

APPLICANT: NORMAN MICHAEL MANOIM

COURT FOR WHICH CANDIDATE APPLIES: GAUTENG DIVISION

1. The candidate's appropriate qualifications:

1.1. The candidate is appropriately qualified having obtained the following qualifications:

1.1.1. BA (Witwatersrand) 1980

1.1.2. LLB (Witwatersrand) 1983

1.2. In addition to his formal qualifications the candidate has been practising law since 1982 to date. During this time the candidate has been an attorney and partner at the law firm of Cheadle, Thompson and Haysom Attorneys and held an appointment on the Competition Tribunal.

1.3. In particular the candidate was a full-time member of the Competition Tribunal from August 1999 to July 2009 and was from August 2009 until July 2019 the chairperson of the Competition Tribunal.

1.4. He is the longest serving member of the Competition Tribunal and has substantial quasi-judicial experience.

1.5. The candidate has also obtained practical judicial experience having acted as a Judge in the Gauteng Local Division of the High Court for a 4 (four) week period during November 2019 and later, during 2020 he served "*the full terms in 2020 in terms of one to three and five weeks of term 4*".

- 1.6. This seems to be the period of 18 November 2019 to 27 March 2020. The candidate has also sat on a single occasion in the Income Tax Court (presumably during his acting appointment).
- 1.7. The candidate during this time however only presided over civil matters and criminal appeals. The candidate does not seem to have obtained practical experience in presiding over criminal trials.
- 1.8. Apart from the above, the candidate also held the position as the Acting Director of the Mandela Institute at the University of the Witwatersrand from August 2019 until January 2020. He currently holds a 3 (three) year part-time appointment as a Professor of Practice in the School of Economics at the University of Johannesburg.

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

- 2.1. The candidate possesses a certificate of good standing from the Legal Practice Council.
- 2.2. No adverse comments have been received.

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

- 3.1. The candidate is a white male.
- 3.2. The candidate's appointment to the bench would, accordingly, not help to reflect the racial and gender composition of South Africa on the bench

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

- 4.1. The candidate has substantial experience in political matters, having a constitutional element, in the pre-democratic South Africa. The candidate had also written extensively on the topic in published journal articles. He also considers that his career began as a Human Rights lawyer.
- 4.2. The candidate's knowledge of constitutional law and its impact on civil procedure was demonstrated in the unreported matter of **Focus Products (Pty) Ltd v Jones Nyambi and Another** (case number 5747/2020) in which the candidate had to deal with differing interpretations relating to the procedure adopted in provisional sentence proceedings and the *ratio decidendi* given by Brand AJ in the Constitutional Court's decision in **Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Bank of South Africa t/a Land Bank** 2011 (3) SA 1 (CC).
- 4.3. In this matter the candidate applied the aforementioned authority, summarised and interpreted the law. In doing so, he clarified the law relating to the provisional sentence procedure. The candidate suitably considered the constitutional basis underlying the test to be applied in defending provisional sentence proceedings.
- 4.4. The candidate also considered the interaction of the rights of accused persons under section 35 of the Constitution with section 59 of the Competition Act (which pertained to *inter alia* the imposition of administrative penalties) in **Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Another** [2003] 2 CPLR 464 (CT) (referred to more fully below).

- 4.5. The candidate's knowledge of administrative law is demonstrated in the decision of **Computicket (Pty) Ltd v Competition Commission** (CR008Apr10/DSM022May11) when the candidate (as a presiding member of the Competition Tribunal) dealt with an application to review and set aside a decision by the Competition Commission to refer a complaint against it.
- 4.6. The candidate was required to determine the applicable legal standard for review within the statutory review mechanism provided for in the Competition Act 89 of 1998 ("the Competition Act").
- 4.7. The judgment is detailed, well-reasoned and evidences that the candidate not only possesses a grasp of both Administrative Law and Competition Law.
- 4.8. In **Nhlanhla Radebe v S** (case number A1183/2019) the candidate handed down judgment in a criminal appeal concerning the conviction of an accused on the basis of his identification by a single witness and circumstantial evidence. The appeal also concerned the Magistrate's sentencing.
- 4.9. In this regard the candidate displayed appropriate judicial temperament by highlighting the fact that both the appellant and the respondent had misread the record about the reliance that the Magistrate placed on a previous robbery conviction in sentencing. The candidate made a finding based on a reading of the record as opposed to relying solely on submissions by counsel.
- 4.10. The candidate demonstrates in this judgment, although he has never presided over a criminal trial, appropriate knowledge of the law of

evidence as well as criminal procedure (particularly the recording of previous convictions and sentencing).

- 4.11. In **Franklin Makela v The Minister of Police** (Case Number A 3055/19) the candidate demonstrated his knowledge of the delictual law of damages as well as the applicable heads of damages in a delictual claim.
- 4.12. The candidate has extensive experience in competition law. Apart from chairing the Competition Tribunal for a substantial period of time, and having sat on the Competition Tribunal for a period of 20 years, the candidate has represented the Competition Tribunal at international conferences, presented papers at these conferences and has been invited to participate on panels by foreign competition and bar authorities.
- 4.13. The candidate's knowledge of competition law, and his development of the jurisprudence is demonstrated in various decisions handed down by him during his tenure with the Competition Commission:
- 4.13.1. In **Competition Commission v Computicket (Pty) Ltd (Case Number: CR008Apr10)** the candidate had to determine whether abuse of dominance had been established.
- 4.13.2. In **American Natural Soda Ash Corp v Botswana Ash (Pty) Ltd [2001 – 2002] CPLR 430 (CT)** the candidate gave judgment concerning the jurisdiction of the Competition Tribunal which required that the Competition Commission must have completed its investigations and determined that a prohibitive practice existed before. These facts, according to the candidate, were jurisdictional prerequisites that must have

been met before the Competition Tribunal could exercise jurisdiction.

4.13.3. In **Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Another** [2003] 2 CPLR 464 (CT) the candidate handed down a judgment in a matter concerning the constitutionality of section 59 of the Competition Act as the section failed to afford sufficient rights to a respondent facing an administrative penalty as the Competition Tribunal was alleged to not constitute an impartial and independent forum and the section was said to be irrational insofar as the section utilised turnover as a basis to determine the maximum penalty to be imposed. An argument was also raised that the section fell short of the safeguards provided for in section 35 of the Constitution to accused persons. The candidate in his judgment dismissed these arguments, considered American law in relation to the notion of “double jeopardy”, and held that (at para 35):

4.13.4. “Our Constitution on the other hand, by virtue of section 34, ensures that fairness is not jettisoned from dispute resolution simply because a procedure is not characterised as criminal. In our law “non-criminal” disputes must still comply with section 34. The right to a public trial, the issue in the Engel case, is, in terms of our Constitution guaranteed not only in criminal proceedings (section 35(3)(c)) but also by section 34.20...”

- 4.13.5. In *Competition Commission of South Africa v American Natural Soda Ash Corp CHE global (Pty) Ltd and Others; American Natural Soda Ash Corp CHE global (Pty) Ltd and Others v Botswana Ash (Pty) Ltd and Another* [2005] 1 CPLR 121 (CT) the candidate gave judgment in a matter concerning an order for interim relief and considered international law. The candidate had due regard to, and applied, customary international law in accordance with section 232 of the Constitution. He also considered the comparative American anti-trust jurisprudence in his judgment.
- 4.13.6. In ***Astral Foods Ltd v Competition Commission and Others*** [2003] 2 CPLR 452 (CT) the candidate handed down a judgment concerning the variation or clarifications to the conditions related to an approved merger and, in doing so, reiterated and detailed the general principles concerning the variation of orders in the High Court and found that same were applicable in the exercise of powers under section 66 of the Competition Act.
- 4.14. The candidate is self-evidently well versed in the field of competition law and has an in-depth knowledge of this area of South African law. He has been responsible for developing the jurisprudence in this area of law.
- 4.15. From the above it is manifest that the candidate possesses the necessary knowledge of South African law for judicial appointment.

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

- 5.1. The candidate's professional background demonstrates his commitment to the values of the constitution.
- 5.2. The candidate was a member of several organisations that are involved in upholding human rights, in this regard:
 - 5.2.1. the candidate was a member of the National Association of Democratic Lawyers (NADEL) from 1984 – 1998;
 - 5.2.2. the candidate was an executive member of Lawyers for Human Rights from 1982 – 1984;
 - 5.2.3. the candidate was an executive member of the Freedom of Expression Institute from 1994 – 1997; and
 - 5.2.4. the candidate was an executive member of the Independent Board of Enquiry into informal Repression from 1992 – 1997.
- 5.3. In addition to the above the candidate, after articles of clerkship, joined the then newly established practice of Cheadle, Thompson and Hayson which focused on labour law and human rights law.
- 5.4. The candidate specifies that his focus was on human rights and that he served as one of the instructing attorneys in several political trials, specifically the matters of **S v Ramgobin and Others** (the UDF Pietermaritzburg Trial) (**S v Ramgobin and Others** 1986 (1) SA 68 (N) for accused number 1) **S v Mayekiso and Others** (the Alexandra Treason Trial) (**S v Mayekiso and Others** 1988(4) SA 738 (W)) and **S v Toka** (1990 (2) SACR 225 (T)). He was also involved in **S v Hogan** as a candidate attorney (**S v Hogan** 1983 (2) SA 46 (W)).

- 5.5. The candidate also represented political detainees as well as persons in certain commissions of inquiry (the Harms Commission of Inquiry, the Winterveld Commission of Inquiry and the Goldstone Commission of Inquiry). These inquiries related to the Apartheid security forces.
- 5.6. The candidate also practised in the area of media law and represented newspaper clients in matters concerning censorship under the apartheid security laws.
- 5.7. The candidate's academic writing further demonstrates a commitment to the Constitution and its values. He has published articles on censorship on student newspapers and the interpretation of the, then, Internal Security Act. He also has prepared an article, albeit an unpublished one, concerning charges under the Security Legislation.
- 5.8. It is manifest from the above that the candidate is committed to the values in the Constitution.

6. Whether any judgments have been overturned on appeal:

- 6.1. None of the candidate's judgments during his acting appointments have been published in the various general law report series.
- 6.2. The candidate however discloses that several judgments which he handed down whilst appointed as a member of the Competition Tribunal were appealed.
- 6.3. When one considers the specialist Competition Law Reports, insofar as the latter judgments are concerned, three judgments are relevant:

- 6.4. In **Competition Commission v Arcelomittal South Africa Ltd and Others** [2010] 2 CPLR 386 (CT) the candidate handed down judgment in a matter wherein the applicants sought production of documents from the Competition Commission before they pleaded in a complaint referral action brought against them for alleged contraventions of the Competition Act. These documents were alleged to be in the possession of the Competition Commission. The question to be determined was whether the documents sought to be disclosed constituted “restricted information” in accordance with the rules of the Competition Commission.
- 6.5. In this matter the candidate handed down judgment and held that access to such documentation was refused as, *inter alia*, section 37(1)(b) of the Promotion of Access to Information Act 2 of 2000 (“PAIA”) entitles the Competition Commission to restrict access to such documentation. According to the candidate the Competition Commission had a discretion to refuse disclosure of the requested documents and once this discretion was exercised, on reasonable grounds, the documentation was considered confidential.
- 6.6. This decision was appealed to the Competition Appeal Court where that Court set aside and replaced the order granted by the candidate. According to the Court, once confidential information is submitted to the Competition Commission it is required to treat such information as being confidential in nature until, and unless, the Competition Tribunal directs otherwise (the request for such relief being brought in the appropriate manner). The matter was remitted back to the Competition Tribunal for determination.

- 6.7. In the appeal judgment (**Arcelomittal South Africa Ltd and Others v Competition Commission and Others [2013] JOL 30105 (CAC)**) the Competition Appeal Court criticised the judgment *a quo* delivered by the candidate and found that there was no merit that documents provided were restricted from disclosure by reason of the applicable rules as read with section 37(1)(b) of PAIA. A finding was also made that the judgment *a quo* failed to appreciate the principles underpinning High Court Rule 35 and, in particular, Rule 35(12) where discovery can be requested of specific documents referred to in pleadings or in affidavits (as the case may be).
- 6.8. This judgment was subsequently appealed further, and cross-appealed, to the Supreme Court of Appeal (**Competition Commission of South Africa v Arcelomittal South Africa Ltd and Others [2013] 3 All SA 234 (SCA)**) where the Supreme Court of Appeal agreed with the findings by the Competition Appeal Court (although not to the same extent insofar as the candidate's judgment *a quo* in concerned).
- 6.9. In **Gold Fields v Harmony Gold Mining Company Ltd and Others [2004] 2 CPLR 358 (CT)** the candidate gave judgment in an urgent application to interdict actions alleged to amount to an implementation of a merger without approval and found that the relief sought was final in nature and the applicant was required to prove its right to claim such relief which it was found, based on the facts of the matter, had not been established.
- 6.10. The matter was subsequently appealed, on an urgent basis, to the Competition Appeal Court which criticised the candidate's judgment *a quo* as elevating form over substance. The judgment of the

Competition Appeal Court is reported as **Gold Fields Ltd v Harmony Gold Mining Company Ltd and another** [2005] 1 CPLR 74 (CAC).

- 6.11. In **Nationwide Poles CC v SASOL (Oil) (Pty) Ltd** [2005] 1 CPLR 156 (CT) the candidate handed down judgment in a matter concerning price discrimination and set out what prohibitive conduct constitutes price discrimination. The Competition Appeal Court however criticised the candidate's factual findings as being based on unreliable evidence (**SASOL (Oil) (Pty) Ltd v Nationwide Poles CC** [2006] 1 CPLR 37 (CAC)).

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

- 7.1. The candidate possesses substantial professional experience.
- 7.2. He has been a partner in an attorneys' practice from 1984 – 1999 and has held a quasi-judicial appointment with the Competition Tribunal from 1999 until 2019 (and as chairperson thereof from August 2009 to July 2019).
- 7.3. He states that he is the longest serving member of the Competition Tribunal.

8. The candidate's linguistic and communication skills:

- 8.1. The fact that the candidate has published several articles, and has presented papers and has participated in panel discussions, demonstrates that the candidate has sufficient linguistic and communication skills.
- 8.2. The judgments written by the candidate are clear and understandable.

8.3. It appears that the candidate possesses the necessary linguistic and communication skills.

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

9.1. No adverse comments have been received.

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

10.1. No adverse comments have been received.

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

11.1. No adverse comments have been received and there is nothing to suggest that the candidate is not independent minded.

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

12.1. No adverse comments have been received.

12.2. The candidate appears to be fully versed with the conduct of court proceedings owing to his extensive experience as a member of the Competition Tribunal.

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

13.1. No adverse comments have been received.

13.2. The candidate appears to be fully versed with the administrative ability associated with a judicial appointment owing to his extensive experience as a member and chairperson of the Competition Commission.

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

- 14.1. No adverse comments have been received and there is nothing to suggest that the candidate is not fit and proper.

15. The candidate's judicial temperament:

- 15.1. No adverse comments have been received and the candidate appears to possess a suitable judicial temperament.

- 15.2. His substantial experience as a member and later chairperson of the Competition Commission further reiterates that the candidate possesses the necessary temperament for a judicial officer.

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

- 16.1. The candidate's career as a human rights lawyer evidences his commitment to human rights and his experience with regard to the values and needs of the community.

17. The candidate's potential:

- 17.1. The candidate's wealth of quasi-judicial experience evidences his potential for judicial appointment.

- 17.2. His potential for judicial appointment is further evidenced in the manner by which he has developed competition law.

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

- 18.1. The candidate's appointment would send a positive message to the community at large.

- 18.2. He is extensively experienced and qualified for appointment owing to previous experience as a member and later chairperson of the Competition Tribunal.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions:

American Natural Soda Ash Corp v Botswana Ash (Pty) Ltd [2001 – 2002] CPLR 430 (CT)

Astral Foods Ltd v Competition Commission and Others [2003] 2 CPLR 452 (CT)

Competition Commission of South Africa v American Natural Soda Ash Corp CHE global (Pty) Ltd and Others; American Natural Soda Ash Corp CHE global (Pty) Ltd and Others v Botswana Ash (Pty) Ltd and Another [2005] 1 CPLR 121 (CT)

Competition Commission v Arcelomittal South Africa Ltd and Others [2010] 2 CPLR 386 (CT)

Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Another [2003] 2 CPLR 464 (CT)

Unreported Decisions:

Competition Commission v Computicket (Pty) Ltd (Case Number: CR008Apr10)

Computicket (Pty) Ltd v Competition Commission (CR008Apr10/DSM022May11)

Focus Products (Pty) Ltd v Jones Nyamambi and Another (Case Number 5747/2020)

Franklin Makela v The Minister of Police (Case Number A 3055/19)

Nhlanhla Titus Radebe v The State (Case Number A183/2019)

Judgments upheld on appeal:

No judgments could be found.

Judgments overturned on appeal:

Competition Commission v Arcelomittal South Africa Ltd and Others [2010] 2
CPLR 386 (CT)

Gold Fields v Harmony Gold Mining Company Ltd and Others [2004] 2 CPLR
358 (CT)

Nationwide Poles CC v SASOL (Oil) (Pty) Ltd [2005] 1 CPLR 156 (CT)