contracts.

Ekurhuleni Metropolitan Municipality v Ergo Mining (Pty) Ltd and Another (A5041/2016) [2017] ZAGPJHC 263 (29 August 2017) –

(Case attached to the candidate's Judicial Service Commission application)

This matter is an appeal to a full bench. Coram was Mabesele J, Adams J and Sardiwala AJ. The judgment is written by the candidate. The judgment set aside the judgment of the court a quo.

The appeal Court set aside the court a quo's order that the appellant and the second respondent be interdicted and restrained from terminating the electricity supply to the metallurgical plant of the first respondent, pending the final

determination of the main application launched by the first respondent against the appellant and the second respondent.

The appeal concerned the interpretation of section 102(2) of the Local Government: Municipal Systems Act, 32 of 2000 which provides inter alia that a municipality will not be able to implement its credit control and debt collection measures where there is a dispute between the municipality and a person liable for payment to the municipality for the provision of services.

The first respondent declined to pay the amount due on the basis that the electricity it consumed is drawn from the second respondent's transformers.

Due to the failure by the first respondent to pay the amount due the appellant threatened to disconnect electricity supply to the first respondent's plant. Due to these threats the first respondent approached the court a quo on an urgent basis for the interdictory order. It invoked the provisions of section 102(2).

The Court below granted the order in favour of the first respondent.

On appeal the candidate writing for the majority held that the word 'dispute' should be interpreted as being a dispute relating to an account issue, with reference to a 'specific amount' of consumption of electricity and the tariff at which the electricity was charged. Therefore, any dispute outside of this interpretation would not be covered by section 102(2). The result is that the dispute between the parties did not fall within the ambit of section 102(2) and the Court below erred in deciding otherwise.

In then deciding whether the interdict should be granted on the common law, the candidate was mindful of the Constitution in that he stated in paragraph 36 that *"...granting of the interdict would hamper the appellant in the execution*

of its constitutional mandate in that it has the effect of restricting its financial resources, thus, restricting its responsibilities to improve socio-economic development in its area."

*Viljoen v Road Accident Fund (*A5057/17) (case attached to the candidate's Judicial Service Commission application)

This matter is an appeal to a full bench. Coram was Mabesele J, Mashile J and Windell J. The judgment is written by the candidate. The judgment upheld the judgment of the court a quo.

It was an appeal against the judgement and the order of the court a quo, granting absolution from the instance at the close of the appellant's case.

The court a quo was of the view that the appellant failed to establish a nexus between the motor vehicle accident and the injuries resulting in loss of income. It was an appeal with leave of the Supreme Court of Appeal.

The Appeal Court held that the evidence revealed that some of the stroke – related symptoms which the appellant initially complained about before the accident were still present after the accident. This was also true for the appellant's back pains.

Judgments upheld on appeal

Educated Risk Investments 165 (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality and Others 2016(6) SA 434 (SCA)

The judgment on appeal dealt with the application of town-planning zoning schemes to informal settlements and confirmed that a municipality has the right to depart from a zoning scheme which should not be rigidly interpreted in all

cases but may be authorized when regard is had to the housing needs of poor South Africans with reference to section 39(2) of the Constitution. It deals extensively with the definition of a "*dwelling house*" for the purpose of town-planning and zoning in the South African context.

The judgment does not refer to the findings of the Court a quo (the candidate) or at all insofar as it deals with the substance of the matter. It only states that there was a delay in the hearing of the application for leave to appeal (the original urgent application was dismissed on 6 May 2014 and the candidate granted leave to appeal on 25 May 2015). The SCA considered this unfortunate given the interests affected by the delay (at paragraph 9).

Victor Kwenda v S [2019] ZASCA 113 (17 September 2019)

The Supreme Court of Appeal dismissed an appeal against the judgment of the candidate in terms of which the candidate refused leave to appeal. In this matter the appellant and been arraigned in the Special Commercial Crimes Court and pleaded guilty to 26 counts of fraud totalling R 4 898 158.21.

The appellant was convicted and sentenced to 20 years imprisonment and then applied for leave to appeal by way of a petition to the Gauteng Division of the High Court. That application came before the candidate and Kolbe AJ who dismissed the application for leave to appeal.

Although the Supreme Court of Appeal predominantly focuses on the imposition of sentence by the Special Commercial Crimes Court, the judgement by the candidate and Kolbe AJ was confirmed on appeal. Unfortunately, that unreported judgment has not be made available and only the judgment of the Supreme Court of Appeal has been considered.

Judgments overturned on appeal

See paragraph 6 above