

APPLICANT: JUDGE DHAYANITHIE PILLAY

COURT FOR WHICH APPLICANT APPLIES: CONSTITUTIONAL COURT

1. The candidate's appropriate qualifications

1.1. The candidate has the following qualifications:

1.1.1. BProc (University of South Africa) (1982);

1.1.2. LLM in Labour (UND) (1993);

1.1.3. Certificate in Constitutional Law (UND) (1994);

1.1.4. LLB (University of South Africa) (2002);

1.1.5. Certificate for participation in Legal Writing Program for Judges (Seattle University School of Law) (2007); and

1.1.6. Certificate for participation in Legal Writing Program for Trainers (Seattle University School of Law) (2008).

1.2. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

2.1. The candidate has served as a permanent Judge of the Labour Court from 2000 to 2010 and of the High Court since July 2010.

2.2. She served as an Acting Judge of the Supreme Court of Appeal from January 2018 to June 2018.

2.3. She has been described by one of those nominating her as having demonstrated a commitment to the public interest and constitutional transformation.

2.4. A review of her judgments provides no indication that she would not be able to fulfil his role as a Constitutional Court Judge.

2.5. No adverse comments have been received.

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 of Indian descent.

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 has produced judgments on a wide range of topics, most notably in constitutional and labour law.

4.2. She has written a number of articles and lectured in constitutional and labour law.

- 4.3. One nominee notes her remarks on the right of access to justice in *Makwickana v Ethekwini Municipality and Others* (11662/13) [2015] ZAKZDHC 7; 2015 (3) SA 165 (KZD) (17 February 2015):

“But for the assistance of the LRC and similar aid organisations, this right of access to courts is theoretical and illusionary for street traders generally. Puran could not pay the fine of R100 let alone engage legal representation to refute the charges. Street traders are required to be at their stands for three to five days in a week according to an arbitrary rule of the first respondent. Being away also means loss of income. The meagre income they generate goes to sustain their large families. Employing legal assistance is not realistic. Reform of the dispute system design in the informal sector should take this into account.”

- 4.4. Her judgments are clear, well-reasoned and comprehensively researched.

5. **The candidate’s commitment to the values of the Constitution**

- 5.1. The candidate has demonstrated commitment to justice and the constitution throughout her life.
- 5.2. During the repression of the 1980s she, amongst other things, managed a practice that served more than 250 detainees for most of the various states of emergency.
- 5.3. She was appointed to draft and review labour laws in South Africa at different stages in her life.
- 5.4. In 2005, she received recognition as a human rights defender from Amnesty International SA (Durban Group).

- 5.5. In 2013, at the Victoria and Griffiths Mxenge Lecture (held at the University of KwaZulu-Natal) she launched The Yunus Mahomed Public Interest Law Award, which she also sponsors. The award is attained by the best article published in an accredited journal and in a newspaper or non-accredited journal.
- 5.6. The candidate has written many judgments and was entrusted to hear the matter of *Motata v Minister of Justice and Correctional Services and Another* (52010/2016) [2016] ZAGPPHC 1063; [2017] 1 All SA 924 (GP) (30 December 2016), in which Judge Motata challenged the constitutionality of various provisions of the Judicial Service Commission Act, 9 of 1994. The court at paragraph 52 held that: “Textually and contextually the Constitution authorises the JSC Act. When Parliament passes the JSC Act it exercises original jurisdiction derived from the Constitution in collaboration with the JSC. The question of JSC delegating its authority to parliament does not arise”.
- 5.7. In *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD) the candidate stated at paragraph 27 that “when the NCA applies, the constitutional right to equality comes to my mind immediately.” The candidate considered the constitutional principle of equality. The candidate further considered legislation which examined the principles of equality such as: the National Credit Act, 34 of 2005, the Consumer Protection Act, 68 of 2008, the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 and the Employment Equity Act, 55 of 1998. The candidate found that the common-law principle of caveat subscriptor could not assist the applicant in the matter because

the dealership never explained the terms and conditions to the respondent whilst it knew all along that he was illiterate.

5.8. In *Makwickana v Ethekwini Municipality and Others* 2015 (3) SA 165 (KZD) the candidate was called to adjudicate upon the legality and constitutionality of certain provisions of the Businesses Act 71 of 1991 and the eThekweni Municipality Informal Trading Bylaw, 2014. The candidate reviewed the provisions of the bylaw in detail and considered their constitutionality. At paragraph 128, the court held that: “Accordingly I find that s 39 of the bylaw is a limitation on constitutional rights such as the s 11 right to life, the s 12 right to security of person, the freedom to trade, the right to property and possibly even the right to equality”. The candidate found that the bylaw did not pass constitutional muster on several levels. Its limitations on the constitutional rights could not be justified. The candidate set aside the decisions of the respondents of removing and impounding the applicant’s goods.

5.9. In *Rodpaul Construction CC t/a Rods Construction v Ethekwini Municipality and Others* (10075/13) [2014] ZAKZDHC 18 (2 June 2014) the candidate embarked on a detailed and comprehensive analysis of the public procurement laws, including seeking guidance from the Constitution and international jurisprudence to evaluate whether strict compliance with the requirements in a Tender Notice is required. The candidate, in a well-reasoned and researched judgment, summarised the law as follows:

“[51] ... the principles from the above authorities, fairness, equity and transparency stand out universally as uncompromising qualities of public procurement. This is so because the process is a competition for the most cost effective bid in the public interest. Whether strict or substantial compliance is required is a matter of interpreting the tender requirements. Consequently, procuring authorities have a public duty to ensure that the text of their invitations to tender is clear and precise, indicating expressly whether requirements are peremptory or directory... Ultimately, it’s the discretion of the authority not the court as to what the prerequisites for a valid tender should be...

[52] Furthermore, only a compliant tenderer acquires the right to challenge an award. At best a non-compliant tenderer may appeal to the authority before expiry of the tender notice to waive strict compliance. The authority has no obligation, but a discretion exercised reasonably to grant a waiver of strict compliance, provided that in doing so it upholds the five core constitutional prescripts for public procurement. Any step in the process that slips from the public eye to become a back door deal strips the bid of transparency.

[53] A waiver is not a right granted on the mere asking. At most it is an indulgence granted when good cause is shown. A non-compliant bidder has no right to insist that the authority investigate its grounds for claiming a waiver. Furthermore, a non-compliant bid cannot be rendered compliant merely because it would be the most competitive and cost effective bid.”

- 5.10. In applying the law to the facts, the candidate found that neither the applicable legislation nor the guides and policies prescribe when the B-BBEE Certificate must be submitted. Equally none of these instruments

prescribe that an invitation to tender should stipulate a time when tenders should be submitted. Consequently, she found that the submission of an original B-BBEE Certificate with the tender form was not prescribed by legislation and therefore not peremptory on that ground. The candidate, thus ultimately found, that even though the time for submitting B-BBEE Certificates is not legislatively prescribed it requires strict compliance because to waive compliance, would violate the requirements of s 217 of the Constitution.

- 5.11. In the Labour Court alone she issued more than 1000 judgments on issues such as retrenchments, closure of business, strikes, lockouts, discrimination, affirmative action, equality, non-appointment, HIV/AIDS testing, review of labour arbitration awards, international employment contracts, whistle-blowing, promotion of access to information and justice etc.
- 5.12. The candidate prepared and conducted a course on legal writing for magistrates. She also served on the faculty of the Judges' Forum, convened by the Democratic Governance and Rights Unit (DGRU) of UCT. In that way too she contributed to academic and judicial education.
- 5.13. The candidate is an extraordinary professor at the University of Pretoria and has recently submitted her LLD thesis for evaluation. She also lectured at the University of Witwatersrand and some universities abroad.
- 5.14. She wrote a number of articles and participated in international seminars and conferences around labour and constitutional law.

6. Whether any judgments have been overturned on appeal

6.1. In a schedule under paragraph 16.4 of the candidate's questionnaire, she lists all her judgments which were subject to an appeal. She indicates which were successfully appealed and which were not.

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

7.1. The candidate has 40 active years of experience in the legal profession.

7.2. She registered (in April 1979) and completed her articles of clerkship with the firm MC Moodliar and Co. She was admitted as an attorney in 1982 and continued to work at MC Moodliar and Co. as a professional assistant until leaving to join David and Company, Verulam and then later Yunus Mahomed and Associates where she was a partner from 1987 until July 2000.

7.3. She was admitted to the Independent Mediation Services of South Africa (IMSSA) Panels as:

7.3.1. Arbitrator (1992);

7.3.2. Mediator (1994);

7.3.3. Trainer (1995);

7.3.4. Labour Relations Act, 1996 Training (1995); and

7.3.5. Dispute Resolution Systems Design (1996).

7.4. She was appointed as Arbitrator by the Arbitration Foundation of South Africa (AFSA) from 1997 to 1999.

- 7.5. In September 2000 she started sitting as a Judge of the Labour Court. She left the Labour Court to sit as a permanent Judge in the High Court, KwaZulu-Natal, Pietermaritzburg and Durban from July 2010 to date. In between her time as a permanent Judge at the Labour Court and the High Court, she had acting stints at the High Court as a civil and criminal Judge respectively.
- 7.6. In January to June 2018 she had an acting stint at the Supreme Court of Appeal.
- 7.7. In November 2018, she was appointed as a Judge on the Electoral Commission. Her term ends in November 2025.

8. The candidate's linguistic and communication skills

- 8.1. The candidate has an appropriate command of the English language and expresses herself clearly and succinctly.
- 8.2. Her judgments are well-structured and are a model of linguistic excellence and clarity.

9. The candidate's ability to produce judgments promptly

- 9.1. The candidate indicates that she has no outstanding judgments.
- 9.2. She produces judgments efficiently. The judgments considered were delivered within three months.

10. The candidate's fairness and impartiality

10.1. The judgments of the candidate indicate that she has a sound sense of fairness. She seems to be specifically sensitive towards vulnerable groups and issues.

10.2. Her judgments demonstrate careful analysis and appropriate weighing of the relevant factors.

11. The candidate's independent mindedness

11.1. The judgments written by the candidate indicate that she is able to apply herself independently in arriving at her decisions.

12. The candidate's ability to conduct court proceedings

12.1. Members of the Bar have reported that they enjoy the candidate's courtesy in her Court, and her willingness to assist them in general.

12.2. No adverse comments have been received.

13. The candidate's administrative ability

13.1. The candidate has acted or been elected in administrative positions previously. For example, she was the administrative secretary for an organisation called Release Mandela (Durban), the secretary of Prisoners' Education Campaign in the late 70's, and an Executive Member of NADEL (Durban). This demonstrates her administrative experience.

13.2. The fact that she has a reservoir of judgments in her almost 20 years on the bench (acting and permanent) and has no reserved judgments, is also a good indication of her administrative ability.

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

14.1. The candidate is regarded as an independent judge, with integrity, and who is committed to her country, its people and the Constitution by which they live. As a judge she is fearless, impartial, resolute and relentless in the pursuance of justice.

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

15. The candidate's judicial temperament

15.1. The candidate has a reputation for fairness and impartiality.

15.2. Interviews and informal enquiries amongst colleagues at the Johannesburg Bar indicate that the candidate treats parties appearing before her with the necessary respect.

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

16.1. It cannot be said that the candidate lacks or does not demonstrate an understanding of, and sensitivity for, constitutional rights and its values. She has throughout her life (professionally and otherwise) demonstrated a commitment to promoting constitutional issues, including transformation. As a judge she has also been actively involved in advising and guiding of other legal professionals, including magistrates and other judges.

17. The candidate's potential

17.1. The candidate has proven herself as a competent judge. She is committed to the Constitution and the need to assist in the development of practitioners of the law, be it magistrates or other judges. She has the requisite experience and displays the potential to be a competent Constitutional Court Judge, and an asset to the judicial community.

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

18.1. In general, it can be said that the candidate is suited to fulfil her role as a Judge of the Constitutional Court.

18.2. The candidate appears to be a competent jurist, and there can be no doubt that her background, and knowledge in the various areas of law in which the candidate has practiced or adjudicated upon, and commitment to human rights and the Constitution will be of value to the Constitutional Court.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

De Beers Consolidated Mines Ltd v CCMA & Others [2000] 5 BLLR 578 (LC)

Blue Ribbon Bakeries v Naicker & Others [2000] 12 BLLR 1411 (LC)

Mould v Roopa NO & Others (2002) 23 ILJ 2076 (LC)

Ngubane v Spray Fishing (Pty) Ltd (2002) 23 ILJ 2104 (LC)

Sibisi v Ganpath [2003] 4 BLLR 401 (LC) / (2003) 24 ILJ 857 (LC)

Irvin & Johnson Limited v Trawler & Line Fishing Union and Others [2003] 4
BLLR 379 (LC)

Enforce Guarding (Pty) Ltd v NASUWU and Others [2003] 1 BLLR 9 (LC)

Great North Transport v Legodi & Others [2004] 1 BLLR 51(LC)

Amalgamated Pharmaceuticals Ltd v Grobler NO & Others (2004) 25 ILJ 523 (LC);
[2004] 6 BLLR 537 (LC)

Telkom (Pty) Ltd v CCMA & Others [2004] 8 BLLR 844 (LC)

Moslemany v Unilever Plc & Another [2006] 12 BLLR 1167 (LC)

Stojce v University of KZN-Natal and Another [2007] 3 BLLR 246 (LC)

Bootes v Eagle Ink Systems KwaZulu- Natal (Pty) Ltd (2008) 29 ILJ 139 (LC)

Perumal & Another v Tiger Brands [2008] 1 BLLR 58 (LC) / (2007) 28 ILJ 2302
(LC)

Zabala v Gold Reef City Casino [2009] 1 BLLR 94 (LC)

Wanless v Fidelity (Pty) Ltd (2008) 29 ILJ 2030 (LC)

City of Matlosana v SA Local Government Bargaining Council & Others (2009) 30
ILJ 1293 (LC)

Jafta v Ezemvelo KZN Wildlife [2008] 10 BLLR 954 (LC)

Rustenburg Base Metal Refineries (Pty) Ltd v Solidarity and Others [2008] 12 BLLR
1223 (LC)

Sappi Forests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration
[2009] 3 BLLR 254 (LC)

*SA Chemical Workers Union v Unitrans Supply Chain Solutions (Pty) Ltd t/a
Unitrans Freight & Logistics & another* (2009) 30 ILJ 2469 (LC)

*Independent Municipal Allied Trade Union (IMATU) v South African Local
Government Bargaining Council and Others* [2010] 5 BLLR 536 (LC)

Heyneke v Umhlatuze Municipality (2010) 31 ILJ 2608 (LC)

Lind v KwaZulu-Natal Department of Health (2010) 31 ILJ 2918 (LC)

Maharaj v Sanlam Life Insurance Ltd and Others [2011] 2 All SA 571 (KZD); 2011
(6) SA 17 (KZD)

*Growthpoint Properties Ltd v South Africa Commercial Catering and Allied
Workers Union (SACCAWU) and Others* 2011 (1) BCLR 81 (KZD); [2011] 1
ALL SA 537 (KZD)

De Koker v Minister of Safety and Security [2010] (2) SACR 595 (KZD)

SARS v CCMA & Others [2010] 3 BLLR 332 (LC)

South African Police Services v Inspector Zandberg and Two Others (2010) 31 ILJ 1230 (LC)

Mudaly v Gwala and Others [2011] 1 All SA 420 (KZD); 2011 (1) SACR 302 (KZD)

Standard Bank of South Africa Ltd v Dlamini 2013 (1) SA 219 (KZD)

Nulandis (Pty) Ltd v Minister of Finance and Another 2013 (5) SA 294 (KZP)

Makwickana v Ethekekwini Municipality and Others 2015 (3) SA 165 (KZD)

Mpontshane v S [2016] 4 ALL SA 145 (KZP)

National Director of Public Prosecutions v Ramlutchman 2016 (1) SACR 362 (KZP)

Motata v Minister of Justice and Correctional Services and Another, [2017] 1 ALL SA 924 (GP)

Laser Junction (Pty) Ltd v Fick (2017) 38 ILJ 2675 (KZD)

S v Ncgobo 2018 (1) SACR 479 (SCA)

S v Shiburi 2018 (2) SACR 485 (SCA)

Pietermaritzburg and District Council for the Care of the Aged (PADCA) v Redlands Development Projects (Pty) Ltd and Others 2018 (4) SA 113 (SCA)

Unreported decisions

Sappi Timber Industries (Pty) Ltd t/a Boskor Sawmill v Commission for Conciliation, Mediation and Arbitration and Others (P502/02) [2003] ZALC 22 (22 February 2003)

Unitrans Fuel and Chemical (Pty) Ltd v Naidoo and Others (D197/04) [2008] ZALC 229 (14 May 2008)

Makibinyane v Nuclear Corporation of South Africa (NECSA) and Another (JS51/08) [2009] ZALC 84 (5 March 2009)

Mankwe v Nowosenetz and Others (JR 483/06) [2009] ZALC 207 (16 September 2009)

South African Police Services v Zandberg and Others (JR1162/08) [2009] ZALCJHB 19 (2 September 2009)

Naidoo and Another v Chetty And Others (6546/06) [2010] ZAKZPHC 104 (3 December 2010)

Kelly NO and Others v Kelly and Others (4334/10) [2011] ZAKZPHC 19 (11 May 2011)

S v Shaw [2011] ZAKZPHC 32; AR342/10 (1 August 2011)

Green v Amalgamated Brokers CC (7806/2011) [2012] ZAKZPHC 44 (26 June 2012)

S v Ndwandwe (AR99/12) [2012] ZAKZPHC 47 (6 August 2012)

S v Pillay (AR 115/10) [2012] ZAKZPHC 48 (8 August 2012)

The Body Corporate of Dolphin Cove v KwaDukuza Municipality and Another (8513/10) [2012] ZAKZDHC 13 (20 February 2012)

D & E Trading (Pty) Ltd v Hilton Village Centre CC and Others (1342/13) [2013] ZAKZPHC 12 (19 March 2013)

Rodpaul Construction CC t/a Rods Construction v Ethekewini Municipality and Others (10075/13) [2014] ZAKZDHC 18 (2 June 2014)

Sants Private Higher Education Institution v MEC For Department of Education KZN and Others (5374/2014) [2014] ZAKZPHC 43 (18 June 2014)

Parker v Standard Bank (AR218/15) [2016] ZAKZDHC 7 (10 February 2016)

Madida obo M v MEC for Health for the Province of KwaZulu-Natal (14275/2014) [2016] ZAKZPHC 27 (14 March 2016)

Westwood Insurance Brokers (Pty) Ltd v Ethekewini Municipality (8221/16) [2016] ZAKZDHC 46 (8 December 2016)

LDM Consulting v South African Roads Agency Society Ltd (SANRAL) (1490/17) [2017] ZAKZPHC 8 (7 March 2017)

Maharaj v The Minister of Safety and Security (11275/2012) [2017] ZAKZDHC 38 (5 October 2017)

Boswell v Member for the Executive Council for Economic Development, Tourism and Environmental Affairs (KwaZulu-Natal) and Others (3792/16P) [2017] ZAKZPHC 18 (25 May 2017)

Renken and Another v KwaDukuza Municipality and Others (9234/15) [2017] ZAKZPHC 20 (30 May 2017)

Jordaan v Marquee Tent and Tarpaulin (8526/12) [2017] ZAKZDHC 34 (6 June 2017)

Four Wheel Drive Accessory Distribution CC v Ratan NO (6916/13) [2017] ZAKZDHC 26 (4 July 2017)

National Ports Authority, a Division of Transnet (SOC) Ltd v Owners and Underwriters of the MV “Smart” (A11-2016; A56-2016; A64-2016) [2017] ZAKZDHC 28 (18 July 2017)

Mngomezulu v eThekweni Metropolitan Municipality and Another (12503/2014) [2017] ZAKZDHC 31 (30 August 2017)

Mbhele and Another v The Minister of Police (AR 790/2016) [2017] ZAKZPHC 45 (3 November 2017)

Stu Davidson and Sons (Pty) Ltd v Eastern Cape Motors (Pty) Ltd (260/2017) [2018] ZASCA 26 (23 March 2018)

Premier Attraction 300 CC t/a Premier Security v City of Cape Town (592/2017) [2018] ZASCA 69 (29 May 2018)

Mawala v S (AR267/16) [2018] ZAKZPHC 52 (12 October 2018)

Nahour & Another v Minister of Justice and Constitutional Development (6057/2007) [2018] ZAKZPHC 65 (3 August 2018)

Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Former Way Trade And Invest (Pty) Ltd t/a Premier Service Station (283/18P) [2018] ZAKZPHC 29 (10 July 2018)

Hanekom v Zuma (D6316/2019) [2019] ZAKZDHC 16 (6 September 2019)

Judgments upheld on appeal

SARS v CCMA & Others [2010] 3 BLLR 332 (LC)

Four Wheel Drive Accessory Distribution CC v Ratan NO (6916/13) [2017] ZAKZDHC 26 (4 July 2017); see *Four Wheel Drive CC v Leshni Rattan NO* (1048/17) [2018] ZASCA 124 (26 September 2018).

South African Police Services v Inspector Zandberg and Two Others (2010) 31 ILJ 1230 (LC); see *Zandberg v National Commissioner- South African Police Services* (DA18/2010) [2012] ZALAC 44 (23 March 2012)

Judgments overturned on appeal

National Director of Public Prosecutions v Ramlutchman 2016 (1) SACR 362 (KZP); see *National Director for Public Prosecutions v Ramlutchman* (677/15) [2016] ZASCA 202; 2017 (1) SACR 343 (SCA) (9 December 2016)