

APPLICANT: JUDGE BASHIER VALLY

COURT FOR WHICH APPLICANT APPLIES: CONSTITUTIONAL COURT

1. The candidate's appropriate qualifications

1.1. The applicant holds the following academic qualifications:

1.1.1. B.Com degree conferred by the University of the Witwatersrand in 1982;

1.1.2. BA (Hons) (Industrial Psychology) conferred by the University of the Witwatersrand in 1983;

1.1.3. MA (Sociology) conferred by the University of Warwick (UK) in 1985;

1.1.4. LLB conferred by the University of the Witwatersrand in 1994;

1.1.5. LLM (Labour Law) conferred by the University of the Witwatersrand in 1996.

1.2. The candidate is appropriately qualified and experienced for appointment to the Constitutional Court.

2. Whether the candidate is a fit and proper person

2.1. There is nothing in the candidate's application or the judgments that 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 man, of Indian descent.

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

4.1. From the judgments reviewed, the candidate appears to possess good knowledge of various areas of the law, including constitutional law.

4.2. The reported judgments also show that the candidate is able to consider and determine complex factual disputes and applies appropriate case law in his judgments.

4.3. The judgments reviewed reflect the candidate's knowledge in:

4.3.1. Contract Law: Exception and public policy; damages, *pacta sunt servanda*; constitutional interpretation; contractual and common law duty of good faith; impossibility of performance.

4.3.2. Procedure: Formal Tenders; Uniform Rule 34(1).

4.3.3. Trustees: Trust Property Control Act; Trustees Duties; Removal of Trustees.

4.3.4. Administrative Law: Promotion of Administrative Justice Act.

4.3.5. Insurance Law: unlawful cancellation of policy by Insurer.

4.3.6. Company Law: the conduct of Business Rescue Practitioners.

4.4. In most cases and where appropriate, the candidate sought to resolve legal issues before him by reference to the precepts of the Constitution.

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

- 5.1. Prior to joining the advocates' profession, and prior to 1994, the candidate showed a keen interest in respect of sociological issues as well as the rights of employees in South Africa. In this regard:
 - 5.1.1. The candidate published a book entitled "*A Social Contract – The Way Forward – A Critical Evaluation*" (1992);
 - 5.1.2. The candidate has published the following articles:
 - 5.1.2.1. "Strikes, Dismissals and Collective Bargaining: A Case for a More Rational and Constructive Approach" in the *South African Journal of Labour Relations*, Volume 16, No. 1, March 1992;
 - 5.1.2.2. "Denying the Strike: *SEIFSA v NUMSA*" in *Employment Law*, Volume 9, No. 3, January 1993;
 - 5.1.2.3. "Paradigms Lost – A Search for the Sociological Perspective" (co-authored with M Sarakinsky) in Sarakinsky M (Ed) *Social Theory*, Lexicon Publishers, 1994.
- 5.2. The candidate was involved in the Commercial, Catering and Allied Workers Union of South Africa from 1985 to 1986.
- 5.3. The candidate was a member of Advocates for Transformation from 2003 to 2012 and served as a member of the Access to Justice Committee in 2009.

5.4. In the judgments reviewed, the candidate has consistently been conscious of testing the legal principles before him against the precepts of the Constitution.

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

6.1. The following reflects decisions of the candidate that have been overturned on appeal, and the comments by the appeal court in respect of the candidate's judgment *a quo*.

6.2. *Lekup Prop No 4 (Pty) Ltd v Wright, John Colin 2012 (5) SA 246 (SCA)*

6.2.1. In this matter, the appellant brought an application in the court *a quo* on the basis that the agreement for the sale of its property to the respondent had lapsed for want of fulfilment of a suspensive condition;

6.2.2. The matter was referred to trial by consent;

6.2.3. The respondent alleged that the appellant had deliberately and intentionally failed to procure the required rezoning and subdivision of the property. In doing so, the purchaser relied on the doctrine of fictional fulfilment;

6.2.4. The candidate (then an acting judge) found in the respondent's favour and held that the agreement had not lapsed and the suspensive condition was deemed to have been fulfilled;

6.2.5. The SCA explained the doctrine of fictional fulfilment and upon analysing the evidence, disagreed with the candidate that the respondent had discharged its onus in relying upon that doctrine; and

- 6.2.6. The SCA commented about the manner in which the trial was conducted. In particular, the SCA commented that the candidate was under a misapprehension as to the status of the affidavits in the context of the trial.
- 6.3. *South African Municipal Workers Union and Others v Mokgatla and Others* [2016] 2 All SA 451 (SCA)
- 6.3.1. The issue before the court was whether the High Court and the Labour Court have concurrent jurisdiction in respect of disputes relating to section 158(1)(e) of the Labour Relations Act (LRA). The candidate presiding in the court *a quo* dismissed a special plea raised by the appellants, that it lacked jurisdiction to consider the application by the respondents for their reinstatement;
- 6.3.2. The SCA found that the court *a quo* “missed” the fundamental guiding principles underlying the determination of jurisdiction of the respective courts over disputes provided for under the LRA, particularly as laid down by the Constitutional Court;
- 6.3.3. The candidate’s judgment was overturned on the basis that he failed to take into account that the Constitution recognises the need for specificity and specialisation under the modern rule of law and thus, when the legislature is mandated to create a detailed legislation for a particular area, like the LRA in the area of labour relations, it is preferable to use the system created by that legislation.
- 6.4. *Atholl Developments (Pty) Ltd v Valuation Appeal Board, Johannesburg and Another* 2015 JDR 0674 (SCA):

- 6.4.1. In the court *a quo*, the candidate expressed a number of views regarding the application of the Local Government: Municipal Property Rates Act 6 of 2004, that do not accord with well-established valuation principles approved by various judgments over the years.
- 6.4.2. This resulted in the applicant in the matter, albeit having been successful before the candidate in the High Court, appealing the decision, because it was concerned that the remarks by the candidate constituted binding findings on the parties and the Valuation Appeal Board [see paragraph 4 of the Supreme Court of Appeal judgment].
- 6.4.3. Several mining companies were granted permission by the Supreme Court of Appeal to intervene as *amici curiae* in the matter. The interests of these companies lay in the fact that they were embroiled in several valuation appeals in which the municipality concerned attempted to rely on comments made by the candidate in the judgment in the court *a quo*.
- 6.4.4. It was of importance to these companies to establish that the remarks made by the candidate were not binding on the Valuation Appeals Board, before which their appeals were being heard.
- 6.4.5. The following statement in paragraph [5] of the Supreme Court of Appeal judgment must be read against the above background: “...*Vally J may well have ranged beyond that narrow remit in this case...*”

6.4.6. In response to the requests by the appellant and the *amici*, the Supreme Court of Appeal expressly stated in paragraphs [5] and [6] that the findings of the candidate are not binding on the parties and the Valuation Appeals Board. During the debate, the bench made it clear that they could not outright state in the judgment that the candidate was wrong, because they may be required to decide the issue in the future, should the matter again reach the Supreme Court of Appeal. In the premises, the judgment is couched in the these specific terms, as the Supreme Court of Appeal held, an appeal against the order and not the reasons for the judgment.

6.4.7. The unnecessary remarks made by the candidate in the court *a quo* induced both the Appellant and the *amici* to approach the Supreme Court of Appeal, to ensure that municipal valuers do not ignore rights, such as leases, registered against a property, when valuing such property. By virtue of Section 46(3)(c) of the Rates Act, only unregistered leases should be ignored.

6.5. *Capitec Bank Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and others* (2021) ZASCA 99:

6.5.1. In this matter the candidate ordered Capitec Holding to consent to the sale of shares, the candidate found that Capitec's conduct by refusing to consent amounted to a breach of its contractual and common law duties of good faith.

6.5.2. The candidate refused leave to appeal of this order, however the Supreme Court of Appeal granted the leave.

6.5.3. The Supreme Court of Appeal held that the court quo failed to make its point of departure the relevant provisions of the subscription agreement. The court *a quo* failed to conduct a proper interpretation analysis of the relevant sections of the subscription agreement.

6.5.4. The Supreme Court of Appeal made the following statement in response to the Candidate relying on his minority judgment to support the order: *“Whether the high court was at large to prefer its minority judgment in Atlantis Property for purposes of its decision in the present case, is a question of precedent with which I need not be further concerned because the Constitutional Court has spoken decisively in Beadica...as to how good faith figures in our law of contract.”*

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

7.1. The candidate has extensive legal experience as appears from the areas of the law covered by the judgments reviewed.

7.2. The candidate has worked in the following capacities in the legal field:

7.2.1. Self-employed Mediator on the panel of the Independent Mediation Services of South Africa from 1991 to 1996;

7.2.2. Self-employed Arbitrator on the panel of the Independent Mediation Services of South Africa from 1993 to 1996;

7.2.3. Advocate of the High Court of South Africa from 1996 to 2012;

7.2.4. Acting High Court Judge in Gauteng from October to December 2010;

- 7.2.5. High Court Judge in Gauteng from 2012 to present;
- 7.2.6. Acting Judge of the Competition Appeal Court from April 2016 to 2018; and
- 7.2.7. Judge of the Competition Appeal Court from 2018 to present.

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

- 8.1. The candidate's judgments are clear and concise. Many of the judgments were fact and law intensive, yet the candidate was able to deal with the issues before him logically and clearly.

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

- 9.1. The candidate generally produces judgments promptly.
- 9.2. Many of the judgments were delivered ex tempore and most others within three months of the conclusion of the hearing.
- 9.3. The reviewers came across only two judgments reviewed that were not delivered promptly, namely:
 - 9.3.1. *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd and Another* 2011 (4) SA 642 (GSJ), which was produced almost four months after the matter was heard; and
 - 9.3.2. *Tshuma v Minister of Safety and Security* (18147/10) [2015] ZAGP JHC 152, which was produced over five months after the hearing of this matter.

10. The candidate's fairness and impartiality

- 10.1. The candidate's judgments reflect a fair and impartial mind that was brought to bear in respect of the matters before the candidate.
- 10.2. In many of his judgments, the candidate clearly expressed each party's arguments and the candidate's view of the merits and demerits of the arguments presented.

11. The candidate's independent mindedness

- 11.1. The judgments reviewed reflect the candidate as very independent-minded.
- 11.2. While acting in the Competition Appeal Court, in *Isipani Construction (Pty) Ltd v The Competition Commission* 2017 ZACAC, the candidate penned a minority judgment in which he would have imposed a greater fine than that imposed by the majority judgment. In so doing, the candidate motivated the basis upon which the Competition Appeal Court ought to exercise its discretion in imposing a higher fine.
- 11.3. In *Atlantis Property Holdings CC v Atlantis Excel Service Station CC* 2019 (3) All SA 441 (GJ), the candidate penned a minority judgment that has subsequently not been followed by the Constitutional Court in *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC).
- 11.4. In *Coral Lagoon Investments 194 (Pty) Limited and Another v Capitec Bank Holdings and Others* [2019] ZAGPJHC 427 5 November 2019 the candidate adopted the concept of a contractual

duty of good faith as set out in his minority judgment in *Atlantis Property Holdings CC* referred to above.

- 11.5. In *Democratic Alliance v President of the Republic of South Africa* 2017 (4) SA 253 (GP), the candidate developed the law by holding that the President was obliged to provide not only the record of proceedings but also reasons for the executive decision relating to the reshuffling of the national executive.

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

- 12.1. A number of negative comments have been received regarding the manner in which the candidate conducts Court proceedings, two of these complaints were received from senior counsel.
- 12.2. Amongst practitioners at the Johannesburg Bar the candidate has been known to avoid dealing with the matters on his roll by unnecessarily standing matters down or postponing matters, despite the fact that matters were set down on the urgent roll.
- 12.3. The candidate's manner with counsel is, at times, abrupt.
- 12.4. These comments, *inter alia*, conveyed the candidate as, at times, being discourteous towards advocates that appear before him and his reluctance to hear certain opposed applications and trials.
- 12.5. Other members have submitted comments in support of the candidate, including that his handling of urgent matters shows a willingness to go to the merits, sometimes allowing counsel to argue late into the night.

13. The candidate's administrative ability

- 13.1. The candidate's extensive work experience, including as an Advocate of the High Court and as a Judge of a busy court, coupled with his ability to deliver well-reasoned judgments promptly, demonstrate that the candidate has strong administrative abilities.
- 13.2. The reviewers have not elicited nor received any specific adverse comments regarding the candidate's administrative ability.

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

- 14.1. No adverse comments have been received in this regard.

15. The candidate's judicial temperament

- 15.1. The reviewers have received a number of negative comments regarding the candidate's judicial temperament, from senior and junior members of the Bar.
- 15.2. These comments, *inter alia*, conveyed the candidate being, at times, discourteous towards advocates that appear before him and his reluctance to hear opposed matters and urgent matters.
- 15.3. Other members have submitted comments in support of the candidate, including that his handling of urgent matters shows a willingness to go to the merits, sometimes allowing counsel to argue late into the night.

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

- 16.1. Prior to joining the advocates' profession, the candidate's writings reflect a keen interest for the rights of employees and generally for social justice.
- 16.2. The candidate's judgments consistently highlight his sensitivity and commitment to the values enshrined in the Constitution.
- 16.3. The candidate has a strong commitment to the values enshrined in the Constitution.

17. The candidate's potential

- 17.1. The candidate holds a number of academic qualifications and has a vast array of experience, both in sociology and in law.
- 17.2. The candidate practised as an Advocate of the High Court for 16 years.
- 17.3. The candidate served as an Acting Judge and then a Judge of the High Court in Gauteng for 11 years.
- 17.4. The candidate acted as Justice of Appeal of the Competition Appeal Court for almost 2 years.
- 17.5. The candidate has been serving as a Justice of Appeal of the Competition Appeal Court from 2018 to present.

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

- 18.1. As mentioned above, the candidate:

- 18.1.1. holds a number of academic qualifications;
 - 18.1.2. has a wide range of experience and expertise in the legal field;
 - 18.1.3. is independently minded; and
 - 18.1.4. has shown a firm commitment to the Constitution.
- 18.2. The mixed comments on the candidate's judicial temperament and reluctance to deal with matters are of concern.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED**Reported decisions**

Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd and Another 2011 (4) SA 642 (GSJ)

Peniel Development (Pty) Ltd and Another v Pietersen and Others 2014 (2) SA 503 (GJ)

Atholl Developments (Pty) Ltd v Valuation Appeal Board, Johannesburg and Another 2014 (5) SA 485 (GJ)

Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd and Others [2014] 3 All SA 454 (GJ)

Trichart v S 2014 (2) SACR 245 (GJ)

ABSA Bank Ltd v Africa's Best Minerals 146 Ltd, In re: Sekhukhune NO v ABSA Bank Ltd [2015] 2 All SA 8 (GJ)

Mncube and Others v Januarie NO and Others [2015] 2 All SA 338 (GJ)

AB LLC and BD Holdings LLC v Commissioner of South African Revenue Services [2015] ZATC 2

De Beer v S [2016] 3 All SA 746 (GJ)

Nkala and Others v Harmony Gold Mining Co Ltd and Others 2016 (5) SA 240 (GJ)

Democratic Alliance v President of the Republic of South Africa 2017 (4) SA 253 (GP)

Democratic Alliance v Minister of International Relationships and Co-operation and Others 2018 (6) SA 109 (GP)

Twine and Another v Naidoo and Another [2018] 1 All SA 297 (GJ)

Thato Masuku v The State [2018] JOL 40391 (GJ)

The Black Eagle Project Roodekrans v MEC Department of Agriculture, Conservation and Environment 2019 (2) All SA 322 (GJ)

Atlantis Property Holdings CC v Atlantis Excel Service Station CC 2019 (3) All SA 441 (GJ)

Khubeka v The State [2019] ZAGPJHC 266

Wimpey v HBS Africa Consulting Engineers [2019] ZAGPJHC 266

McNair v Crossman and Another [2019] ZAGPJHC 298

Drummond Cable Concepts v Advancenet (Pty) Ltd 2020 (1) SA 546 (GJ)

Frajenron (Pty) Ltd v Metcash Trading Ltd and Others 2020 (3) SA 210 (GJ)

National Union of Metalworkers of SA and Others v VR Laser Services (Pty) Ltd and Others [2020] 2 All SA 536 (GJ) (10 March 2020)

Moropa and Others v Chemical Industries National Provident Fund and Others 2021 (1) SA 499 (GJ)

Unreported decisions

S v Dladla and Another (2006/22220) [2011] ZAGPJHC 233

Venter v Hauptfleisch Inc (2009/2747) [2012] ZAGPJHC 222

S v Rautenbach (164/2012) [2013] ZAGPJHC 105

S v Bayat (2013/08/05) [2013] ZAGPPHC 344

S v Majola and Others (98/2013) [2014] ZAGPJHC 421

Mokgatla and Others v South African Municipal Workers Union and Others
(21815/2014) [2014] ZAGPJHC 276

Thusi and Another v Minister of Safety and Security (1442713) [2014] ZAGPJHC
387

Urban Genesis Management (Pty) Ltd and Another v Jooste and Another
(2014/05400) [2014] ZAGPJHC 380

*Wynand NO and Another v MEC for the Department of Local Government and
Housing of the Gauteng Province and Another* (20291/2013) [2014]
ZAGPJHC 388

Tshuma v Minister of Safety and Security (18147/10) [2015] ZAGPJHC 152

Mtshali and Another v S (A319/2014) [2015] ZAGPJHC 153

A v Commissioner of the South African Revenue Services (VAT1129) [2015]
ZATC 3

Hicks and Another v S (A609/2008) [2015] ZAGPJHC 64

*Caxton and CTP Publishers and Printers Ltd and Others v Multichoice (Pty) Ltd
and Others* (140/CAC/MAR16) [2016] ZACAC 3

Davis and Another v Purple Fountain Properties 118 (Pty) Ltd (08/36380,
30457/15) [2016] ZAGPJHC 198

*Kenako Consulting (Pty) Ltd v City of Johannesburg Property Company (SOC)
Ltd and Others* (08/36380, A5023/2015) [2016] ZAGPJHC 196

Kingdom Films and Others v Kaplan NO (14/43457) [2016] ZAGPJHC 37

Sasfin Commercial Solutions (Pty) Ltd v Firststrand Bank Ltd (08/36380, 37344/2015) [2016] ZAGPJHC 246

Isipani Construction (Pty) Ltd v Competition Commission (144/CAC/LUG16CT, 019950) [2017] ZACAC 3

Transnet SOC Limited v IGS Consulting Engineers CC and Others (34688/2017) [2019] ZAGPJHC 527 (11 December 2019)

Coral Lagoon Investments 194 (Pty) Limited and Another v Capitec Bank Holdings and Others [2019] ZAGPJHC 427 5 November 2019

Hermione Nell and 74 Others v Constantia Insurance Company Limited and Others (10068/2020) (26/06/2020)

Judgments upheld on appeal

Atholl Developments (Pty) Ltd v Valuation Appeal Board, Johannesburg, and Another 2015 ZASCA 55

Tridevco (Pty) Limited & Others v Zenprop Property Holdings (Pty) Limited and Others ZAGPPHC 658 2 September 2018

Judgments overturned on appeal

Xstrata South Africa (Pty) Ltd and Others v SFF Association 2012 (5) SA 60 (SCA)

Lekup Prop No 4 (Pty) Ltd v Wright, John Colin 2012 (5) SA 246 (SCA)

South African Municipal Workers Union and Others v Mokgatla and Others [2016] 2 All SA 451 (SCA)

De Beer v S 2018 (1) SACR 229 (SCA)

Nature's Choice Farms (Pty) Ltd v Ekurhuleni Metropolitan Municipality (Case no 463/19) [2020] ZASCA 20 (25 March 2020)