

**APPLICANT: JUDGE KATHREE-SETILOANE****COURT FOR WHICH CANDIDATE APPLIES: CONSTITUTIONAL COURT****1. The candidate's appropriate qualifications:**

- 1.1. Bachelor of Arts (BA), University of Natal, Durban, 1988
- 1.2. Bachelor of Laws (LLB), University of Natal, Durban, 1991
- 1.3. Masters in Law (LLM), Georgetown University Law School, Washington DC

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

- 2.1. The candidate was appointed as a High Court judge in 2010.
- 2.2. As far as the reviewers are aware, there have been no complaints of misconduct against the candidate to the Judicial Service Commission (JSC).
- 2.3. Nor were any allegations of misconduct communicated to the reviewers during the course of their assessment of the candidate's application.
- 2.4. The letters of recommendation accompanying her application attest to the candidate's sound ethics and unquestionable character and values.
- 2.5. Subject only to the *caveats* recorded in paragraphs 10 and 15 below, there is nothing that the reviewers are aware of that gainsays her suitability for judicial office, including as a member of the country's highest Court.

2.6. She is a fit and proper person, in the view of the reviewers.

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

3.1. As far as the reviewers are aware, the Constitutional Court has nine permanent judges. Of these, there are five men and four women. The gender balance has improved considerably in recent years.

3.2. Justice Khampepe's term as a member of the Constitutional Court is understood by the reviewers to be coming to an end.

3.3. The candidate is an Indian female judge. Her appointment would help to reflect a transformed racial and gender composition of the Constitutional Court.

3.4. This would in turn enable the Court better to reflect the racial and gender composition of the country.

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

4.1. The candidate has served as an Acting Judge in all our appellate Courts, as is detailed in paragraph 7 below.

4.2. She has penned reported judgments (including during her time in practice as an Advocate) in wide-ranging areas of the law.

4.3. Generally, her judgments are skilfully written, well researched and reasoned. Overall, she reflects an excellent grasp of legal principles and the imperatives of the Constitution, as appears from the survey of certain of the candidate's judgments that is annexed to this review.

4.4. Her judgments, generally, are indicative of a judicial officer with a deep and developed sense of justice. In the view of the reviewers, the

judgments commend the candidate for membership of our highest Court.

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

5.1. The candidate's letters of reference and support are from all corners of society (i.e. public interest organisations, senior members of both the Advocates' and Attorneys' professions and members of the Judiciary) and are emblematic of a legal career that has been dedicated and committed to the values of the Constitution and its transformative agenda.

5.2. The reviewers are unaware of anything that would tend to draw into question the candidate's commitment to the values of the Constitution.

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

6.1. The candidate has listed five judgments which were successfully overturned on appeal.

6.2. As far as the reviewers are able to establish, these appeals succeeded not on account of obvious errors on the part of the candidate but due to the complexity of the matters, on issues in respect of which judges could reasonably differ. We do however draw attention to the Constitutional Court's findings in the appeal against the candidate's judgment in *SAEWA obo Bester v Rustenburg Platinum Mine and Another* (2017) 38 ILJ 1779 (LAC), referred to in the second annexure to this review. In any event, given the extent of the candidate's judicial career, five reversals do not appear to the reviewers to detract from the strength of her application.

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

7.1. January 1989 to December 1990

7.1.1. Research Assistant, Centre for Socio-Legal Studies,  
University of Natal, Durban

7.2. January 1991 to December 1992

7.2.1. Fellow, Legal Resources Centre, Durban

7.3. May 1993 to December 1993

7.3.1. Lecturer, University of Maryland School of Law, Baltimore,  
USA

7.4. March 1994 to May 1994

7.4.1. Election Administrator, Independent Electoral Commission,  
Northern Cape Provincial Office

7.5. June 1994 to December 1995

7.5.1. Senior Research Fellow, Gender Project, Community Law  
Centre, University of Cape Town

7.5.2. Lecturer, International Human Rights Law, Department of  
Public Law, University of Western Cape

7.6. January 1995 to December 1995

7.6.1. Law Researcher to Justice Yvonne Mokgoro, Constitutional  
Court of South Africa

7.7. January 1996 to March 1997

- 7.7.1. Advocate, Constitutional Litigation Unit, Legal Resources Centre, Johannesburg
- 7.8. April 1997 to September 2006; February 2010 to October 2010
- 7.8.1. Advocate, Johannesburg Society of Advocates (JSA)
- 7.9. October 2006 to January 2010
- 7.9.1. Director, Werksmans Advisory Services (Pty) Ltd, a subsidiary of Werksmans Attorneys
- 7.10. 01 February 2010 to 30 October 2010
- 7.10.1. Acting Judge, South Gauteng High Court
- 7.11. 31 October 2010 to present
- 7.11.1. Judge, High Court of South Africa, Gauteng Local and Provincial Divisions (Pretoria & Johannesburg)
- 7.12. 01 June 2014 to 13 December 2014; 31 December 2016 to 31 May 2017; 01 July 2018 to 31 December 2018; 01 July 2019 to 31 December 2019; 01 July 2020 to 31 December 2020
- 7.12.1. Acting Judge of Appeal, Labour Appeal Court
- 7.13. 01 December 2015 to 31 May 2016
- 7.13.1. Acting Judge of Appeal, Supreme Court of Appeal
- 7.14. 26 July 2017 to 31 July 2017
- 7.14.1. Acting Justice, Constitutional Court of South Africa
- 7.15. January 2018 to December 2020

7.15.1. Acting Judge of Appeal, Competition Appeal Court

7.16. The reviewers consider the candidate's wealth of experience in academic, professional, judicial and appellate disciplines to commend her for membership of our highest Court.

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

8.1. The candidate presents herself as assertive, confident and formidable. Subject only to the *caveats* recorded in paragraphs 10 and 15 below, these characteristics are regarded by the reviewers as desirable in an applicant for membership of our highest Court.

8.2. The manner in which she communicates and articulates her views was the subject of a question before the JSC in April 2019. Her reflection on the question, in response, was that it was unfair and potentially sexist. The question was posed by the erstwhile Minister of Justice and Correctional Services, Michael Masutha. In summary, he asked the candidate's view on whether she considered her manner of communication as overbearing. She replied that she was not overbearing but assertive. The reviewers are alive to concerns expressed by members of the JSA, which are traversed below, but tend to support the candidate's assessment of her judicial demeanour.

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

9.1. The candidate's record of producing judgments within a reasonable period of time is exemplary, in the reviewers' view. The response from members of the JSA is supportive of this view.

9.2. She has no reserved judgments of which the reviewers are aware.

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

- 10.1. As far as the reviewers are aware, the candidate enjoys a reputation of being fair and impartial.
- 10.2. However, there is a comment received from a senior member (SC) of the JSA that there is a “*general concern*” as to whether she can be persuaded otherwise after she has adopted a position.
- 10.3. Other JSA members expressed similar concerns to the effect that the candidate, who is typically well prepared for a hearing, may be quick to adopt a stance on a disputed issue from which she is difficult to move. The reviewers consider it desirable for litigants and their legal representatives to feel that their submissions are heard.
- 10.4. But the reviewers accept too that it is a feature of preparation and decisiveness – both desirable judicial traits – that the losing side may feel that the loss became evident too early in the hearing.

**11. The candidate's independent mindedness:**

- 11.1. No adverse comments have been received by the reviewers in this regard.
- 11.2. The reviewers consider that the candidate is independent minded, and that this strength is reflected in her judicial hearings and writings.

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

- 12.1. The candidate is a seasoned judge, and she is, generally, able to conduct proceedings in a fair and balanced manner.

- 12.2. She is known to expect legal practitioners to be well prepared and to make only proper factual and legal submissions. The reviewers consider this expectation to be appropriate.
- 12.3. When the expectation is not met, the interactions between the candidate and counsel are known to be less than cordial.
- 12.4. It may be assumed, the reviewers consider, that the candidate would generally find practitioners briefed to appear in the Constitutional Court to be well-placed to make proper submissions.

**13. The candidate's administrative ability:**

- 13.1. The candidate has a reputation for being hardworking, administratively sound and an organised judge.
- 13.2. The efficiency with which she discharges her judicial service bears testament to the fact. And no adverse comments have been received by the reviewers in this regard.

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

- 14.1. No adverse comments have been received by the reviewers in this regard.
- 14.2. Indeed, the candidate is highly respected for her integrity and ethics.

**15. The candidate's judicial temperament:**

- 15.1. At least five comments have been received from members of the JSA (albeit not consistent with other comments) that the candidate is unpleasant to appear before because she "*screams and shouts*" at counsel. The context and circumstances of these comments are unclear to the reviewers. One of the members recalled an experience

in a busy Court in which the candidate was allegedly discourteous to counsel and Court staff, slamming files down on the bench, etc. The reviewers consider these allegations to be serious and worthy of investigation by the JSC.

- 15.2. However, the reviewers have also received inputs from other JSA members to the effect that the candidate is robust but fair in her approach, reserving her irritation for those practitioners who are unprepared or unconsidered in their submissions. The reviewers are mindful too of the phenomenon, both in legal practice and elsewhere, of criticising women for characteristics that are considered desirable or at least acceptable in men. On balance, these reports do not cause the reviewers to withhold their support for this application.
- 15.3. The candidate's acting stint at the Constitutional Court appears to have been marred by a controversy regarding how she treated members of staff, including her law clerk. The latter appears to have lodged a complaint against the candidate, the content and veracity of which are unknown to the reviewers.
- 15.4. The Chief Justice raised these issues with the candidate in her JSC interview in April 2019. She denied that she had demanded "parking" and a "chamber" from the Court manager or that she had addressed staff tersely or rudely. She accepted that her arrival at Court had been unannounced and that, at the time, she had yet to receive her letter of appointment. However, she attended at Court to establish when the appointment would be finalised and to request information regarding when she would be provided with the term's records. Before attending at the Constitutional Court, she had received confirmation from her Judge President that she had been

appointed. She had also been advised by Judge Matojane to attend at the Constitutional Court because Judge Nkabinde would generally be available to assist. The Chief Justice seemed to accept the explanation but remained concerned about the complaints he had received from the Court staff and manager regarding the candidate's conduct. To the minds of the reviewers, the matter was neither here nor there at that point.

15.5. The crucial issue was the exchange on the day. The candidate appeared to accuse the Chief Justice of lying, responding to a question that “*what [he was] saying is not entirely true*”. The Chief Justice appeared to be troubled by this response. He asked whether the candidate suggested that he was not telling the truth or that he had not been told the truth. The candidate disputed the version of the Chief Justice and proceeded to tender her version, as the truth. The indirect accusation of untruthfulness demonstrates a lapse of judgment, it seems to the reviewers. This could be attributable to a stressful interview environment but a person in the candidate's position ought to be able to exercise restraint and respect, particularly for the head of the judiciary and the leader of the Court she seeks to be a member of.

15.6. The second issue raised by the Chief Justice concerned the complaint by the candidate's law clerk at the Constitutional Court. It appears that a fellow clerk had filed an affidavit in support of the candidate and distanced herself from the allegations of her colleague, which were said to be an exaggeration of what transpired. This issue was referred to the Law Clerk's committee and subsequently to the Deputy Chief Justice. The candidate maintained her innocence and lamented not being afforded an opportunity for an inquiry, which she

had requested to “*clear her name*”. She was concerned that this incident would destroy her career. The issue between the judge and her clerk appears to have remained unresolved.

15.7. On what is in the reviewers’ knowledge, these issues (whilst unfortunate) do not appear to provide sufficient reason why the candidate should not be elevated to the apex Court. On balance, the issues do not cause the reviewers to withhold their support for this application.

15.8. Be that as it may, the reviewers consider that the question of the candidate’s judicial temperament should be raised with the JSC to be explored in the course of the candidate’s interview.

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

16.1. No adverse comments have been received by the reviewers in this regard.

16.2. The candidate’s *curriculum vitae* reflects a firm commitment to human rights and the needs of the community. That is so throughout the academic, professional, judicial and appellate components of her career.

16.3. The candidate has been involved in many organisations that contribute positively to society and the legal community. This involvement demands personal sacrifice and devotion and demonstrates commitment to the values of the Constitution.

16.4. For example, she has been involved in National Democratic Lawyers Association, the Executive Committee of the General Bar Council,

the Executive Committee of Advocates for Transformation, and as a Director at Pro Bono.org and the Centre for the Study of Violence and Reconciliation.

**17. The candidate's potential:**

17.1. No adverse comments have been received by the reviewers in this regard.

17.2. The candidate has the requisite experience, expertise and potential to excel in this role, in the reviewers' view.

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

18.1. The country is committed to the appointment, development, education and advancement of black female lawyers and judges.

18.2. The candidate is a pioneer. She was one of the first law researchers at the Constitutional Court, the first of such researchers to ascend to the bench and later to act as a Judge at the Constitutional Court.

18.3. Her appointment to the Constitutional Court would, as Mtshaulana SC puts it, be a fitting tribute to the founding justices of the Court.

18.4. The researchers share this sentiment and support the application.

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

*Absa Bank Ltd v Botha NO and Others* (39228/12) [2013] ZAGPPHC 163; 2013 (5) SA 563 (GNP) (7 June 2013)

*African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others* [2013] 4 All SA 432 (GNP)

*Archer v Public School-Pinelands High School and Others* (2020) 41 ILJ 610 (LAC); [2020] 3 BLLR 235 (LAC)

*BMW (South Africa) (Pty) Ltd v National Union of Metalworkers of South Africa and Another* (2020) 41 (ILJ) 1877 (LAC) [2020] 11 BLLR 1079 (LAC)

*BR and another v TM; In re: LR* [2015] 4 All SA 280 (GJ); 2016 (3) SA 417 (GJ)

*Cele v Avusa Media Ltd* (08/10831) [2013] ZAGPJHC 15; [2013] 2 All SA 412 (GSJ) (14 February 2013)

*City of Johannesburg v SAMWU obo Monareng and Another;* (2019) 40 ILJ 1753 (LAC)

*Communication Workers Union and others v Mobile Telephone Networks (Pty) Ltd and others* (2020) 41ILJ 2072 (LAC); [2020] 11 BLLR 1096 (LAC)

*Council for Medical Schemes and others v Liberty Medical Scheme and another* [2013] 3 All SA 508 (GNP)

*Continental Tyres South Africa (Pty) Ltd v Competition Commission and another and a related matter* [2018] 2 CPLR 504 (CAC)

*Edumbe Municipality v Putini and Others* (2020) 41 ILJ 891 (LAC); [2020] 5 BLLR 496 (LAC)

*Export Development Canada and Another v Westdawn Investments Proprietary and Others* [2018] 2 All SA 783 (GJ)

*Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and others* 2017 (4) SA 207 (GJ)

*Legal Aid South Africa v Theunissen* (2020) 41 ILJ 625 (LAC); [2020] 4 BLLR 370 (LAC)

*McBride v Minister of Police and Another* [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP)

*Macsteel Trading Wadeville v Francois van der Merwe N.O and Others* (2019) 40 ILJ 798 (LAC)

*MEC for Economic Development, Environment & Tourism v Mogahlane* (2019) 40 ILJ 315 (LAC); [2019] 4 BLLR 347 (LAC)

*Msimang NO and Another v Katuliiba and Others* (11/23050) [2012] ZAGPJHC 240; [2013] 1 All SA 580 (GSJ) (27 November 2012)

*National Commissioner of the South African Police and Another v Myers* (2018) 39 ILJ 1965 (LAC); [2018] 9 BLLR 882 (LAC)

*National Transport Movement (NTM) and Others v Passenger Rail Agency of South Africa Limited (PRASA)* (2018) 39 ILJ 560 (LAC); [2018] 2 BLLR 141 (LAC)

*NCP Chlorchem (Pty) Ltd v National Energy Regulator and Others* [2017] 1 All SA 950 (GJ); 2017 (6) SA 158 (GJ)

*National Education Health and Allied Workers' Union Obo Kgekwané v Department of Development Planning and Local Government* [2015] 6 BLLR 575 (LAC);

*Nova Property Group Holdings v Cobbett* [2016] 3 All SA 32 (SCA); 2016 (4) SA 317 (SCA)

*Palluci Home Depot (Pty) Ltd v Herskowitz and Others* (2015) 36 ILJ 1511 (LAC) [2015] 5 BLLR 484 (LAC)

*Pharmaco Distribution (Pty) Ltd v W* (2017) 38 ILJ 2496 (LAC)

*Rapoo v Rustenburg Local Municipality* [2020] 6 BLLR 533 (LAC)

*Residents of: Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* [2020] 3 All SA 902 (GJ); 2021 (1) SACR 66 (GJ)

*Rukwaya and Others v Kitchen Bar Restaurant* (2018) 39 ILJ 180 (LAC); [2018] 2 BLLR 161 (LAC)

*SACCAWU obo Mokebe and Others v Pick'n Pay Retailers* (2018) 39 ILJ 201 (LAC) [2017] 12 BLLR 1196 (LAC)

*SAEWA obo Bester v Rustenburg Platinum Mine and Another* (2017) 38 ILJ 1779 (LAC); [2017] 8 BLLR 764 (LAC)

*South African Breweries (Pty) Ltd v Hansen and Others* (2017) 38 ILJ 1766 (LAC); [2017] 9 BLLR 892 (LAC)

*South African Municipal Workers Union obo Manentza v Ngwathe Local Municipality and Others* (2015) 36 ILJ 2581; [2015] 9 BLLR 894 (LAC)

*S.O.S Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others* 2019 (1) SA 370 (CC); 2018 (12) BCLR 1553 (CC)

*Transport and Allied Workers Union of South Africa v Algoa Bus Company (PTY) Limited South African Transport and Allied Workers Union and Others* (2019) 40 ILJ 827 (LAC); [2019] 3 BLLR 262 (LAC)

*Quest Flexible Staffing Solutions (Pty) Ltd (a division of ADCORP Fulfilment Services (Pty) Ltd) v Lebogate* (JA104/13) [2014] ZALAC 55; [2015] 2 BLLR 105 (LAC) (21 October 2014)

### **Unreported, but marked as reportable decisions**

*EA v EC* (09/25924) [2012] ZAGPJHC 219 (25 October 2012)

*Feedpro Animal Nutrition (Pty) Ltd v Nienaber NO and Another* (20866/2014) [2016] ZASCA 32 (23 March 2016)

*Freidlein Company (Pty) Ltd v Simaan and Others* (2009/45807) [2012] ZAGPJHC 16 (8 February 2012)

*Hemingways Shopping Centre (Pty) Ltd v PD Naidoo & Associates Consulting Engineering (Pty) Ltd* (2009/44089) [2012] ZAGPJHC 51 (30 March 2012)

*Kukard v GKD Delkor (Pty) Ltd* (JA52/2013) [2014] ZALAC 52; [2015] 1 BLLR 63 (LAC) (7 October 2014)

*Motswana and Others v African National Congress and Others* (35398/18) [2019] ZAGPJHC 4 (6 February 2019)

*National Tertiary Retirement Fund v Mokadi and Another* (419/2015) [2016] ZASCA 92 (1 June 2016)

*NS and Others v Presiding Officer of the Children's Court* (2184/18) [2018] ZAGPJHC 59 (6 February 2018)

*Nzimande and Another v Nzimande and Others* (24490/12) [2012] ZAGPJHC 223 (11 September 2012)

*Paredes-Tarazona v Cobalt Capital (Pty) Ltd* (2009/44215) [2012] ZAGPJHC 75 (23 April 2012)

*Pharmaco Distribution (Pty) Ltd v Weideman* (JA104/2015) [2017] ZALCJHB 258 (4 July 2017)

*Sikuola v Minister of Home Affairs and Others* (08174/12) [2012] ZAGPJHC 98 (18 May 2012)

*South African Municipal Workers Union obo Mosomo v Greater Tubatse Local Municipality* (JA 64/2019) [2020] ZALAC 53 (2 December 2020)

*Spar Group Limited v Absa Bank Limited* (74870/2019) [2020] ZAGPJHC 259 (14 August 2020)

*Walker and Another v Mosdel and Another* (2009/53147) [2012] ZAGPJHC 171 (29 August 2012)

### **Unreported decisions:**

*Absa Technology Finance Solutions (Pty) Limited v Thando Funeral Service CC and Another* (7283/2012) [2014] ZAGPJHC 94 (17 April 2014)

*Absa Bank Limited v Thermex Carbon Technologies* (2013/25849) [2015] ZAGPJHC 294 (10 December 2015)

*Afrisam (South Africa) (Pty) Limited v Paget and Others* (41969/13) [2014] ZAGPJHC 74 (4 April 2014)

*Browns The Diamond Store CC V Van Zyl* (717/2015) [2017] ZAGPJHC 70 (3 February 2017)

*Bruyn v Road Accident Fund* (42547/2013) [2015] ZAGPJHC 251 (18 September 2015)

*Chapeikin and Another v Mini* (103/2015) [2016] ZASCA 105 (14 July 2016)

*Choma v Prasa* (16436/2011) [2012] ZAGPJHC 215 (22 October 2012)

*Egoli Gas (Pty) Limited v Epic Foods (Pty) Limited* (31944/2014) [2015] ZAGPJHC 252 (18 September 2015)

*Ekurhuleni Metropolitan Municipality v NCP Chlorchem (Pty) Limited* (3545/2013) [2015] ZAGPJHC 234 (23 September 2015)

*Eskom Holdings Soc Limited v Khum MK Investments and Bie Joint Venture and Others* (A5018/2016) [2017] ZAGPJHC 106 (23 February 2017)

*Factaprops 52 CC v Nedbank Limited* (29142/2014) [2015] ZAGPJHC 156 (26 June 2015)

*Gerber v Road Accident Fund* (11/3022) [2015] ZAGPJHC 155 (26 June 2015)

*Green Glades Properties (Pty) Ltd v Investec Bank* (A5020/12) [2012] ZAGPJHC 229 (22 October 2012)

*Investec Bank Limited v Maruarona and Another* (14412/2014) [2016] ZAGPJHC 160 (19 April 2016)

*Juanne Properties (Pty) Limited v Conn-Weld Africa (Pty) Limited* [2015] JOL 34128 (GJ) (09 June 2014)

*Leigh v Rasleigh Properties* (38090/2012) [2013] ZAGPJHC 391 (6 December 2013)

*Madullammoho Housing Association (Pty) Ltd v Mbambo and Others; In re: Madullammoho Housing Association (Pty) Ltd v Mbambo and Others* (MEC

- for Human Settlement and Local Government, Gauteng Province (Interested Party))* (2016/16069) [2016] ZAGPJHC 285 (28 June 2016)
- MEC for Education and Another v Zwane* (A5026/2015) [2016] ZAGPJHC 326 (25 November 2016)
- Metcash Trading Africa v Clothing City Trading Plastics (Pty) Ltd t/a Crazy Plastics* (12/28298) [2012] ZAGPJHC 216 (22 October 2012)
- National Union of Mineworkers and Another v Commission for Conciliation Mediation and Arbitration and Others* (JA90/2013) [2014] ZALAC 51 (1 October 2014)
- New Modder Developments (Pty) Limited v Ekurhuleni Metropolitan Municipality* (11860/2013) [2013] ZAGPJHC 384 (13 November 2013)
- N v Road Accident Fund* (07245/2015) [2016] ZAGPJHC 314 (15 November 2016)
- Nkosi v S* (A375/2014) [2015] ZAGPJHC 167 (28 July 2015)
- Olckers v Road Accident Fund* (23369/2014) [2016] ZAGPJHC 14 (12 February 2016)
- Oosthuizen v Road Accident Fund* [2015] JOL 32805 (GJ) (03 June 2014)
- Roberts NO v Brian Kahn Inc and Others* (08393/2016) [2016] ZAGPJHC 315 (18 November 2016)
- SA Fruit Promoters (Pty) Ltd and Others v Mercantile Bank Limited* (3605/2013) [2014] ZAGPJHC 75 (4 April 2014)
- Screening and Earthworks (Proprietary) Limited v Hollard Insurance Company Limited* (2008/27712) [2014] ZAGPJHC 76 (4 April 2014)

*Silvo Transport CC v Minister of Safety and Security* (24711/1996) [2017] ZAGPJHC 105 (24 February 2017)

*Sindat Spol S.R.O v Euro Diamond Products CC* (05957/2014) [2015] ZAGPJHC 284 (10 December 2015)

*Teaca Properties (Pty) Ltd and Others v John Banza and Others* (2017/36741) [2018] ZAGPJHC 72 (9 February 2018)

*Tyco International (Pty) Ltd and Another v Golden Mile Trading 547 CC* (949/2013) [2016] ZASCA 44 (31 March 2016)

*Van Der Burgh v Eskom Holdings SOC Limited* (64002/2012) [2013] ZAGPPHC 526 (11 October 2013)

*Zoo Lake Bowling Club v City of Johannesburg Property Company (SOC) Ltd and Others* (23848/2013) [2015] ZAGPJHC 1 (14 January 2015)

**Reviewed judgments that have been overturned on appeal:**

*African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others* [2013] 4 All SA 432 (GNP) – see *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others* 2015 (5) SA 192 (SCA)

**Reviewed judgments that have been confirmed on appeal**

*De Montlehu v Mayo NO and Others* (42552/2012) [2014] ZAGPJHC 301; 2015 (3) SA 253 (GJ) (30 April 2014)

*Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and others* 2017 (4) SA 207 (GJ)

*Wright v Wright and Another* (2005/8980) [2012] ZAGPJHC 250; 2013 (3) SA  
360 (GSJ) (7 December 2012)

## **ANNEXURE 2: REVIEW OF CERTAIN JUDGMENTS CONSIDERED**

### **Rustenburg Platinum Mine v SAEWA obo Bester and Others 2018 (5) SA 78 (CC)**

The Constitutional Court unanimously upheld an appeal by Rustenburg Platinum Mine from the Labour Appeal Court (LAC), which had also penned a unanimous judgment. The candidate was the author of the LAC judgment and Jappie JA and Davis JA concurred in her judgment.

The first respondent was South African Equity Workers Association, a trade union acting for Mr Bester. Bester was a former employee of Rustenburg Platinum Mine. He was dismissed for insubordination and having made racist remarks against a co-worker, whom he referred to as a “*swart man*”.

The Constitutional Court was called upon to determine whether, in context, calling a fellow employee a “*swart man*”, was racist and derogatory. The commissioner in the Conciliation, Mediation and Arbitration (CCMA) had found the use of the words to be “*racially innocuous*”.

The Constitutional Court discussed the LAC’s findings at paras 18 to 23 of its judgment. The LAC had held that context was important and that on the facts, including that Bester did not even know the identity of the individual, his name or rank, reference to him as a “*swart man*” could not objectively be seen to be racist and defamatory, even if this statement were coming from a white man (LAC at para 21).

According to the LAC, on the evidence, Bester had no reason to denigrate his co-workers because they did not know him. However, the LAC did find that it may have been unwise for Bester to have used his race as a descriptor (LAC at para 27).

The Constitutional Court held that the Commissioner in the CCMA had decided the matter based on evidence that was not before him. In evidence, Bester denied using the words “*swart man*”. His defence was not that it was not derogatory (CC at paras 43 to 44).

The Constitutional Court held that the LAC had misdirected itself by finding in favour of Bester on the basis of an unarticulated defence that was not supported by evidence (para 46).

The court held that the LAC had failed to identify the correct facts and relied on evidence that had not been placed before it (para 47).

The Constitutional Court criticised the LAC’s point of departure that the phrase “*swart man*” was neutral. It held that the phrase was determined without reference to context and “*fail[ed] to recognise the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present*” (part 48).

The court found that the LAC failed to approach the dispute “*in an impartial manner taking into account the “totality of circumstances”*”. These words were “*derogatorily subordinating*” and it was unreasonable for the LAC to conclude otherwise (part 49).

### **African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others 2015 (5) SA 192 (SCA)**

This case concerned the interpretation of the words “*binding offer*” as they appear in section 153(1)(b)(ii) of the Companies Act. In particular, whether a “*binding offer*” is binding on the offeree once it is made but before it is accepted.

Secondly, the question was whether there were reasonable prospects of a successful business rescue plan and whether the resolution to commence business rescue fell to be set aside.

The shareholders and directors of *Kariba*, having taken a resolution to place the company under business rescue, appointed a business rescue practitioner (BRP), approved his plan (on very short time frames) and made a binding offer to purchase the bank's voting interest (63%). The bank rejected the plan. The BRP considered that the bank was bound by the offer. Accordingly, the bank's interest was transferred to the shareholders.

The bank challenged this decision in High Court. It complained that the offer made to it was irregular in that it lacked clarity regarding *inter alia* the identity of the offeror, the amount and the terms of payment or whether there were conditions attached thereto. The offer was for the “*value independently and expertly determined to be a fair and reasonable estimate*” of the return to the bank, should *Kariba* be liquidated.

The High Court (per the candidate) dismissed the bank's application and approved the process followed by the BRP in dealing with the offer, holding that section 153(1)(b)(ii) had been properly applied. The High Court found that the offer was binding once it was made and there was no requirement for an agreement. Accordingly, the High Court refused to set aside the plan and the resolution.

The Supreme Court of Appeal (SCA) found that the High Court had determined the matter on the basis of its understanding of a “*binding offer*” but without considering the broad scheme of business rescue as envisaged in the Companies Act. In addition, the court had taken into account foreign law (US Bankruptcy Code) in reaching its decision, which was wholly distinguishable (paras 14 to 17).

The SCA held that an “*offer*” must be considered in the context of its ordinary use in South Africa as signifying a proposal. But further that the meaning in legal parlance also meant an invitation to consent to the creation of obligations. It required acceptance (para 18).

The offer made by Kariba could not be classified as such. Moreover, it did not contain the *essentialia* of an agreement. The SCA held that the offer in this context was not binding (para 19).

The word binding was found to mean that, once the offer was made, it could not be withdrawn (para 21). The court held that the High Court's interpretation did not lead to sensible, business-like results and could not be supported (para 25).

Lastly, the SCA held that the business rescue plan fell short of providing the information required in terms of section 150(2) and (3) of the Companies Act (para 31 to 32). Further, that the resolution had been taken on the basis of financial statements that were more than five years old (para 33). Accordingly, the true state of affairs of Kariba could not be established without an update of the books of account and a proper valuation of the company. Thus, the SCA found that the resolution to commence business rescue was taken without a proper basis and fell to be set aside (para 34).

### **S v Liesching and Others 2019 (4) SA 219 (CC)**

The candidate produced a dissenting judgment with which none of the members of the Constitutional Court agreed, concurring instead with the judgment and orders of Theron J.

The matter concerned the interpretation of section 17(2)(f) of the Superior Courts Act in the context of a post-trial recantation by a material witness in a subsequent trial of a co-accused. The question was whether this recantation constituted exceptional circumstances under section 17(2)(f).

Section 17(2)(f) provides that “[t]he decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional

circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.”

The SCA had held that a convicted person seeking to adduce further evidence, after all the recognised appeal procedures had been exhausted, had to do so under section 327(1) of the Criminal Procedure Act and not section 17(2)(f) of the Superior Courts Act (para 18).

The candidate proposed an order setting aside that of the SCA, referring the matter back to it for reconsideration and, if necessary, variation in terms of section 17(2)(f).

Theron J penned a judgment differing with both the reasoning and conclusion of the candidate.

The majority held that section 17(2)(f) was not intended to afford disappointed litigants a further attempt to procure relief that had already been refused. Instead, it was intended to enable the President to deal with situations where injustice might otherwise result and does not afford litigants a parallel appeal process in order to pursue additional bites at the proverbial appeal cherry (para 139).

The court sounded a warning at paragraph 160 of its judgment that the Constitutional Court should be careful not to deal with and pronounce on issues that should be properly considered by the High Court and the SCA (i.e. whether the applicants have met the requirements for the re-opening of a criminal trial).

It held that it was not for the Constitutional Court to determine whether the test for the admission of new evidence had been met, nor was this the question that was before the President of the SCA.

The Court concluded that there were no exceptional circumstances that existed in terms of section 17(2)(f). The application for leave to appeal was accordingly dismissed (paras 163 and 164).

**Residents of: Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others [2020] 3 All SA 902 (GJ); 2021 (1) SACR 66 (GJ)**

This matter dealt with an application to declare s 13(7) of the SAPS Act constitutionally invalid on the basis that it infringes s 14 of the Constitution. The section, enacted post-Constitution, gives the police extensive powers to restore public order or to ensure the safety of the public in a particular area.

The court – a full bench including the candidate – narrowed the scope of the application for constitutional invalidity to only encompass s 13(7)(c) of the SAPS Act, found the subsection to be invalid, but suspended the declaration of invalidity for a period of 24 months to enable the legislature to cure this invalidity.

In coming to the decision to narrow the scope of the application, the court considered the application to have the whole of s 13(7) declared constitutionally invalid to be impermissibly broad.

The court found that s13(7)(a) empowers the national or provincial commissioner to authorise that a particular area be cordoned off in order to restore public order or to ensure the safety of the public in that area. And it held that s 13(7)(b) provides that such authorisation shall specify the period, which shall not exceed 24 hours, during which the particular area may be cordoned off, and the object of the proposed action. The court found that none of those provisions infringes upon the right to privacy in s 14 of the Constitution.

The court found that the focus of the applicant's constitutional challenge was the power given to the police in s 13(7)(c) – as this subsection permits a warrantless search of any person, premises or vehicle, or any receptacle or object found in the cordoned-off area – which the court found afforded to police officers power that violates the right to privacy protected in terms of 14 of the Constitution.

This judgment, while not the candidate's alone – as it is the full court's – can still be used to assess the candidate.

The judgement displayed the candidate's knowledge of the law and the fashioning appropriate remedies.

In the reviewers' assessment, the judgment shows a commitment to the Constitution and human rights – in dealing with the human rights, including privacy and human dignity, of people who, because of their geographic location and economic standing in our society, are often at the mercy of law enforcement and City officials. In finding for the applicants, the judges displayed a commitment to human rights and the upholding of the Constitution. The court also noted the vulnerable status of many of the applicants due to not only socio-economic issues but also immigration status.

The judgment is clear and easy to read. It is also easy to understand and follows the logic of the analysis of the arguments and the law as it pertained to the matter.

The judgment, which concerns issues of gravity, was delivered some four months after the hearing, by three judges in a busy division. The reviewers consider this period to be reasonable in the circumstances.

**Communication Workers Union and others v Mobile Telephone Networks (Pty) Ltd and others (2020) 41 ILJ 2072 (LAC); [2020] 11 BLLR 1096 (LAC)**

This case was an appeal against a Labour Court decision upholding an arbitration award in the CCMA.

The issue before the court was whether the CCMA had jurisdiction to hear a matter, when there was an award by another commissioner preventing the setting down of the dispute in the absence of payment of a costs order – which had not been complied with.

On appeal, Kathree-Setiloane AJA overturned the Labour Court order. In her judgment, she held that the award preventing the setting down of the matter was an administrative decision and remained binding until set aside.

In the absence of an order setting, it aside, the CCMA had no jurisdiction to determine the dispute. The Labour Court had erred by failing to set aside the subsequent order of the second commissioner.

In the reviewers' assessment, the candidate displays her knowledge of the interface between labour and administrative law, clarifying the nature and effect of a ruling or award of a CCMA commissioner.

In addition, in the reviewers' assessment, the judgment showcases the candidate's independent-mindedness. This is because the candidate came to the decision that the Labour Court erred by failing to properly apply its mind to the issue of the ruling which placed a hold on the dispute and therefore the jurisdiction of the CCMA.

**South African Municipal Workers Union obo Mosomo v Greater Tubatse Local Municipality (JA 64/2019) [2020] ZALAC 53 (2 December 2020)**

This matter concerned an appeal against a review of an arbitration award finding that the dismissal of the applicant's employee had been fair. The judgment usefully sets out the different tests for review and appeal.

In upholding the appeal, the court found that arbitrator's failure to properly apply his mind to the evidence led in the arbitration amounted to a reviewable irregularity that justified interference on review by the Labour Court.

The judgment displays the candidate's knowledge of the law in her application of the test for appeal in the labour and employment law context, having set out the difference between the *tests* on appeal and review.

In doing so, the candidate displays her knowledge of civil procedure and labour law. See, for example, pages 8-9 (para 27), where the court stated that:

*“To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.”*

The judgment is well reasoned and displays the candidate's linguistic and communication skills. For example, it clarifies the issues raised by the appeal and the history of the dispute from arbitration to appeal. In addition, the facts were set out in a clear and accessible manner.

The judgment was delivered in less than three months of the hearing date – again, a period the reviewers consider reasonable in the circumstances.

**Spar Group Limited v Absa Bank Limited (74870/2019) [2020] ZAGPJHC 259 (14 August 2020)**

This judgment dealt with a novel issue of delictual liability emanating from a bank's wrongful and negligent conduct in the reversal of EFT payments collected by debit order. The judgment developed the common law to extend a legal duty to banks to avoid economic loss to a third party not to reverse EFT payments without doing more.

In finding for the plaintiff, the court found that, where a bank has a discretion to reverse an EFT, it has a legal duty to the beneficiary of the EFT to investigate the instructions of its customer.

In the reviewers' assessment, the judgment displays the candidate's knowledge of the law by understanding the need to develop the law in respect of an issue relating to payment systems between Banks.

The judgment, while long and technical, is easy to read.

**Council for Medical Schemes and others v Liberty Medical Scheme and another [2013] 3 All SA 508 (GNP)**

In this judgment, the candidate's knowledge of the Medical Schemes Act and the Financial Institutions Protections of Funds Act is displayed. Her understanding of the significance of a medical scheme's Rules and the concomitant and derivative powers that they provide to the Scheme's Board of Trustees is evident.

The candidate accurately identified the point in issue – whether the payment of a termination and restraint of trade fee to an erstwhile trustee was ultra vires the Medical Schemes Act and the Liberty Medical Scheme's Rules. She decided the issue with reliance on various authoritative precedents, in addition to the relevant

Acts. The candidate's evaluation of the facts was succinct; she appropriately only dealt with them to the extent that they were relevant to the point in issue.

Additionally, the candidate's understanding and consequent application of the Uniform Rules of Court is shown in this judgment, when she determined a preliminary challenge to the first applicant's attorney's Power of Attorney to act. Her ruling regarding the applicants challenged locus standi was determined with an in-depth evaluation of the Medical Schemes Act and Financial Institution Protections of Funds Act. The reviewers consider the ultimate outcome to be correct.

The reviewers consider the candidate's evaluation of the relevant laws against the facts and case law to have been thorough.

The candidate's judgment and reasoning was fair and impartial, as she objectively relied on the relevant Acts, the Scheme's Rules and the Rules of Court to substantiate her judgment. The matter was not taken on review or appeal.

This matter was heard on 16 April 2013 and judgment was handed down on 28 May 2013, within what may be considered a reasonable period in the circumstances.

**Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and others [2017] JOL 37652 (GJ)**

In this judgment, the candidate was required to determine whether section 18(1) of the Superior Courts Act permitted enforcement of a Court Order which the unsuccessful party advised it intends to appeal but which it had not yet made such application for. The successful party sought to avoid the suspension of the Court Order which would be a consequence of the application for leave to appeal before the application for leave to appeal was lodged.

This, the candidate explained, was to the background of various other applications about the same matter to Court which had dragged out the matter and left the successful applicant with no actual relief.

The candidate found that a successful litigant left without any remedy during the ‘appeal period’, especially where such litigant could show irreparable harm suffered and that the unsuccessful party was not subject to any harm, was untenable. She referenced case law to substantiate her decision to make the order effective and enforceable despite a pending application for leave to appeal.

This judgment showcased the candidate’s compassion to the plight of a suffering litigant who was being frustrated by an opponent who deliberately opposed a previous Court Order.

In this matter the candidate’s commitment to uphold the Constitution was evident as she substantiated the applicant’s right to enforcement of the order by citing its constitutional right not to be deprived of access to the Courts (which, for the 15-day period, pending the institution of an application for leave to appeal, it would be, all the while suffering irreparable harm). She cited constitutional provisions, section 39(2), aimed at promoting the bill of rights.

This judgment gives effect to constitutional principles and displays an evident and genuine compassion for the plight of the applicant.

This judgment is well written, easy to read and well researched.

This matter had a hearing date of 21 June 2016 and judgment was handed down on 08 July 2016. There were, thus, 2 and a half weeks between the date of the hearing and the date of the judgment. This expedition provides an indication that the candidate appreciated the urgency of the matter and also that she appreciates her role in ensuring litigant’s speedy access to justice.