

APPLICANT: ANTHONY PETER MILLAR

**COURT FOR WHICH APPLICANT APPLIES: GAUTENG
DIVISION**

1. The candidate's appropriate qualifications

1.1. The candidate has the following degrees and qualification:

1.1.1. BA (University of the Witwatersrand 1989), and

1.1.2. LLB (University of the Witwatersrand 1992).

2. Whether the candidate is a fit and proper person

2.1. There is nothing in the candidate's application or to our knowledge suggesting that he is not a fit and proper person.

2.2. A review of his judgments and information in the public domain provides no indication that he is unfit for the position applied for.

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

3.1. The candidate is a 51-year-old white male.

3.2. The appointment of a male candidate will not advance the cause of gender or racial representation.

3.3. As the candidate is currently 51 years old, section 3(2) of the Judge's Remuneration and Condition of Employment Act 47 of 2011 is not a real consideration presently.

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

- 4.1. The candidate's 25 years of experience as an attorney is largely confined to the area of Road Accident Fund matters and ancillary aspects arising therefrom, with only more limited experience in other areas of law, primarily arising out of his experience as an acting judge during the past four years.
- 4.2. The candidate's judgments reflect an understanding of procedural and substantive law. The candidate displays an understanding of established legal principles. His judgments, however, lack judicial reasoning. The candidate cites the legal principle, then arrives at a decision (mostly correct). The judgments do not, however, reflect a robust process of applying the law to the facts in order to substantiate that decision.
- 4.3. This style of decision-making may suffice for less complex matters, but it is inadequate to deal with matters of factual or legal complexity.
- 4.4. The majority of the candidate's judgments do not deal with issues that are novel and/or highly complex. It is therefore difficult to assess fairly the candidate's ability for astute reasoning.
- 4.5. The candidate's knowledge of Constitutional Law as reflected in his judgments appears somewhat shallow, as can be seen in his decision in the case of *Vaal River Development Association (Pty) Ltd v Eskom Holdings SOC Ltd and Others; Lekwa Rate*

Payers Association NPC v Eskom Holdings SOC Ltd and Others
(31813/20) [2020] ZAGPPHC 429, dealt with below.

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

5.1. The candidate does not expressly state his commitment to the values of the Constitution. However, he shows a commitment to transformation and access to justice in that:

5.1.1. The candidate was a member of the Black Lawyers Association from 1999 to 2015.

5.1.2. The candidate pursued the eradication of the use and abuse of Contingency Fee Agreements and was instrumental in calling for the first proper Council Election of the Law Society of the Northern Provinces.

5.2. Bar two matters, the first (*SM v AB* [2020] ZAGPPHC 265) where the candidate had to consider the applicant's Constitutional rights to privacy and dignity, and the second (*Vaal River Development Association*, referred to above) the reviewers were unable to find a judgment where the candidate directly deals with matters of Constitutional import.

5.3. Although the applicant's reasoning in the first matter was sound, it was not particularly detailed and it is therefore difficult to discern whether the candidate is fully conversant in this area of law.

5.4. In the latter, the candidate effectively read in the right to electricity and the manner of its provision into the Bill of Rights. At one level, this may be seen as commitment to the values of

the Constitution, but the manner in which the candidate reached this far-reaching conclusion is not reassuring as to the candidate's grasp of constitutional jurisprudence.

6. Whether any judgments have been overturned on appeal

6.1. We could not find any of the candidate's judgments that have been overturned on appeal.

6.2. It does bear mention that the majority of the candidate's judgments have been marked "not reportable" and "not to interest of other judges".

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

7.1. The candidate has by virtue of his experience as an attorney for 26 years, together with several short acting stints totalling 63 weeks, sufficient knowledge of the legal profession, procedure and the law.

7.2. The candidate's judgments, however, reflect a limited exposure to all areas of law, with very limited exposure to criminal law. The candidate has only in the past 18 months in his capacity as an acting judge had exposure to criminal trials and appeals.

8. The candidate's linguistic and communication skills

8.1. The candidate appears to have a preference for writing short judgments.

8.2. Many of the candidate's judgments are difficult to follow due to a lack of structure and the lack of clarity in the judicial reasoning

process, particularly in the failure to identify the facts and the issues to be determined.

8.3. While the candidate's judgments in RAF matters, where he has extensive experience show sound reasoning, his judgments in other areas of law lack the same quality of reasoning.

8.4. This being said, generally the candidate arrives at the correct conclusion.

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

9.1. The candidate states that he has no outstanding judgments.

9.2. The judgments reviewed indicate that his judgments were given promptly within a couple of days after the hearing of the matter. None of the judgments that was reviewed indicated an inordinate delay.

9.3. The promptness of the judgments may have come at the expense of a more thorough grappling with the legal reasoning process embodied therein.

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

10.1. We could find no adverse indication to impugn the candidate's fairness and impartiality.

10.2. In the matter of *Ex Parte: Goosen and Others* (2019/2137) [2019] ZAGPJHC 154; [2019] 3 All SA 161 (GJ) (17 May 2019), the candidate sat as a full court with Sutherland and Modiba JJ, on a point of law, i.e. the effect of the Legal Practice Act on admissions of legal practitioners. As a preliminary issue,

the court had to deal with a recusal application brought by an amicus against the candidate based on his position as a member of the Legal Practice Council, one of the amici parties to the litigation. The recusal application was dismissed, and the court *inter alia* found that an amicus does not have standing to bring a recusal application.

- 10.3. In the Vaal River Development Association matter, Eskom's counsel brought an application for the candidate's recusal from the bar after the close of the applicant's case on several grounds. The first ground was that the propositions that were put to the applicant's counsel during his argument were indicative of the matter having been prejudged, the second that the candidate had used the term "throttle" in regard to the reduction of the electricity supply and that this was a negative term that implied that the candidate found Eskom to be acting improperly, and the third was that the candidate allegedly "chortled" when the applicant's counsel had pointed out that Eskom had denied the applicant's assertion that repairs to the damaged infrastructure at Ngwathe would cost millions of Rand to repair and had itself stated that the cost was only one hundred and twenty-seven thousand Rand. The final ground was that the candidate had not afforded Eskom an opportunity to be heard on the question of urgency
- 10.4. The candidate dismissed the application after a flawed application of the recusal test laid out in the Constitutional Court decision in *President of the Republic of South Africa v SARFU 2000 (1) SA 1 (CC)*. Instead of assessing his conduct objectively as required by the SARFU test, the candidate assessed his

conduct subjectively. The lack of appreciation of the standard for recusal application which by its nature is predicated on a perception of bias is cause for concern.

11. The candidate's independent mindedness:

11.1. There is nothing suggesting that the candidate is not independent minded.

12. The candidate's ability to conduct court proceedings

12.1. The candidate has 26 years of experience as a practising attorney and has acted as judge cumulatively for 63 weeks.

12.2. His judgments reflect a good understanding of the rules of court, evidential rules and a commitment to procedural fairness.

13. The candidate's administrative ability

13.1. There is no reason to believe that the candidate does not have the necessary administrative ability.

13.2. He has held various positions within the Law Society, LPC and their sub-committees:

13.2.1. He was appointed as president of the Law Society of the Northern Provinces (November 2015 to January 2017).

13.2.2. Member of the Management Committee of the Law Society of the Northern Provinces (2015 – 2016).

13.2.3. Member of the Finances and Human Resources Committee of the Law Society of the Northern Provinces (2015 to January 2017).

- 13.2.4. Member of the Council of the Law Society of South Africa (2016 to March 2019).
- 13.2.5. Appointed to the Board of the Attorneys' Fidelity Fund (2016 to October 2018).
- 13.2.6. Member of the Transformation Committee of the Law Society of the Northern Provinces (2016 to October 2018).
- 13.2.7. Member of the Contingency Fees Committee of the Law Society of the Northern Provinces (2016 to March 2018).
- 13.2.8. Chair and member of the Contingency Fees Tribunal (2016 to present).
- 13.2.9. Member of the Legal Practice Council (November 2018 to present).

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

- 14.1. No adverse information has been received which would cast doubt on the candidate's integrity and ethical behaviour.

15. The candidate's judicial temperament

- 15.1. No adverse comments were received concerning the candidate's temperament and conduct in court.
- 15.2. There is no reason to believe that the candidate does not have an even judicial temperament.

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

16.1. Notwithstanding the candidate's limited exposure to matters involving constitutional law and values, his involvement in ensuring fairness of contingency fee agreements indicates a commitment to access to justice.

16.2. It is difficult to assess the candidate's commitment to human rights extrapolated from his judgments. In the 63 weeks the candidate has acted as a judge, he has only dealt with two matters with constitutional reach as identified above. In the one, dealing with the Constitutional rights of dignity and privacy, the candidate indicates an understanding and appreciation of striking a fair balance between these rights and circumstances in where it can be limited. In the other, the candidate finds that the supply of electricity is a cornerstone on which the realisation of rights, such as life and dignity, are based. There is no judicial reasoning for this conclusion. There is no explicit right to electricity in the Constitution. Absent the judicial reasoning, it is difficult to assess whether the candidate actually understands the constitutional principles.

17. The candidate's potential

17.1. No adverse information was received which would call into question the candidate's potential.

17.2. A review of the candidate's judgments over the four-year period in which he has acted, however, reflect a lack of development in his judicial writing. The candidate's inability to construct

judicial reasoning as part of his decision-making process may not be an encouraging sign for his future potential as a judge.

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

18.1. The candidate is a white male. His appointment will not contribute to the project to transform the judiciary.

18.2. The candidate's involvement in the various committees within the Law Society of the Northern Provinces and Legal Practice Council reflects a broader public interest commitment.

18.3. From this limited perspective, his appointment would send a positive message to the community.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported judgments

Ex Parte: Goosen and Others [2019] 3 All SA 161 (GJ) (17 May 2019)

LDB v Road Accident Fund 2018 JDR 0112 (GP)

South African Board for Sheriffs v Cibe 2018 JDR 2153 (GJ)

Dredging Africa (Pty) Ltd v Master Chemicals South Africa (Pty) Ltd 2019 JDR 0584

Unreported Judgments

Brouwer N O v Road Accident Fund (22517/2012) [2019] ZAGPPHC 21 (4 February 2019)

De Bruyn vs RAF (14606/2016)

Draht N.O and Others v Manqele and Others (29501/2014) [2019] ZAGPPHC 288 (11 July 2019)

GCP International Logistics CC v Mobile Telephone Networks (Pty) Ltd & Another (35432/2018) [2019] ZAGPPHC 9

Homeless Peoples Housing Co-operative Ltd & others v Sheriff Kempton Park & Tembisa & others (24505/2019) [2019] ZAGPPHC 354

Innovative Water Care LLC v Fluidra (Pty) Ltd (69172/2019) [2019] ZAGPPHC 530

JR209 Investments (Pty) Ltd and Others v Homeless People Housing Cooperative Limited and Others (24505/2019) [2019] ZAGPPHC 290 (11 July 2019)

Kuyasa Mining (Pty) Ltd & Another v Eskom Holdings SOC Ltd
(02966/2020) [2020] ZAGPHHC 175

Lau v Real Tine Investments 165 CC (50134/2019) [2019] ZAGPPHC 313
(23 July 2019)

M v Road Accident Fund (22100/2012) [2019] ZAGPPHC 5 (31 January
2019)

M v Road Accident Fund (56080/2012) [2020] ZAGPPHC 23 (21 February
2020)

McLeroth v Naicker and Others (43885/2018) [2020] ZAGPJHC 177 (11
August 2020)

Mere v Mere and Others (22159/2017) [2019] ZAGPPHC 90 (26 March
2019)

Molabe v S (CC36/2019) [2020] ZAGPPHC 404 (21 August 2020)

Montanari v Botha GLD 1732/2020

Mngomezulu v Minister of Police (10618/2016) [2018] ZAGPJHC 524 (13
September 2018)

Myekwa v Road Accident Fund (56080/2012) [2020] ZAGPP1HC 62 (21
February 2020)

N v Road Accident Fund (47979/2018) [2020] ZAGPPHC 21 (21 February
2020)

*Nedbank Limited v Luvhomba Communications & Information technologies
& others; Nedbank Limited v Mzantsi Restaurants CC & others Nedbank*

Limited v Luvomba Legal Edge CC (48411/2013; 4842/2013; 48413/2013 [2020] ZAGPPHC 336

Pan Africanist Congress of Azania v Moloto (46162/2019) [2019] ZAGPPHC 537 (12 July 2019)

Pan Africanist Congress of Azania v Moloto (46162/2019) [2019] ZAGPPHC 538 (12 October 2019)

Pretorius v Road Accident Fund (80333/2015) [2019] ZAGPPHC 17 (4 February 2019)

Prusent v Road Accident Fund (3033/2017) [2019] ZAGPPHC 15 (5 February 2019)

Ramosebudi v Mercedes Benz Financial Services South Africa (Pty) Ltd (51196/2017) [2019] ZAGPPHC 84

S v S M (CC36/2019) [2020] ZAGPPHC 441 (22 July 2020)

Molabe v S (CC36/2019) [2020] ZAGPPHC 404 (21 August 2020)

S M v A B (20/1732) [2020] ZAGPJHC 265 (11 September 2020)

S M v S (A17/2017) [2020] ZAGPJHC 324 (4 September 2020)

Shongwe v The State (1166/2017) [2019] ZAGPPHC 62 (25 February 2019)

Shongwe v S (72734/2017) [2020] ZAGPPHC 27 (25 February 2020)

Smith v The Financial Services Board & Another (9046/2018) [2019] ZAGPPHC 83 (20 March 2019)

South African Arms and Ammunition Dealers Association v National Commissioner of the South African Police Service and others (38807/2019) [2019] ZAGPPHC 291 (11 July 2019)

TransAction Capital Recoveries (Pty)Ltd v Emfuleni Local Municipality (2014/2020) [2020] ZAGJHC 180

Tshabalala v Road Accident Fund (9711/2016) [2020] ZAGPPHC 17 (21 February 2020)

Vaal River Developments Association (Pty)Ltd v Eskom Holdings SOC Ltd and others; Lekwa Rate payers Association NPC v Eskom SOC Ltd and others (31813/2020) [2020] ZAGPPHC

Judgments upheld on appeal:

None

Judgments overturned on appeal:

None