

APPLICANT: JUSTICE BASHIER VALLY

COURT FOR WHICH APPLICANT APPLIES: CONSTITUTIONAL COURT

1 The candidate's appropriate qualifications:

1.1 The applicant holds the following academic qualifications:

1.1.1 B.Com degree conferred by the University of the Witwatersrand in 1982;

1.1.2 BA (Hons) (Industrial Psychology) conferred by the University of the Witwatersrand in 1983;

1.1.3 MA (Sociology) conferred by the University of Warwick (UK) in 1985;

1.1.4 LLM (Labour Law) conferred by the University of the Witwatersrand in 1994;

1.1.5 LLB conferred by the University of the Witwatersrand in 1996.

1.2 The candidate has worked in the following capacities in the legal field:

1.2.1 Self-employed Mediator on the panel of the Independent Mediation Services of South Africa from 1991 to 1996;

1.2.2 Self-employed Arbitrator on the panel of the Independent Mediation Services of South Africa from 1993 to 1996;

- 1.2.3 Advocate of the High Court of South Africa from 1996 to 2012;
- 1.2.4 Acting High Court Judge in Gauteng from October to December 2010;
- 1.2.5 High Court Judge in Gauteng from 2012 to present;
- 1.2.6 Acting Judge of the Competition Appeal Court from April 2016 to 2018; and
- 1.2.7 Judge of the Competition Appeal Court from 2018 to present.
- 1.2.8 The candidate is appropriately qualified and experienced for appointment to the Constitutional Court.

2 Whether the candidate is a fit and proper person

- 2.1 There is nothing in the candidate's application or the judgments that have been considered by the reviewers that suggests that the candidate is not 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 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 From the judgments reviewed, the candidate appears to possess good knowledge of various areas of the law, including constitutional law.

4.2 The reported judgments that have been reviewed also show that the candidate is able to consider and determine complex factual disputes and applies appropriate case law in his judgments.

4.3 The judgments reviewed reflect the candidate's knowledge in:

4.3.1 Delict, spanning the fields of unlawful arrest, *Actio Iniuriarim*, *Actio legis acquiliae*, Misrepresentations; Legal Duty of Care, Pure Economic Loss; negligent misstatements in contractual negotiations;

4.3.2 Competition Law: Collusive Tendering; Mergers;

4.3.3 Tax: Value Added Tax; Double Taxation Agreements; International Tax Treaties;

4.3.4 Administrative Law: Review Applications (Including matters concerning Municipal Rates and the Prerogatives of the President of the Republic of South Africa); Doctrine of Legality; Rule 53 applicability to Executive Decisions; Impact of Fundamental Rights; Rationality; Reasonableness and Proportionality Tests.

4.3.5 Labour Law;

4.3.6 Interdicts;

4.3.7 Protection of Confidential Information;

- 4.3.8 Insolvency and Liquidation;
- 4.3.9 Liens: Enrichment; Debtor Creditor Liens;
- 4.3.10 Request for Documents: Protection of Access to Information Act;
- 4.3.11 Criminal Law: Criminal Procedure Act, various crimes spanning rape, sexual assault, naming of children, unfair cross examination, robbery, murder, unlawful possession of firearm, possession of narcotics, theft, appeals and sentencing;
- 4.3.12 Deceased Estates: Wills;
- 4.3.13 Company Law;
- 4.3.14 Financial Instruments: Securitisation;
- 4.3.15 Class Actions: Certification; Transmissibility of General Damages;
- 4.3.16 Expert Witnesses: Role;
- 4.3.17 Immunity from Prosecution: Customary International Law; Foreign States Immunities Act; Diplomatic Immunities and Privileges Act;
- 4.3.18 Environmental Law: application of S24 of the Constitution;
- 4.3.19 Contract Law: Exception and public policy; *pacta sunt servanda*; constitutional interpretation; sale of shares; BEE share schemes; contractual and common law duty of good faith; negligent misstatement in contractual negotiations;

- 4.3.20 Procedure: Formal Tenders; Uniform Rule 34(1).
- 4.3.21 Trustees: Trust Property Control Act; Trustees Duties; Removal of Trustees.
- 4.3.22 Save as reflected in paragraph 6.3 below, in most cases and where appropriate, the candidate sought to resolve legal issues before him by reference to the precepts of the Constitution.

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

- 5.1 Prior to joining the Advocates' profession, and prior to 1994, the candidate showed a keen interest in respect of sociological issues as well as the rights of employees in South Africa. In this regard:
 - 5.1.1 The candidate published a book entitled "*A Social Contract – The Way Forward – A Critical Evaluation*" (1992);
 - 5.1.2 The candidate has published the following articles:
 - 5.1.2.1 "*Strikes, Dismissals and Collective Bargaining: A Case for a More Rational and Constructive Approach*" in the *South African Journal of Labour Relations*, Volume 16, No. 1, March 1992;
 - 5.1.2.2 "*Denying the Strike: SEIFSA v NUMSA*" in *Employment Law*, Volume 9, No. 3, January 1993;
 - 5.1.2.3 "*Paradigms Lost – A Search for the Sociological Perspective*" (co-authored with M Sarakinsky) in *Sarakinsky M (Ed) Social Theory*, Lexicon Publishers, 1994.

- 5.2 The candidate was involved in the Commercial, Catering and Allied Workers Union of South Africa from 1985 to 1986.
- 5.3 The candidate was a member of Advocates for Transformation from 2003 to 2012 and served as a member of the Access to Justice Committee in 2009.
- 5.4 In the judgments reviewed, the candidate has consistently been conscious of testing the legal principles before him against the precepts of the Constitution.

6 **Whether any judgments have been overturned on appeal**

6.1 *Xstrata South Africa (Pty) Ltd and Others v SFF Association* 2012 (5) SA 60 (SCA).

6.1.1 In this matter, the candidate (then an acting judge) held that the respondent was entitled to be paid royalties from the appellant in terms of an agreement notwithstanding changes to the Mineral and Petroleum Resources Development Act (MPRDA);

6.1.2 The SCA held that the order granted by the candidate was contrary to the MPRDA and overturned his decision.

6.2 *Lekup Prop No 4 (Pty) Ltd v Wright, John Colin* 2012 (5) SA 246 (SCA).

6.2.1 In this matter, the appellant brought an application in the court a quo on the basis that the agreement for the sale of its property to the respondent had lapsed for want of fulfilment of a suspensive condition;

- 6.2.2 The matter was referred to trial by consent;
- 6.2.3 The respondent alleged that the appellant had deliberately and intentionally failed to procure the required rezoning and subdivision of the property. In doing so, the purchaser relied on the doctrine of fictional fulfilment;
- 6.2.4 The candidate (then an acting judge) found in the respondent's favour and held that the agreement had not lapsed and the suspensive condition was deemed to have been fulfilled;
- 6.2.5 The SCA explained the doctrine of fictional fulfilment and upon analysing the evidence, disagreed with the candidate that the respondent had discharged its onus in relying upon that doctrine; and
- 6.2.6 The SCA commented about the manner in which the trial was conducted. In particular, the SCA commented that the candidate was under a misapprehension as to the status of the affidavits in the context of the trial.
- 6.3 *South African Municipal Workers Union and Others v Mokgatla and Others* [2016] 2 All SA 451 (SCA).
- 6.3.1 The issue before the court was whether the High Court and the Labour Court have concurrent jurisdiction in respect of disputes relating to section 158(1)(e) of the Labour Relations Act (LRA). The candidate presiding in the court a quo dismissed a special plea raised by the appellants, that it lacked jurisdiction to

consider the application by the respondents for their reinstatement;

6.3.2 The SCA found that the court a quo “missed” the fundamental guiding principles underlying the determination of jurisdiction of the respective courts over disputes provided for under the LRA, particularly as laid down by the Constitutional Court;

6.3.3 The candidate’s judgment was overturned on the basis that he failed to take into account that the Constitution recognises the need for specificity and specialisation under the modern rule of law and thus, when the legislature is mandated to create a detailed legislation for a particular area, like the LRA in the area of labour relations, it is preferable to use the system created by that legislation.

6.4 *De Beer v S* [2016] ZAGPJHC 184.

6.4.1 The SCA overturned a portion of the order granted by the candidate and Judge Siwendu (sitting as the Criminal Appeal Court in the Johannesburg High Court) which imposed a life sentence upon the accused. Instead, the SCA sentenced the accused to 15 years imprisonment;

6.4.2 The SCA stated that the candidate and Siwendu J did not give proper consideration to whether a life sentence was in proportion to the crime, the accused and the needs of society;

6.4.3 The candidate and Siwendu J were criticised for focusing too much on the fact that life imprisonment was the prescribed

minimum sentence. Life imprisonment, the SCA held, was an injustice and the accused deserved a custodial sentence;

6.4.4 The SCA found that there was no reason for the candidate and Siwendu J to have interfered with the decision of the Regional Magistrate as the latter had exercised his discretion proportionately.

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

7.1 The candidate has extensive legal experience as appears from the areas of the law covered by the judgments reviewed.

7.2 The candidate practised as an Advocate of the High Court for 16 years.

7.3 The candidate served as an Acting Judge and then a Judge of the High Court in Gauteng for almost 6 years.

7.4 The candidate acted as Justice of Appeal of the Competition Appeal Court for almost 2 years.

7.5 The candidate has been serving as a Justice of Appeal of the Competition Appeal Court from 2018 to present.

8 The candidate's linguistic and communication skills

8.1 The candidate's judgments are in English.

8.2 From the judgments reviewed, the candidate's judgments are clear and concise. Many of the judgments were fact and law intensive, yet, the candidate was able to deal with the issues before him logically and clearly.

8.3 To the best of the reviewers' knowledge, there have been no adverse comments regarding the candidate's linguistic or communication skills.

9 **The candidate's ability to produce judgments promptly**

9.1 The reviewers have reviewed 45 (reported and unreported) cases by the candidate.

9.2 The candidate generally produces judgments promptly.

9.3 Many of the judgments were delivered ex tempore and most others within 3 months of the conclusion of the hearing.

9.4 The reviewers came across two judgments reviewed that were not delivered promptly, namely:

9.4.1 *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd and Another* 2011 (4) SA 642 (GSJ), which was produced almost 4 months after the matter was heard; and

9.4.2 *Tshuma v Minister of Safety and Security* (18147/10) [2015] ZAGP JHC 152, which was produced over 5 months after the hearing of this matter.

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

10.1 The candidate's judgments reflect a fair and impartial mind that was brought to bear in respect of the matters before the candidate.

10.2 In many of his judgments, the candidate clearly expressed each party's arguments and the candidate's view of the merits and demerits of the arguments presented.

10.3 The reviewers have not elicited nor received any specific adverse comments regarding the candidate's fairness or impartiality.

11 **The candidate's independent mindedness**

11.1 The judgments reviewed reflect the candidate as independent-minded.

11.2 While acting in the Competition Appeal Court, in *Isipani Construction (Pty) Ltd v The Competition Commission* 2017 ZACAC, the candidate penned a minority judgment in which he would have imposed a greater fine than that imposed by the majority judgment. In so doing, the candidate motivated the basis upon which the Competition Appeal Court ought to exercise its discretion in imposing a higher fine.

11.3 In *Atlantis Property Holdings CC v Atlantis Excel Service Station CC* 2019 (3) All SA 441 (GJ), the candidate penned a minority judgment in which he supported the Constitutional Court's approach to contractual interpretation as opposed to the SCA's approach and held that the court was bound by the Constitutional Court's approach.

11.4 In *Coral Lagoon Investments 194 (Pty) Limited and Another v Capitec Bank Holdings and Others* [2019] ZAGPJHC 427 5 November 2019 the candidate adopted the concept of a contractual duty of good faith as set out in his minority judgment in *Atlantis Property Holdings CC* referred to above.

11.5 *Democratic Alliance v President of the Republic of South Africa* 2017 (4) SA 253 (GP) the candidate developed the law by holding that the President was obliged to provide not only the record of proceedings but

also reasons for the executive decision relating to the reshuffling of the national executive.

11.6 The reviewers have not elicited nor received any specific adverse comments regarding the candidate's independence.

12 The candidate's ability to conduct court proceedings

12.1 The reviewers have received a number of negative comments regarding the manner in which the candidate conducts Court proceedings from practitioners at the Johannesburg Bar, one such complaint having been received from a senior silk. Specifically:

12.1.1 the candidate has been known to seek to avoid dealing with matters on his roll by unnecessarily standing matters down or postponing matters;

12.1.2 counsel complain that the candidate's manner with them is sometimes abrupt and he tends not to listen to what counsel is saying; and

12.1.3 he sometimes draws conclusions without meaningfully engaging in the merits of a matter.

12.1.4 the candidate is often discourteous towards counsel.

13 The candidate's administrative ability

13.1 The candidate's extensive work experience, including as an Advocate of the High Court and as a Judge of a busy court, coupled with his ability

to deliver well-reasoned judgments promptly, demonstrate that the candidate has strong administrative abilities.

- 13.2 The reviewers have not elicited nor received any specific adverse comments regarding the candidate's administrative ability.

14 The candidate's reputation for integrity and ethical behaviour

- 14.1 No concerns have been picked up in the applicant's formal application, supporting documentation or in the judgments reviewed impacting on the candidate's reputation, integrity or ethical behaviour other than the fact that he indicated that he was detained in 1986. No further details have been provided concerning his detention.

- 14.2 The reviewers have not elicited nor received any specific adverse comments regarding the candidate's reputation, integrity or ethical behaviour.

15 The candidate's judicial temperament

- 15.1 The reviewers have received a number of negative comments regarding the candidate's judicial temperament, one such complaint having been received from a senior silk.

- 15.2 These comments, inter alia, conveyed the candidate being discourteous towards advocates that appear before him and his reluctance to hear opposed matters.

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

- 16.1 Prior to joining the advocates profession, the candidate's writings reflect a keen interest for the rights of employees and generally for social justice.
- 16.2 The candidate's judgments consistently highlight his sensitivity and commitment to the values enshrined in the Constitution.
- 16.3 The candidate's judgments referred to in 11.3, 11.4 and 11.5 above are strong indications of his judicial activism and commitment to the values enshrined in the Constitution.

17 The candidate's potential

- 17.1 The candidate holds a number of academic qualifications and has a vast array of experience, both in sociology and in law.
- 17.2 The candidate practised as an Advocate of the High Court for 16 years.
- 17.3 The candidate served as an Acting Judge and then a Judge of the High Court in Gauteng for almost 6 years.
- 17.4 The candidate acted as Justice of Appeal of the Competition Appeal Court for almost 2 years.
- 17.5 The candidate has been serving as a Justice of Appeal of the Competition Appeal Court from 2018 to present.

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

- 18.1 As mentioned above, the candidate holds a number of academic qualifications; has a wide range of experience and expertise in the legal

field; and is by virtue of his race, representative of a section of our society that is not currently reflected in the composition of the Constitutional Court Bench.

18.2 The candidate's judicial temperament and reluctance to deal with matters is of concern.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd and Another
2011 (4) SA 642 (GSJ)

Peniel Development (Pty) Ltd and Another v Pietersen and Others 2014 (2) SA 503
(GJ)

Atholl Developments (Pty) Ltd v Valuation Appeal Board, Johannesburg and Another 2014 (5) SA 485 (GJ) AND *Atholl Developments (Pty) Ltd v Valuation Appeal Board, Johannesburg and Another* 2015 JDR 0674 (SCA)

In the Court a quo, the candidate expressed a number of views regarding the application of the Local Government: Municipal Property Rates Act No. 6 of 2004, that do not accord with well – established valuation principles ensconced by various judgments over the years.

This resulted in the applicant in matter, although successful before the candidate in the High Court, appealing the decision, because it was concerned that the remarks by the candidate constituted binding findings on the parties and the Valuation Appeal Board [see paragraph 4 of the Supreme Court of Appeal judgment].

Several mining companies were granted permission by the Supreme Court of Appeal to intervene as amici curiae in the matter. The interests of these companies lay in the fact that they were embroiled in several valuation appeals in which the municipality concerned attempted to rely on comments made by the candidate in the judgment in the Court a quo.

It was of importance to these companies to establish that the remarks made by the candidate were not binding on the Valuation Appeals Board, before which their appeals were being heard.

The following statement in paragraph [5] of the Supreme Court of Appeal judgment must be read against the above background: "...Vally J may well have ranged beyond that narrow remit in this case..."

In response to the requests by the appellant and the amici, the Supreme Court of Appeal expressly stated in paragraphs [5] and [6] that the findings of the candidate are not binding on the parties and the Valuation Appeals Board. During the debate, the bench made it clear that they could not outright state in the judgment that the candidate was wrong, because they may be required to decide the issue in the future, should the matter again reach the Supreme Court of Appeal. In the premises, the judgment is couched in the aforesaid specific terms, as the Supreme Court of Appeal held, an appeal against the order and not the reasons for the judgment.

The unnecessary remarks made by the candidate in the Court a quo induced both the Appellant and the amici to approach the Supreme Court of Appeal, to ensure that municipal valuers do not ignore rights, such as leased, registered against a property, when valuing such property. By virtue of Section 46(3)(c) of the Rates Act, only unregistered leases should be ignored.

Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd and Others [2014] 3 All SA 454 (GJ)

Trichart v S 2014 (2) SACR 245 (GJ)

ABSA Bank Ltd v Africa's Best Minerals 146 Ltd, In re: Sekhukhune NO v ABSA Bank Ltd [2015] 2 All SA 8 (GJ)

Mncube and Others v Januarie NO and Others [2015] 2 All SA 338 (GJ)

AB LLC and BD Holdings LLC v Commissioner of South African Revenue Services [2015] ZATC 2

De Beer v S [2016] 3 All SA 746 (GJ)

Nkala and Others v Harmony Gold Mining Co Ltd and Others 2016 (5) SA 240 (GJ)

Democratic Alliance v President of the Republic of South Africa 2017 (4) SA 253 (GP)

Democratic Alliance v Minister of International Relationships and Co-operation and Others 2018 (6) SA 109 (GP)

Twine and Another v Naidoo and Another [2018] 1 All SA 297 (GJ)

Thato Masuku v The State [2018] JOL 40391 (GJ)

The Black Eagle Project Roodekrans v MEC Department of Agriculture, Conservation and Environment 2019 (2) All SA 322 (GJ)

Atlantis Property Holdings CC v Atlantis Excel Service Station CC 2019 (3) All SA 441 (GJ)

Khubeka v The State [2019] ZAGPJHC 266

Wimpey v HBS Africa Consulting Engineers [2019] ZAGPJHC 266

McNair v Crossman and Another [2019] ZAGPJHC 298

Unreported decisions

S v Dladla and Another (2006/22220) [2011] ZAGPJHC 233

Venter v Hauptfleisch Inc (2009/2747) [2012] ZAGPJHC 222

S v Rautenbach (164/2012) [2013] ZAGPJHC 105

S v Bayat (2013/08/05) [2013] ZAGPPHC 344

S v Majola and Others (98/2013) [2014] ZAGPJHC 421

Mokgatla and Others v South African Municipal Workers Union and Others
(21815/2014) [2014] ZAGPJHC 276

Thusi and Another v Minister of Safety and Security (1442713) [2014] ZAGPJHC
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Urban Genesis Management (Pty) Ltd and Another v Jooste and Another
(2014/05400) [2014] ZAGPJHC 380

*Wynand NO and Another v MEC for the Department of Local Government and
Housing of the Gauteng Province and Another* (20291/2013) [2014] ZAGPJHC
388

Tshuma v Minister of Safety and Security (18147/10) [2015] ZAGPJHC 152

Mtshali and Another v S (A319/2014) [2015] ZAGPJHC 153

A v Commissioner of the South African Revenue Services (VAT1129) [2015] ZATC
3

Hicks and Another v S (A609/2008) [2015] ZAGPJHC 64

Caxton and CTP Publishers and Printers Ltd and Others v Multichoice (Pty) Ltd and Others (140/CAC/MAR16) [2016] ZACAC 3

Davis and Another v Purple Fountain Properties 118 (Pty) Ltd (08/36380, 30457/15) [2016] ZAGPJHC 198

Kenako Consulting (Pty) Ltd v City of Johannesburg Property Company (SOC) Ltd and Others (08/36380, A5023/2015) [2016] ZAGPJHC 196

Kingdom Films and Others v Kaplan NO (14/43457) [2016] ZAGPJHC 37

Sasfin Commercial Solutions (Pty) Ltd v Firstrand Bank Ltd (08/36380, 37344/2015) [2016] ZAGPJHC 246

Isipani Construction (Pty) Ltd v Competition Commission (144/CAC/LUG16CT, 019950) [2017] ZACAC 3.

Coral Lagoon Investments 194 (Pty) Limited and Another v Capitec Bank Holdings and Others [2019] ZAGPJHC 427 5 November 2019.

Judgments upheld on appeal

Atholl Developments (Pty) Ltd v Valuation Appeal Board, Johannesburg, and Another 2015 ZASCA 55

Tridevco (Pty) Limited @ Other v Zenprop Property Holdings (Pty) Limited and Others ZAGPPHC 658 2 September 2018.

Judgments overturned on appeal

Xstrata South Africa (Pty) Ltd and Others v SFF Association 2012 (5) SA 60 (SCA).

Lekup Prop No 4 (Pty) Ltd v Wright, John Colin 2012 (5) SA 246 (SCA).

South African Municipal Workers Union and Others v Mokgatla and Others [2016]
2 All SA 451 (SCA).

De Beer v S [2016] ZAGPJHC 184