

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

- 1.1. BA *Cum Laude* (University of Cape Town, 1982)
- 1.2. Hons (Latin) (University of Cape Town, 1983)
- 1.3. LLB *Magna Cum Laude* (University of Cape Town, 1985)
- 1.4. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

- 2.1. The candidate has served in the legal profession as a candidate attorney from 1986 to 1987, as an advocate from 1988 to 2012, as a judge of the Cape High Court from 2013 to date, as a judge of the Competition Appeal Court from January 2017, and as an acting judge of the Supreme Court of Appeal for six separate terms between 2017 and 2019.
- 2.2. We are not aware of any professional complaint being made against the candidate in any of these capacities.
- 2.3. The candidate is known to members of the profession as a person of the utmost integrity.
- 2.4. There is accordingly no reason to find that the candidate is not fit and proper.

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. His appointment would therefore not, in and of itself, enhance the representation of black and female persons on the bench.

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

4.1. The candidate is known to members of the profession as a lawyer of the highest calibre, with an exceptional knowledge of the law, including constitutional law.

4.2. The candidate has experience in numerous areas of the law, particularly commercial and corporate law, competition law, tax law and administrative law.

4.3. Before his appointment as a permanent judge of the Cape High Court, the candidate acted on five separate occasions in the High Court, and on one occasion in the Labour Court. In that time he had 4 reported High Court judgments and 2 reported Labour Court judgments. One further High Court judgment handed down while he was an acting Judge was reported after his permanent judicial appointment,

4.4. In the eight years since his permanent judicial appointment, he has had a further 52 High Court reported judgments, as well as 6 reported judgments of the Competition Appeal Court.

4.5. In his time as an acting judge of the Supreme Court of Appeal, he has had 13 reported judgments, and has authored 4 other unreported SCA judgments.

4.6. The range of matters dealt with in his reported judgments is wide, ranging from criminal and administrative law to commercial and constitutional law.

4.7. It is a mark of the exceptional calibre of the candidate that, of all the judgments he has handed down in his time as an acting and permanent judge, only 4 have ultimately been reversed on appeal. These judgments are referred to under paragraph 6 below.

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

5.1. There is no reason to doubt the candidate's commitment to the values of the Constitution.

5.2. Constitutional considerations were mentioned in, or central to, a number of his reported cases. These include:

5.2.1. *Shelfplett 46 (Pty) Ltd v MEC for Environmental Affairs and Development Planning* 2012 (3) SA 441 (WCC) (co-operative government and autonomy of spheres of government);

5.2.2. *Scalabrini Centre Cape Town v Minister of Home Affairs* 2013 (3) SA 531 (WCC) (rights of asylum seekers);

5.2.3. *Gaertner v Minister of Finance* 2013 (4) SA 87 (WCC) (right to privacy in context of search of premises);

5.2.4. *Democratic Alliance v President of RSA* 2014 (4) SA 402 (WCC) (validity of enactment of legislation); and

5.2.5. *WWF South Africa v Minister of Agriculture, Forestry and Fishing* 2019 (2) SA 403 (WCC) (constitutional impact on performance of environmental management function).

5.3. The candidate's extensive involvement in advocacy training for junior members of the Bar also reflects his commitment to the rule of law and the need for competent advocacy in the courts, this in turn being essential to the optimal functioning of the court system and the effective separation of powers. Testament to his contribution in this area is the fact that he has been nominated for appointment to the SCA by both the former and current GCB National Advocacy Training Convenors.

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

6.1. To our knowledge, only four of the candidate's numerous judgments (*KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2016 (5) SA 485 (WCC), *Trust Hungary RZT v Vincorp (Pty) Ltd* [2016] ZAWCHC 112, *S v Coetzee & Others* and *CV v Commissioner for the South African Revenue Service* [2020] ZAWCHC 140) were ultimately overturned on appeal.

6.2. The SCA also overruled the candidate's judgment in *Nkata v First Rand Bank Limited* 2014 (2) SA 412 (WCC), but his judgment was reinstated on further appeal to the Constitutional Court.

6.3. In the confirmation hearing in *Gaertner & Others v Minister of Finance & Others*, 2014 (1) SA 442 (CC), the candidate's

decision on constitutional remedy was amended by simplifying and truncating the formulation of his temporary reading-in.

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

- 7.1. The candidate practised as a candidate attorney from 1986 to 1987. He was a member of the Cape Bar from 1988 to 2012. Senior counsel status was conferred on him in October 1999.
- 7.2. His extensive practice in the advocates' profession allowed him exposure to many areas of law. He had a particular focus on commercial, corporate, competition and tax law. In the earlier years of his practice he was extensively briefed in employment law matters, while he was regularly engaged in administrative law disputes. His academic rigour, research ability and broad legal experience meant that he was briefed for opinions in many fields of law.
- 7.3. The extent of his involvement in different areas of law during his time as a permanent judge is apparent from his list of reported judgments. It is safe to say that there is hardly an identifiable area of law in which he has not been required to exercise judicial functions.
- 7.4. The candidate was also active in the stewardship and regulation of the advocates' profession, having served on the Cape Bar Council from 1994 to 1998 and from 2000 to 2005, two of the latter years as Chairperson.

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

- 8.1. The candidate is known in the profession to have exceptional linguistic and communication skills in English.
- 8.2. He understands and communicates well in Afrikaans.
- 8.3. He is not known to have any proficiency in African languages.

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

- 9.1. The candidate is known to produce his judgments extremely promptly. Most of his judgments are handed down within one or two weeks.
- 9.2. He also has a reputation of being well-prepared for argument, and in most cases to have researched the legal aspects carefully before hearing argument. This has allowed him to engage constructively with counsel, and has assisted him in handing down judgments speedily after argument, often on an *ex tempore* basis.

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

- 10.1. We are not aware of any complaints that have been made pertaining to the candidate's fairness and impartiality, and have no reason to question these aspects.
- 10.2. Members' experience of dealing with the candidate during his judicial career is consistent with the above.

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

- 11.1. We are not aware of any complaints that have been made pertaining to the candidate's independent-mindedness.
- 11.2. On the contrary, members consider the candidate to be strongly independent-minded, as is apparent from his judgments, many of which are the product of his own research and application of law to the issues before him.
- 11.3. The candidate's reported judgments also reveal his focus on applying the law without fear or favour.

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

- 12.1. In his time both as an acting and permanent judge, members experienced the candidate as a highly competent judicial officer. He has conducted court proceedings diligently, efficiently, impartially and courteously. A particular feature, evident in his motion court work, is his reticence to burden fellow judges with the same matter through granting unnecessary postponements or delays.
- 12.2. He has a reputation for having read the papers before coming to court, and for adopting a pragmatic and sensible approach towards the adducing of evidence and the resolution of disputes. Time in his court tends to be well used.

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

- 13.1. The profession cannot comment on the candidate's administrative abilities in his capacity as a judge.

13.2. However, in his time as an advocate, the candidate was closely involved in the organisation and regulation of the profession through the Cape Bar Council and its various sub-committees. Members who served with him on those structures have emphasized his thoroughness, efficiency and pragmatism.

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

14.1. Members consider the candidate to have an impeccable reputation for integrity and ethical behaviour.

14.2. No complaints or queries about his ethical standards or integrity have been received.

15. The candidate's judicial temperament

15.1. Members who have appeared before the candidate note that he has an even and constructive judicial temperament. He is not inclined to irascibility and always seeks the most efficient manner to conduct proceedings.

15.2. He is considered to have a sound judicial temperament.

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

16.1. The list of reported judgments of the candidate demonstrate his commitment to human rights, and to the enhancement of the values and needs of the community.

16.2. Emphasis must be placed in this regard *inter alia* on his judgments in *Scalabrini Centre Cape Town v Minister of Home Affairs* 2013 (3) SA 531 (WCC), which dealt with the needs of

vulnerable asylum seekers, *Nkata v First Rand Bank Limited* 2014 (2) SA 412 (WCC), which aimed to protect home loan defaulters against unnecessary sale in execution of their properties, and *Road Accident Fund v Mohohlo* 2018 (2) SA 65 (SCA) in which he demonstrated his sensitivity to the complexities in the duty of support within African communities.

- 16.3. In his time as the Chair of the Cape Bar Council, he initiated and championed various practical transformation measures, so as to advance the practices of black and female junior counsel. These included fee-sharing and *pro bono* initiatives.
- 16.4. His subsequent work, as a judge, in the field of advocacy training demonstrates his commitment to enhancing the rule of law and ensuring the competence and representivity of the next generation of legal practitioners.

17. **The candidate's potential**

- 17.1. The candidate's performance as a judge of the High Court and the Competition Appeal Court, and as an acting judge of the Supreme Court of Appeal, demonstrate that he has the potential to be an exceptional judge of appeal, and to contribute to transformation both inside and outside the legal profession.

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

- 18.1. The candidate is white. The public may view his appointment as a failure to transform the judiciary. However, to members of the profession, the candidate's appointment would send a

message that white males who contribute to transformation and have a thorough knowledge of the law are not ignored.

- 18.2. In particular, the candidate's appointment would send a message to the legal and wider community that candidates of undoubted integrity and competence, who show a commitment to Constitutional values, can add great value to the development of our Constitutional democracy.