

APPLICANT: MR ANTHONY PETER MILLAR

**COURT FOR WHICH APPLICANT APPLIES: GAUTENG DIVISION OF
THE HIGH COURT**

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 judgments suggesting that he 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 There are currently 73 full time judges on the Gauteng bench, comprising (as far as could be ascertained):

3.1.1 22 black women (17 African, 3 Indian, 2 Coloured);

3.1.2 25 black men (18 African, 5 Indian, 2 Coloured);

3.1.3 13 white women; and

3.1.4 13 white men.

3.2 The candidate is a white man.

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 there from, 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 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, 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 fairly to assess 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.

4.6 In the candidate's treatment of criminal appeals, he generally confines himself to a superficial overview of the evidence. It is not readily apparent from the judgments authored by him that the applicable legal principles have been correctly applied.

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

5.1 The candidate 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 Only 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) have been found 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. For example, in paragraph 49, the applicant refers to Oxford dictionary definitions of the words "dignity" and "privacy" in his analysis and he does not consider

the jurisprudence of our Constitutional Court in relation to these words in any detail.

- 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. This judgment is currently on appeal to the SCA.

6 Whether any judgments have been overturned on appeal

- 6.1 None of the judgments reviewed have been overturned on appeal.

- 6.2 Though the candidate granted leave to appeal in the Vaal River Development Association matter, to the SCA on 14 September 2020, the appeal does not appear to have been heard.

- 6.3 The majority of the candidate's judgments have been marked "not reportable" and "not of interest to 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, in particular in relation to more complex matters and those dealing with constitutional principles.

10 The candidate's fairness and impartiality

10.1 Save as follows, we could find no adverse indication to impugn the candidate's fairness and impartiality.

- 10.1.1 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 sitting as a full court with Sutherland and Modiba JJ, which matter regarded the proper interpretation of a point of law, i.e., the effect of the Legal Practice Act on admissions of legal practitioners.
- 10.1.2 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.
- 10.1.3 The recusal application was dismissed, and the court *inter alia* found that an amicus does not have standing to bring a recusal application.
- 10.1.4 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 applicants 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 applicants counsel had pointed out that Eskom had denied the applicants 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

- 10.1.5 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 Not answered

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

- 12.1 The candidate has 26 years of experience as a practicing 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), as the appointed representative of the Attorneys Fidelity Fund.

14 The candidate's reputation for integrity and ethical behaviour

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

14.2 The candidate recorded in his previous application dated November 2020 that a complaint had been laid against him to the Judicial Conduct Tribunal. The candidate does not in this application record whether the complaint has been resolved nor the outcome of the complaint.

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 as 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, 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.

- 16.3 The candidate does appear to be cognisant of the plight of young children who are caught up in undesirable circumstances which impact on their Constitutional rights. In *S v Maphosa* (2021 JDR 0419 (GP)) he directed that a copy of the judgment be forwarded to, *inter alia*, the National Director of Public Prosecutions and the South African Human Rights Commission to investigate what he described as forced labour and a deprivation of the right of the complainant's child to attend school.

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, reflects 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's involvement in the various committees within the Law Society of the Northern Provinces and Legal Practice Council reflects a broader public interest commitment to the legal profession.

18.2 The candidate mentions his contribution in the establishment of the Legal Practice Council which will serve the interests of the legal profession and the country. The candidate does not articulate how as the appointed representative of the Attorneys Fidelity Fund on the LPC, his contribution is significant to either the law or the pursuit of justice.

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 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 Mangele 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 JOYISI (2019 JDR 0528 (GP)) (12 March 2021)

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

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

S v Madisha (2021 JDR 0473 (GP)) (25 February 2021)

S v Maphosa (2021 JDR 0419 (GP)) (1 March 2021)

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) [209] 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

Van Rhyn and Another v The Pension Funds Adjudicator 2021 JDR 0811 (GP) (31
March 2021)