

**APPLICANT: JUDGE FAYEEZA 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 There is nothing to suggest that the candidate is not a fit and proper person.

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

3.1 The Constitutional Court bench currently comprises nine Justices of whom three will shortly leave the court, having served their respective non-renewable terms. As a result, the court will, by the end of 2021, comprise six Justices (three black men, and three black women).

3.2 The candidate is a black woman, of Indian descent.

**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.

- 4.2 She has penned reported judgments (including as an acting judge) in wide-ranging areas of the law.
- 4.3 Generally, her judgments are skilfully written, well researched and reasoned. Overall, her judgments reflect an excellent grasp of legal principles and the imperatives of the Constitution.
- 4.4 Her judgments, generally, are indicative of a judicial officer with a deep and developed sense of justice. 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 *curriculum vitae* reflects a broad array of activities indicating a commitment to the values of the Constitution. These are referred to further below.
- 5.2 Her judgments seek to give effect to constitutional principles and display an evident and genuine compassion for the litigants that appear before her.

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

- 6.1 The candidate has listed five judgments which were successfully overturned on appeal. More recently, a further judgment of the candidate was overturned on appeal by the SCA: *Watson NO v Ngonyama and Another* [2021] 3 All SA 412 (SCA).
- 6.2 In general, the 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. Given the

extent of the candidate's judicial career, six reversals do not detract from the strength of her application.

- 6.3 The Constitutional Court's findings in the appeal against the candidate's judgment on behalf of the Labour Appeal Court in *SAEWA obo Bester v Rustenburg Platinum Mine and Another* (2017) 38 ILJ 1779 (LAC) are however notable. In this case, Mr Bester was dismissed for insubordination and having made racist remarks against a co-worker, whom he referred to as a "*swart man*". 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*" (para 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 (para 49).

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

- 7.1 The candidate's wealth of experience in academic, professional, judicial and appellate disciplines commends 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. These characteristics are 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.
- 8.3 The issue was raised again by, *inter alios*, Adv. Madonsela, in her interview before the JSC in April 2021. Madonsela suggested that the candidate is impatient and firm in the manner in which she interacts with counsel who appear before her. The candidate's answers remained similar to those provided in 2019. She did, however, elaborate by stating that she does take a robust approach in her court and requires high standards of counsel. In addition, she stated that, notwithstanding her tendency to be impatient, she has always allowed evidence to be led and allowed submissions to be made by counsel who appear before her. She furthermore emphasised that she has always given parties a fair hearing.

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.

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

10.1 The candidate enjoys a reputation of being fair and impartial.

10.2 However, there is a comment received from a senior member 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.

10.4 It is desirable for litigants and their legal representatives to feel that their submissions are heard. It is also 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 The candidate is independent minded, and 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.
- 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, 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 this fact.

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

- 14.1 The candidate is highly respected for her integrity and ethics.

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

- 15.1 Five comments were received from members of the JSA that the candidate is unpleasant to appear before because she can be irascible with counsel. 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.
- 15.2 However, inputs were also received 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. It is necessary to be 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.

15.3 The question of the candidate's judicial temperament was raised with her by the JSC during the course of her most recent interview.

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 *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.

16.2 Her professional activities before elevation to the bench also include acting as an advocate of the Constitutional Litigation Unit of the Legal Resources Centre, lecturing in international human rights law, researching for the Gender Project, Community Law Centre, and acting as an election administrator for the Independent Electoral Commission.

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 She has been involved in the National Association of Democratic Lawyers and has served in leadership positions of several bodies dedicated to transformation such as the Executive Committee of the

General Council of the Bar of SA, 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 The candidate has the requisite experience, expertise and potential to excel in this role.

**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, and the first of such researchers to ascend to the bench and later to act as a Judge at the Constitutional Court.



**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) (07 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)

*Booyesen v Safety and Security Sectoral Bargaining Council and Others* (2021) 42 ILJ 1192 (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) 41 ILJ 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)

*Kukard v GKD Delkor (Pty) Ltd* (JA52/2013) [2015] 1 BLLR 63 (LAC)

*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 Kgekwanne 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 (08 February 2012)

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

*Motswana and Others v African National Congress and Others* (35398/18) [2019]  
ZAGPJHC 4 (06 February 2019)

*National Tertiary Retirement Fund v Mokadi and Another* (419/2015) [2016]  
ZASCA 92 (01 June 2016)

*NS and Others v Presiding Officer of the Children's Court* (2184/18) [2018]  
ZAGPJHC 59 (06 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  
(04 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 (02 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 (04 April 2014)

*Browns The Diamond Store CC V Van Zyl* (717/2015) [2017] ZAGPJHC 70 (03 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 (06 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 (01 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 (04 April 2014)

*Screening and Earthworks (Proprietary) Limited v Hollard Insurance Company Limited* (2008/27712) [2014] ZAGPJHC 76 (04 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 (09 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)

*Watson NO v Ngonyama and Another* [2021] 3 All SA 412 (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) (07 December 2012)