

APPLICANT: JUDGE WENDY HUGHES**COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL****1. The candidate's appropriate qualifications:**

- 1.1. Judge Hughes has a B. Proc, LLB (both from the University of Durban, Westville) and an Advanced Diploma in Labour Law (from the former Rand Afrikaans University).
- 1.2. Judge Hughes has served as a High Court judge since 2013.

2. Whether the candidate is a fit and proper person:

- 2.1. Judge Hughes practised as an attorney from May 1995 until her permanent appointment as a High Court Judge (Pretoria) on 1 July 2013.
- 2.2. Before her permanent appointment, Judge Hughes acted as a judge in various divisions of the High Court (KZN, Northern Cape and Pretoria).
- 2.3. Judge Hughes has therefore practised as an attorney or served as a judge for over 25 years. This history suggests that she is a fit and proper person and there is no indication otherwise in the public record.

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

- 3.1. Judge Hughes is a coloured female.

3.2. There are, at present, no other coloured females represented on the SCA.¹ There are, at present, 9 female judges on the SCA, out of a total of 26.²

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

4.1. Judge Hughes has written several judgments (some of which have been considered for the purposes of this review and are listed below) that have addressed principles of constitutional law. Judge Hughes has also taken extra Equality Court training and has obtained various certificates in specialised areas of law (such as maritime law, and a course on the evaluation of permanent impairment as part of the study of disability medicine, which in turn is relevant to personal injury law - one of Judge Hughes' main areas of expertise).

4.2. As shown below, Judge Hughes has had a few decisions overturned on appeal. This is not uncommon for a High Court judge, even a good one. Some of the decisions that were overturned, were decisions either of the full court on appeal to the SCA or the SCA (when Judge Hughes was acting) on appeal to the Constitutional Court. They relate to a diverse range of legal topics – from tax law to copyright law. Judge Hughes has also decided several criminal cases. She therefore appears to be familiar with a wide range of subject areas.

4.3. Concerns may, however, be raised in regard to the depth of Judge Hughes' knowledge of the law and her judicial reasoning. An example may be found in the matter of *Zikhulise Cleaning*

¹ Judiciary Annual Report (2019/2020), accessible at: <https://www.judiciary.org.za/index.php/documents/judiciary-annual-reports#>

² Judiciary Annual Report (2019/2020), accessible at: <https://www.judiciary.org.za/index.php/documents/judiciary-annual-reports#>

Maintenance (the neutral citation of the unreported judgment of Judge Hughes is given below in the list of judgments successfully appealed against; the citation of the SCA judgment upholding the appeal is *Zikhulise Cleaning Maintenance & Transport CC v Chairman of the Investigating Committee of the Construction Industry Development Board* [2020] 1 All SA 677 (SCA)):

4.3.1. The case concerned an application to review a decision of an investigating committee of the Construction Industry Development Board not to dismiss certain charges brought against the applicant in an inquiry under the Construction Industry Development Board Act 38 of 2000. The applicant raised four grounds of review. The fact that four grounds were raised is relevant to what is said below; the nature of those grounds need not, however, be discussed here.

4.3.2. The difficulty in the approach adopted by Judge Hughes is summed up in the following extract from the judgment of the SCA in the appeal:

“In dismissing the review, the learned judge a quo dealt with the first of these grounds. She concluded that the fact that the appellant may not have been registered as a contractor at the time of the conduct that was the subject of the charges, was no impediment to the inquiry being held. On the strength of this finding alone, she dismissed the review, ignoring the second, third and fourth points, any one of which would in itself, if upheld, have allowed the review to succeed. Why she did so, or whether she merely overlooked these other grounds, is known only

unto her. It was raised as a ground of appeal in the appellant's application for leave to appeal to this court, but the learned judge avoided the issue in her judgment on that application, stating that she had dealt with 'as much as that which was relevant' in her judgment. Unfortunately, she had not. Her failure to deal with certain of the grounds of review remains a mystery. Although this cuts across the appellant's constitutional rights of access to the courts, it can be cured by this court considering the other grounds advanced in the court a quo."

- 4.3.3. It is not necessary to elaborate as to why the criticism of the SCA raises a concern about Judge Hughes' knowledge of the law and suitability for elevation – the criticism speaks for itself. This episode raises questions both as to Judge Hughes' ability to discern what issues are decisive in cases before her, and also as to her judicial temperament and approach. It is a fundamental example of judicial misdirection for a judge to dismiss a review without considering review grounds which, taken on their own, would result in the review succeeding if upheld. It is for this reason that the *Zikhulise* judgment is addressed here, as part of an assessment of the candidate's knowledge of the law – Judge Hughes' approach in this case reveals a failure to apply basic principles of civil procedure; and if such principles are not applied, then there is no evidence that they are understood. However, this misdirection cuts across several of the categories discussed in this review, such as, as noted above, the candidate's judicial temperament.

5. The candidate's commitment to the values of the constitution:

5.1. There is nothing in Judge Hughes's application and/or history that answers this question in either direction.

5.2. A concern was raised by the SCA, addressed more fully below, that Judge Hughes adopted an approach in a case before her which was inimical to a particular litigant's right of access to courts. There is no suggestion in the SCA judgment that this was done deliberately, but it nevertheless raises a concern relevant to whether Judge Hughes is suitable for elevation to the SCA.

6. Whether any judgments have been overturned on appeal:

6.1. Judge Hughes has highlighted, in her application, that 5 of her judgments were overturned on appeal.

6.2. These judgments are listed in paragraph 16.4 of Judge Hughes' application. They have all been considered as part of this review.

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

7.1. Judge Hughes's main professional experience before becoming a judge was her 17-and-a-half-year career as an attorney. During that time, she also served as a part-time commissioner of the CCMA.

7.2. Judge Hughes has served as a High Court judge for 7 and a half years. She also served several stints as an acting Judge of the High Court for four years before her permanent appointment and has acted on the SCA on two occasions (for almost six months each time).

7.3. If Judge Hughes were to be appointed to the SCA, her length of tenure on the High Court would not indicate an unusually quick

elevation. For example, Judge Navsa was a High Court judge for 5 years before being elevated. Judge Mbha was a High Court judge for 10 years before being elevated. Judge Salduker was a judge for 9 years before being elevated. Judge Dambuza was a judge for 10 years before being elevated. Judge Schippers was a judge for 5 years before being elevated. Judge Wallis was a judge for only 2.5 years before being elevated.³

- 7.4. In short, there is nothing remarkable about Judge Hughes's professional experience, but it is commensurate with the experience of other judges appointed to the SCA (several of whom were attorneys before being elevated to the High Court bench). It is not, in the opinion of this review, Judge Hughes' length of tenure on the High Court or any other deficiency in her professional experience that makes her unsuitable for elevation. It is, rather, the issues identified in paragraph 5 (above) and paragraph 8 (below).

8. **The candidate's linguistic and communication skills:**

- 8.1. Several of Judge Hughes's unreported judgments have been considered in order to assess her writing style and command of written English.
- 8.2. Judge Hughes has a competent, but not excellent, command of written English. It has to be said, frankly, that the candidate's writing style in unreported judgments does not reveal a standard that one would expect of an SCA judge. While her command of written English is, as said, competent, it is not particularly good, with various grammatical errors and inelegant turns of phrase. In this

³ This information about each of the judges was obtained from the SCA website (www.supremecourtofappeal.org.za)

regard, grammatical errors should, in fairness to the candidate, be distinguished from typographical errors. The latter are to be expected in unreported judgments, especially in a busy division. But grammatical errors (especially when frequent) reveal a weakness in the command of written English, which is unsatisfactory in an appellate judge.

8.3. Examples include:

8.3.1. referring to the single applicant as “they” and “it” interchangeably, when only the latter is correct;

8.3.2. inappropriately combining two clauses in one sentence. The following two examples from two of Judge Hughes’ recent unreported judgments may be given. The first is: “They further contend that the voucher does not entitle the holder to specific goods or services, instead, it’s a means to pay for unspecified services in the future.” (See *MTN v Commissioner, SARS* (see below for citation)). The second is: “The plaintiff as at the date of the collision was unemployed but volunteered as a paramedic assistant, as a volunteer she earned no income.” (See *Masango v Road Accident Fund – JDR* citation below.) This type of error is common in Judge Hughes’ unreported (and therefore unedited) judgments;

8.3.3. the use of imprecise and inelegant turns of phrase. An example: “The applicant seeks this court to exercise its discretion in the granting of the declaratory.” Courts, surely, must always exercise their discretion when deciding whether to grant declaratory relief. It is assumed that Judge Hughes intended to say something along the following lines: “The

applicant asks this court to exercise its discretion in favour of granting the declaratory order sought.” Or, “The applicant asks this court to exercise its discretion in favour of granting declaratory relief.” (It should be noted that, throughout the judgment in question, Judge Hughes referred to the declaratory order sought by the applicant as “the declaratory”. This appears simply to be an idiosyncratic turn of phrase preferred by the candidate.)

- 8.4. In addition to the grammatical errors highlighted above, some of Judge Hughes’ judgments reveal an inability to follow a logical structure. An example of this may be found in the recent unreported judgment of *MTN v Commissioner for the South African Revenue Service* (please see below for JDR citation), which was also consulted in order to assess the grammatical concerns summarised above. In that judgment, Judge Hughes begins by summarising the arguments of the two parties. There is then a heading “Discussion”, which leads the reader to expect an analysis of the merits of the arguments of each side. Instead, there is what appears to be a summary of the history of the dispute between the parties, which one would have expected to see much earlier in the judgment as part of the summary of the history of the matter. Another example may be found in *Mathuhle v The Health Professions Council of South Africa* (JDR citation given below). Paragraph 3 of that judgment, reproduced here in its entirety, reads: “This review is brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), specifically section 6(2) (d), 6(2) (e) (ii) and 6(2) (e) (vi). In that the decision taken by the RAF was influenced by an error of law or irrelevant considerations were taken to account and relevant

considerations were not taken into account in making the decision. Lastly, the said decision taken is one that is arbitrary and not procedurally fair.” It would appear from this extract, read in context, that Judge Hughes intended to summarise the grounds on which the review was based. But this is by no means clear.

8.5. There are also examples of sentences that are simply incoherent. Again, *Mathuhle* (supra) is used as an example (the following quote is reproduced verbatim): “It is trite that when dealing with a review one looks at how the decision was reached or was one examines the conduct of the proceedings in reaching that decision and not the decision itself.” In the matter of *Centre for Child Law v Media Law* (JDR reference below), Judge Hughes says the following (again, reproduced verbatim): “Having come to the conclusion above I find that there is sufficient as I have set out supra to read into section 154(3), if one applies the purposive manner of interpretation, that the child victim is therefore covered in section 154(3)”.

8.6. It must be emphasised that, in a desire to be as fair to the candidate as possible, many of the candidate’s unreported judgments were consulted (the judgments consulted are listed below). The impression should not be created that the limited examples given above have been cherry-picked to create a negative impression of the candidate. They are examples that are consistent with the general writing style of Judge Hughes, as reflected in most of her unreported judgments. Random samples have simply been provided above, with the aim of keeping this review to a manageable length.

9. The candidate's ability to produce judgments promptly:

9.1. At the time of making her application, Judge Hughes had no backlog of reserved judgments from previous terms. She had four reserved judgments pending at the time of her application, and all four of them had been heard in that term (fourth term of 2020).

9.2. Judge Hughes is from a busy division and so this would suggest that she has an ability to deliver judgments promptly.

10. The candidate's fairness and impartiality:

10.1. There is nothing in the candidate's application, or in her judicial record, to suggest that the candidate is not fair and impartial.

10.2. Interviews with colleagues (conducted for the purpose of this review), suggest that Judge Hughes runs proceedings in her court fairly and collegially.

11. The candidate's independent mindedness:

11.1. There is nothing in the candidate's application, or in her judicial record, to suggest that she is not independent minded.

12. The candidate's ability to conduct court proceedings:

12.1. Interviews with colleagues (conducted for the purpose of this review), suggest that Judge Hughes runs proceedings in her court fairly and collegially.

12.2. The same interviews also revealed that colleagues consider the experience of appearing before Judge Hughes to be pleasant. They appreciate, in particular, that she engages actively with counsel and puts her views to them, to give them a proper opportunity to respond.

13. The candidate's administrative ability:

- 13.1. Judge Hughes has not included, in her application, a lot of information about activities outside of her time as a judge that would be relevant to assessing her administrative ability. It should be noted, however, that she was the sole director of her own law firm, from 1 April 2001 to 2013. It has to be assumed that, in order to be able to run a firm for more than 10 years, Judge Hughes had good administrative skills.
- 13.2. Another indication of Judge Hughes's administrative skill is her track record in delivering judgments. She routinely delivers judgments in three months or less.

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

- 14.1. There is nothing in the candidate's application, or in her public record, to raise any doubt about her integrity or ethics.

15. The candidate's judicial temperament:

- 15.1. Interviews with colleagues (conducted for the purpose of this review), suggest that Judge Hughes runs proceedings in her court fairly and collegially.
- 15.2. The same interviews also revealed that colleagues consider the experience of appearing before Judge Hughes to be pleasant. They appreciate, in particular, that she engages actively with counsel and puts her views to them, to give them a proper opportunity to respond.

15.3. A major concern has, however, been raised in paragraph 5 above, which is relevant to an assessment of Judge Hughes' judicial temperament.

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

16.1. Judge Hughes mentions four organisations of which she was a member before she was appointed as a High Court judge. These are:

16.1.1. the Wentworth Improvement Project;

16.1.2. the Wentworth Victim Friendly Centre;

16.1.3. the Business Women's Association (Nedbank); and

16.1.4. the Durban Chamber of Commerce and Industry.

16.2. Judge Hughes also records that she was a member of the Black Lawyers' Association and the South African Women Lawyers Association.

16.3. No detail is provided as to the role played by Judge Hughes in these organisations. In the case of the majority of these organisations, there is also insufficient information about the nature of the organisation to assess its role in the community. It is therefore not possible to answer this question conclusively.

17. The candidate's potential:

17.1. Judge Hughes has been a High Court judge for seven and a half years. She is, according to her application, turning 53 on 28 February 2021. Judge Hughes therefore has plenty of time to be appointed to the SCA in the future, if not appointed now.

17.2. Concerns must be raised as to the candidate's potential to serve as an SCA judge. The problems highlighted in paragraphs 5 and 8 above could fairly be described as permanent obstacles to her elevation.

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

18.1. It is the frank assessment of this review that the elevation of Judge Hughes to the SCA would send a message that mediocrity in legal reasoning and writing is to be tolerated on the SCA.

18.2. Judge Hughes is clearly an energetic judge, with good control over her workload and with a notable record of output. There is also evidence in her judgments of a goal of vindicating the values of the Constitution (as seen, for example, in the candidate's judgment in *Centre for Child Law v Media 24*, the citation of which is provided below). However, serious examples of poor legal reasoning and expression have been found in many of the candidate's unreported judgments, which raise serious concerns about the appropriateness of the candidate's elevation to the SCA.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED**Reported decisions**

Fouriefismer v Road Accident Fund and Related Matters 2020 (5) SA 465 (GP)

President of the Republic of South Africa v Public Protector 2018 (2) SA 100 (GP)

Bouttell v Road Accident Fund 2018 (5) SA 99 (SCA)

Centre for Child Law v Media 24 Limited 2017 (2) SACR 416 (GP)

Unreported Decisions

MTN (Pty) Ltd v Commissioner, SARS 2021 JDR 0137 (GP)

Chairperson of the Judicial Commission of Inquiry (State Capture) v President, RSA 2020 JDR 0561 (GP)

Masango v RAF 2020 JDR 0604 (GP)

Mathuhle v Health Professions Council of SA 2020 JDR 0940 (GP)

Mhlongo v Mokoena NO 2020 JDR 0942 (GP)

Nyalunga v Commissioner, SARS 2020 JDR 0961 (GP)

Chief of the SANDF v Masinga 2020 JDR 1215 (GP)

Themba NO v MEC for Health, Mpumalanga 2020 JDR 2543 (GP)

AN v MNe 2020 JDR 2544 (GP)

Open Horizon Ltd v Carnilinx (Pty) Ltd 2020 JDR 2610 (GP)

PRASA v Siyangena Technologies (Pty) Ltd 2020 JDR 2740 (GP)

S v Mabona 2020 JDR 2893 (GP)

S v Sekalala 2019 JDR 0289 (GP)

S v Kwenda 2019 JDR 1719 (SCA)

S v Ndaminde 2019 JDR 1849 (SCA)

S v Zulu 2019 JDR 2522 (SCA)

S v Kubeka 2018 JDR 0118 (GP)

WRP Consulting Engineers (Pty) Ltd v Chief Chunda Associates CC 2018 JDR 0204 (GP)

Tequila Cuervo SA de CV v Fabrication and Light Engineering CC 2018 JDR 0335 (GP)

Rajah v Balduzzi 2018 JDR 0974 (SCA)

DGR v JAD JDR 1515 (GP)

Commissioner, SARS v Amewele Joint Venture CC 2017 JDR 0188 (GP)

Jordaan NO v Tung'Ande 2017 JDR 0280 (GP)

Tung'Ande v Tung'Ande 2017 JDR 0281 (GP)

BMW Financial Services (SA) (Pty) Ltd v Finlay 2017 JDR 0348 (GP)

BMW Financial Services (SA) (Pty) Ltd v Finlay 2017 JDR 0603 (GP)

SAB v SARS 2017 JDR 0764 (GP)

Booyesen v RAF 2017 JDR 0957 (GP)

Premier, Gauteng v Booyse 2017 JDR 0990 (GP)

PRASA v Mnguni 2017 JDR 1179 (GP)

Nannen v Momentum 2017 JDR 1253 (GP)

Van Schalkwyk v Minister of Justice and Constitutional Development 2017 JDR 1270 (GP)

Solar Technologies (Pty) Ltd v Deltrosys (Pty) Ltd 2017 JDR 1335 (GP)

Barrett v Start-Up Properties 102 CC 2017 JDR 1349 (GP)

Judgments upheld on appeal:

Muldersdrift Sustainable Development v Mogale City Local Municipality 2013 JDR 2806 (GNP)

Tasima (Pty) Ltd v Department of Transport 2015 JDR 1318 (GP)

Big Five Duty Free (Pty) Ltd v Airports Company South Africa 2016 JDR 1467 (GP)

General Council of the Bar of SA v Jiba [2016] JOL 38844 (SCA)

Centre for Child Law v Media 24 Ltd [2017] 3 All SA 862 (GP)

President of the Republic of South Africa v Office of the Public Protector [2018] 1 All SA 800 (GP)

Judgments overturned on appeal:

Afri Corporation Limited v Eloff 2014 JDR 0378 (GNP)

Dinnermates (Tvl) CC v Piquante Brands International (Pty) Ltd 2017 JDR 0239 (GP)

Commissioner for the South African Revenue Service v Amewele Joint Venture
CC 2017 JDR 0188 (GP)

*Zikhulise Cleaning Maintenance and Transport CC v The Chairman:
Investigating Committee of the Construction Industry Development* [2017]
ZAGPPHC 1108

De Klerk v Minister of Police [2018] 2 All SA 597 (SCA)