

APPLICANT: CASSIM MAHOMED SARDIWALLA

**COURT FOR WHICH APPLICANT APPLIES: KWAZULU-NATAL
DIVISION FOR SECONDMENT TO THE LAND CLAIMS COURT**

1. The candidate's appropriate qualifications

1.1 The candidate obtained a B Proc degree in 1981 from the University of South Africa and University of Durban Westville (2 years).

1.2 The candidate was appointed as a judge of the Gauteng Provincial Division of the High Court in 2018. Further, he has acted in the Land Claims Court for a period of 5 years prior to this appointment.

1.3 The candidate is appropriately qualified.

1.4 The candidate's career path:

1.4.1 1978 – 1981: Articled clerk at C A Botha & Partners;

1.4.2 1982 – present: Managing partner at C M Sardiwalla & Co;

1.4.3 Acting Judge in KwaZulu-Natal Provincial & Local Divisions (07/2001) (03/2003);

1.4.4 Acting Judge in Eastern Cape Provincial & Local Division (08/2002 – 09/2002);

1.4.5 Acting stints as a Judge in the Land Claims Court (2001 – 2017);

1.4.6 Acting position in the Gauteng Provincial Division of the High Court, February 2018;

1.4.7 Appointed as a Judge of the Gauteng Provincial Division of the High Court in 2018, to present.

2 Whether the candidate is a fit and proper person

2.1 There is no reason to doubt that the candidate is a fit and proper person.

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

3.1 The candidate is a black man, of Indian descent.

3.2 The appointment of the candidate would therefore broadly help to reflect the racial composition of South Africa.

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

4.1 Our ability to assess the candidate's knowledge of the law was hampered due to difficulties in accessing the candidate's judgments. These comments should be viewed in light of this constraint. Judgments sourced and considered were primarily Land Claims Court matters and criminal matters. These judgments dealt with a range of issues including constitutional and administrative law, procedural matters, contract and delict.

4.2 The candidate takes care in his judgments to research and consider the law and sets out the basis for his legal findings. His judgments are generally well reasoned.

- 4.3 In one of the candidate's early judgments in a criminal trial involving rape of a mentally disabled child (2001), a full bench of the KwaZulu-Natal court held that the candidate misdirected himself in his approach to sentencing in the context of the applicable minimum sentencing legislation. See section below dealing with appeals.
- 4.4 Some of the candidate's criminal judgments raise a concern about the candidate's understanding of the constitution and constitutional values. We draw attention to the following decisions and paragraphs which are referred to further in the section on the constitution:
- 4.4.1 *Ngcobo v S* (AR-68/13) [2014] ZAKZPHC 10 (27 February 2014) at paragraph 13. This is the full bench decision referred to above overturning a sentence imposed by the candidate in a criminal trial involving rape of a mentally disabled child.
- 4.4.2 *Salzmann v S* (Case no A99/2016 – supplied by candidate) at paragraph 126. This is an appeal against certain convictions and sentences imposed by the Specialised Commercial Crimes Court in connection with the Electronic Communications and Transactions Act 2002.
- 4.5 The candidate has extensive exposure to land law having served in the Land Claims Court. In this role, he has been responsible for several important judgments, more particularly the Salem, Rooyendal and Blue Horison judgments.
- 4.6 The SCA upheld the decisions in each of these cases and the Constitutional Court refused leave to appeal in the Blue Horison matter

on the basis that there were no prospects of success on appeal. The Constitutional Court granted leave to appeal in the Salem matter, but ultimately dismissed the appeal.

4.7 The Land Claims Courts decisions show an appreciation of the challenges confronting land claimants and the delicate process of balancing the rights of land owners and land claimants.

4.8 The *Salem* judgment is important with reference to the impact of the frontier wars on whether land rights were lost during conquest.

4.9 The candidate has a broad array of experience over his career in different areas of law including specialist areas. See further below.

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

5.1 The candidate's commitment to the values of the Constitution is most evident in his judgments emanating from the Land Claims Court, for example the Salem decision. It is also broadly evident from his professional commitments.

5.2 There are, however, certain remarks in the judgment in *Ngcobo v S* (AR-68/13) [2014] ZAKZPHC 10 (27 February 2014) that require highlighting.

5.3 This is the full bench decision referred to above overturning the sentence imposed by the candidate in a criminal trial involving rape of a mentally disabled, 13 year-old child. While we do not have the judgment a quo, the full bench quotes the following extract from the candidate's judgment:

“This crime is as bizarre as you can find them. Sometimes immorality is responsible for rape where there is a certain level of attraction caused by the female herself but here we have the weakest of the weakest, a young disabled child. In fact, if there ever was the death sentence still available to these courts, it may well have been argued that this was an ideal scenario for that sentence. The court has an obligation to protect society from people like the accused and behaviour of this nature. [There] cannot be a more appropriate sentence than the life sentence, given the fact that there are absolutely no substantial and compelling circumstances, in fact, aggravating circumstances.” (own emphasis)

- 5.4 The comments on the death penalty may not have been appropriate in circumstances where the Constitutional Court had years earlier made its position on the death penalty clear.
- 5.5 The comment on immorality being responsible for rape where there is a certain level of attraction caused by the female herself is concerning as it removes agency from perpetrators and seeks to apportion blame to victims.
- 5.6 In *Salzmann v S* (Case no A99/2016 – supplied by candidate) the candidate appears to have considered an accused’s exercise of his right to appeal as a factor indicating a lack of remorse. It is difficult to see how the exercise of a guaranteed right of appeal can be a fact that demonstrates a lack of remorse.

6 Whether any judgments have been overturned on appeal

6.1 Yes.

6.2 The candidate in his application refers simply to leave granted to the SCA. The cases where his judgment was overturned on appeal is not identified. We did find the following further cases in which the candidate's judgment was overturned on appeal:

- *Ngcobo v S* 2014 JDR 0485 (KZP);
- *Adendorffs Boerderye (Pty) Ltd v Shabalala* 2017 JDR 0584 (SCA).

6.3 We have referred to *Ngcobo* above. On the merits of the judgment, the appeal court found that the candidate had misdirected himself as to the proper approach to sentencing in a minimum sentencing case and found that the imposition of life imprisonment was disproportionate to the crime. The finding of the appeal court concerned the proper approach to the exercise of judicial discretion and to proportionality in sentencing. Furthermore, the Supreme Court of Appeal had not long before handed down the authoritative decision on this point in *S v Malgas* 2001 (2) SA 1222 (SCA) which set out the approach to be followed by courts when applying the minimum sentencing legislation. The candidate had not followed the approach set out in *Malgas*.

6.4 In the *Adendorffs* matter the applicants sought an order removing the respondent's livestock from the applicant's farm on the basis that the respondents breached a grazing agreement by keeping more livestock than allowed which led to overgrazing. The court on appeal found that

the candidate did not apply the correct law and incorrectly applied ESTA.

- 6.5 Furthermore, the court a quo granted orders that were not asked for and did not afford the parties an opportunity to file further affidavits or present argument before granting these orders, which ought not to have been granted. The Appeal Court found that the failure of the candidate to forewarn the parties that he was inclined to grant orders not sought in the notice of motion is contrary to well established principles stated by the Constitutional Court in the *Molusi v Voges* matter[2016] ZACC 6: 2016 (3) SA 370 (CC) paras 27 to 28.

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

- 7.1 The candidate's experience, except for the periods during which he has acted as a judge, has been in his capacity as an attorney. He has broad experience in various fields of law which include amongst others commercial, criminal, maritime, land restitution, family, African customary law, engineering, tax and intellectual property law. The candidate represented clients in political matters in the 1980s.
- 7.2 The candidate has participated in the drafting of the Rules for The Promotion of Access to Information Act, The Promotion of Access to Justice Act and also research and drafting of The Engineering Professions Act.
- 7.3 The candidate has conducted research on the Review of the Civil Justice System in South Africa and prepared a joint concept paper and terms of reference with the Department of Justice.

7.4 The candidate has been a chairperson and member of various commissions of enquiry as well as disciplinary committees.

7.5 Throughout his career he has participated in a range of professional activities that serve the profession and transformation (including for example NADEL).

7.6 He has acted as a judge in the KwaZulu-Natal Provincial and Local Divisions, Eastern Cape Provincial and Local Divisions, the Land Claims Court and the Gauteng Division.

8 The candidate's linguistic and communication skills

8.1 The candidate indicates that he speaks English, Afrikaans and Zulu.

8.2 No adverse comments have been received in respect of his communication skills.

8.3 A consideration of the judgments reveals that the candidate has the ability to write judgments well. He also has the ability to explain his reasoning and evaluation of evidence clearly. However, it should be noted that some judgments would benefit from careful editing and unnecessary lengthy narration of evidence and case law.

9 The candidate's ability to produce judgments promptly

9.1 The candidate has no outstanding judgments despite having acted as a judge over a substantial period of time. In his letter of support, retired Judge President Somyalo, who invited the candidate to act in his

division in Grahamstown and Port Elizabeth, commented favourably on the fact that the candidate left with no outstanding judgments.

9.2 We have assessed the candidate's ability to produce judgments promptly using a limited sample of judgments. The sample constitutes all of the judgments in respect of which we could verify information using Jutastat, Lexis Nexis, or Saflii.

9.3 Further, certain of the information provided relates to decisions of the Supreme Court of Appeal rather than decisions of the candidate. Based on the sample of judgments considered, albeit of only a few judgments, the following observations can be made: two judgments in interdict proceedings were handed down on the day of the hearing which is, where possible, a laudable approach.

9.4 A number of judgments were handed down in time-frames that, on the face of it, are reasonable. There was a lengthy period between hearing and judgment in the following matters. Truter appears to have been a relatively simple case and it is unclear why it took so long for judgment to be delivered. The judgment was delivered almost six months after the hearing date. Rooyendal appears to have been a complex case factually. However, whether the time taken was warranted may be the subject of legitimate enquiry during interview. We cannot ascertain how long the Salem judgment took to deliver – but it is a legally and factually very difficult matter. In *Ndaba v Braithwaite* the judgment was delivered almost eight months after the hearing date.

10 **The candidate's fairness and impartiality**

10.1 There are no adverse comments received in respect of these qualities. There are letters of support which speak favourably of the candidate in this respect. We refer to the letters from by C. M. Somyalo (retired judge president) and Adv Viwe Notshe SC.

The judgment on appeal in Shabalala raises an issue relating to fairness.

11 **The candidate's independent mindedness**

11.1 No adverse comments have been received.

11.2 There is reference to a recusal application in a matter in which the candidate was involved being *Normandien Farms (Pty) Ltd v Mathimbane and others* (LCC 196/2013) [2015] ZALCC 14(5 November 2015) but we are unable to ascertain what transpired.

11.3 There is no reason to doubt that the candidate is independently minded.

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

12.1 No adverse comments have been received in this regard and certain favourable comments have been received. There is no reason to doubt that the candidate is able to conduct court proceedings.

13 **The candidate's administrative ability**

13.1 No adverse comments have been received. On the information to hand it is notable that the candidate has made himself available for service in a number of roles that may signal administrative ability. There is no reason to doubt that the candidate has the necessary administrative ability.

14 The candidate's reputation for integrity and ethical behaviour

14.1 No adverse comments have been received. The candidate filled in that there are **no** circumstances, financial or otherwise that may cause embarrassment in undertaking the office of a judge.

15 The candidate's judicial temperament

15.1 There are no adverse comments received in this regard. Favourable comments are given by C. M. Somyalo (retired judge president) and Adv Viwe Notshe SC.

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

16.1 The candidate was involved in representing parties in political trials in the 1980s. The candidate has been a member of several community-based organizations reflecting a commitment to community concerns affecting socio-economic matters, local government and development. For example, Ladysmith Ennambithi (local council Deputy Mayor), Flood Liaison Committee (Chairperson), Acacia Housing Committee (Co-chairperson), E-Section Ezakheni Development Committee (Member), Steadville Development Committee (Member), Project Amanzi (member) and Parent Teacher Association.

16.2 The candidate has served in a range of capacities which can be regarded as enhancing access to justice, such as serving as a small claims commissioner, serving on the ADR Committee of the Rules Board, chairing an Advisory Committee on Court Annexed Mediation,

addressing conferences on mediation and other related roles detailed more fully in his answer to question 7 of the application form.

16.3 The sections in the candidate's CV relating to his efforts to improve access to and efficiency of the Land Claims Court are also relevant.

17 **The candidate's potential**

17.1 The candidate has been a permanent judge of the Gauteng division since 2018. He also acted in the Gauteng division for 2 years prior to that appointment. In addition, he had the benefit of acting in the Land Claims court for a period of five years, before his Gauteng appointment.

17.2 From 2002 until his service in the Land Claims division, he served as an acting judge in Grahamstown and Port Elizabeth, under guidance of the Judge President C.M. Somyalo who has also nominated him for this position under application.

17.3 In view of the candidate's extensive and long-standing experience, he can appropriately be evaluated on his track record and significant experience rather than upon his potential.

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

18.1 The candidate has a clear commitment to the realisation of the Constitution's promises, notably regarding land reform, and an appreciation of the challenges the country faces in view of its land history. He also has a notable concern with access to justice.

18.2 The breadth of experience and the wide range of civic activity that the candidate has been engaged in over his lifetime, both ancillary to his professional life and independently of it, is also positive. His commitment to service is notable from his application.