

**JSC INTERVIEW ROUND: APRIL 2022**

**CANDIDATE: JUDGE FAYEEZA KATHREE-SETILOANE**

**COURT FOR WHICH CANDIDATE APPLIES: CONSTITUTIONAL COURT**

**1. The candidate's tertiary qualifications, professional admissions and honours:**

1.1. The candidate holds the following formal qualifications:

1.1.1. Bachelor of Arts, University of Natal (1988);

1.1.2. LLB, University of Natal (1991); and

1.1.3. LLM, Georgetown University Law School, Washington DC (1993).

1.2. The candidate's professional admissions and honours:

1.2.1. Advocate (1997).

1.3. The candidate possesses the requisite qualifications for the position for which she has applied. She is well-qualified academically.

**2. The candidate's integrity and ethics:**

2.1. No circumstances are known that would suggest that the candidate is not a person of integrity with a reputation for ethical behaviour or is not a fit and proper person for appointment.

**3. Whether the candidate's appointment would help to achieve an appropriate racial and gender composition on the bench:**

3.1. There are currently 8 full time judges on the Constitutional Court bench, comprising:

3.1.1. 3 black women (2 African, 0 Indian, 1 Coloured);

3.1.2. 5 black men (3 African, 1 Indian, 1 Coloured);

3.1.3. 0 white women; and

3.1.4. 0 white men.

3.2. The candidate is a black (Indian) woman.

**4. The implications of the constitutional mandatory term limits and age requirements for discharge from active service of Constitutional Court judges:**

4.1. Section 176(1) of the Constitution provides that a Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever is the earlier, unless extended by an Act of Parliament.

4.2. Section 4(1) of the Judges Remuneration and Conditions of Employment Act 47 of 2001 provides that a Constitutional Court judge whose 12-year term of office as a Constitutional Court judge expires before he or she has completed 15 years' active service as a judge must, subject to subsection (2), continue to perform active service as a Constitutional Court judge to the date on which he or she completes a

period of 15 years' active service, whereupon he or she must be discharged as a Constitutional Court judge.

4.3. Section 4(2) of the Act provides that a Constitutional Court judge who, on attaining the age of 70 years, has not yet completed 15 years' active service as a judge, must continue to perform active service as a Constitutional Court judge to the date on which he or she completes a period of 15 years' active service as a judge or attains the age of 75 years, whichever occurs first, whereupon he or she must be discharged as a Constitutional Court judge.

4.4. The candidate is 56 and has completed a period of 12 years of active service as a judge.

4.5. If appointed, the candidate's office will terminate in 12 years.

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

5.1. The candidate has a long history of activism and commitment to social causes that align with the values enshrined in the Constitution. It is evident from the organisations to which she belongs and participates in that she is committed to the transformation of our society, gender equality and the pursuit of justice.

5.2. The candidate has, by virtue of her permanent appointment and various intermittent acting appointments, served on the judiciary for 12 years.

5.3. The candidate authored a publication which considered the socio-economic circumstances of the poor and vulnerable members of society against the transformative vision of the Constitution.

- 5.4. The candidate has authored many publications which relate to women's rights, the advancement of women's rights and the elimination of discrimination against women. These publications are both in the field of law and outside the field of law.
- 5.5. The candidate was an advocate in the Constitutional Litigation Unit of the Legal Resources Centre in Johannesburg. This undertaking demonstrates a personal commitment to values enshrined in the Constitution as the candidate dedicated her time as well as the income she would have earned if she had spent this time in private practice.
- 5.6. The candidate was a lecturer in International Human Rights Law in the Department of Public Law at the University of the Western Cape.
- 5.7. The candidate's judgments seek to give effect to constitutional principles and display an evident and genuine compassion for the litigants that appear before her.

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

- 6.1. The candidate has been a judge of the High Court since 2010. In addition, she has served as an acting judge in all our Appellate Courts, including the Supreme Court of Appeal, the Labour Appeal Court and the Competition Appeal Court. She sat as an acting justice in the Constitutional Court from 26 July 2017 to 31 December 2017.
- 6.2. The candidate's judgments are generally indicative of a judicial officer with a deep and developed sense of justice.

6.3. The candidate's application of the principles of the interpretation of written documents is sound:

6.3.1. Although overturned on appeal, *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 417 (GNP) involved the interpretation of what is meant by a binding offer in section 153 of the Companies Act, 71 of 2008. This judgment also involved consideration of constitutional challenges to the business rescue procedure.

6.3.2. In *Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and Others* 2017 (4) SA 207 (GJ), the candidate interpreted the provisions of section 18 of the Superior Courts Act, 10 of 2013.

6.3.3. In *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius* 2010 (4) SA 635 (GSL), the candidate interpreted section 86(10) of the National Credit Act, 34 of 2005. Although the candidate's interpretation was not adopted by the Supreme Court of Appeal, the section was later amended, and such amendment accorded with the candidate's interpretation of the section.

6.4. The candidate has authored many judgments in which constitutional principles were applied correctly.

6.4.1. In *Residents, Industry House v Minister of Police and Others* 2021 (2) SA 220 (GJ), the candidate handed down a judgment which declared section 13(7)(c) of the South African Police

Services Act, 68 of 1995 unconstitutional in that it infringed the right to privacy. The judgment is a good example of the candidate's sound reasoning process applied in the constitutional law field.

- 6.4.2. In *S v Liesching and Others* 2019 (4) SA 219 (CC), the candidate, as an Acting Justice of the Constitutional Court, in a dissenting judgment, gave a detailed analysis of section 17(2)(f) of the Superior Courts Act, 10 of 2013 and the meaning of the phrase “*exceptional circumstances*”.

**7. Judgments of the candidate that have been overturned, upheld or commented on, on appeal:**

- 7.1. Ten of the candidate's judgments have been unsuccessfully appealed and six of the candidate's judgment have been successfully appealed.
- 7.2. *De Montlehu v Mayo N.O. and Others* 2015 (3) SA 253 (GJ) involved a judicial review of the Master's decision brought in terms of section 151 of the Insolvency Act. The matter was complicated by the fact that there were a number of pending and inter-related applications and counter-applications. The judgment was upheld on appeal in the Supreme Court of Appeal.
- 7.3. The judgment in *Wright v Wright* 2013 (3) SA 360 (GSJ) was upheld on appeal by the Supreme Court of Appeal.
- 7.4. In general, the successful appeals against the candidate's judgments have not been on account of obvious errors on her part 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.

7.5. The Constitutional Court's findings in *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] ZACC 13, 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).

7.6. In *Ronald Bobroff & Partners Inc v De la Guerre; South African Association of Personal Injury Lawyers v Minister of Justice & Constitutional Development* [2014] ZACC, the Constitutional Court upheld the decision by the candidate in *South African Association of*

*Personal Injury Lawyers v Minister of Justice and Constitutional Development* 2013 (2) SA 583 (GNP).

- 7.7. In the matter of *Nova Property Group Holdings and Others v Cobbett* 2016 (4) SA 317 (SCA), the candidate authored the judgment and Justices Maya, Majiedt, Mbha and Plasket concurred. The Constitutional Court held that there were no prospects of success and dismissed the appeal.
- 7.8. *McBride v Minister of Police* 1 All SA 811 (GP), involved the declaration of invalidity of section 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act 1 of 2011. The Constitutional Court confirmed the candidate's decision.

**8. The extent and breadth of the candidate's professional experience:**

- 8.1. The candidate was an advocate at the Johannesburg Bar for 9 years and a director at Werksmans Advisory Services (Pty) Ltd, which is a subsidiary of Werksmans Attorneys, where she was employed as in-house counsel for 4 years before her appointment to the bench.
- 8.2. During the period 2010 to date, the candidate has held a permanent appointment at the High Court of South Africa and has had various acting appointments in the Constitutional Court, the Supreme Court of Appeal, the Labour Appeal Court, the Labour Court and the Competition Appeal Court.
- 8.3. The candidate has extensive experience as a judge and an acting judge in the superior courts.

**9. The candidate's linguistic and communication skills:**

- 9.1. The candidate is articulate and has an excellent command of the English language.
- 9.2. The candidate's judgments are well-written and she clearly applies legal principles to the facts.

**10. The candidate's ability to produce judgments promptly:**

- 10.1. Of the judgments considered, there are no instances in which the candidate took longer than three months to hand down a judgment.
- 10.2. The candidate has no reserved judgments and no part-heard matters.

**11. The candidate's ability to conduct court proceedings fairly, efficiently and effectively:**

- 11.1. The candidate presents herself as assertive, confident and formidable. In previous reviews submitted, it was recorded that there had been comments that the candidate could be abrasive, but more recent comments from members of the Bar have indicated that this is no longer a concern.
- 11.2. There have been no adverse comments regarding the candidate's fairness, punctuality, preparedness, adherence to procedural rules, optimal use of court time and resources, responsiveness, performance of case management functions and management of administrative matters.

**12. The candidate's independent-mindedness:**

- 12.1. From the candidate's judgments it is clear that she exhibits independent-mindedness and a lack of bias.

**13. The candidate's administrative ability (other than in relation to court proceedings):**

- 13.1. The candidate has a reputation for being hardworking, administratively sound and an organised judge. This is also evident from the fact that the candidate has no outstanding judgments despite having been on the bench for 12 years.

**14. The message that the candidate's appointment would send to the public at large:**

- 14.1. The candidate has dedicated her professional life to the advancement of social justice and gender equality.
- 14.2. 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.
- 14.3. The candidate is an Indian woman, which will contribute to a more representative and diverse Constitutional Court bench. The candidate's appointment further advances South Africa's commitment to the development, education and advancement of black women lawyers and judges.

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

*Nova property Group Holdings v Cobbett* 2016 (4) SA 317 (SCA)

*UASA- The Union and Others v Western Platinum (Pty) Ltd & Others* (2021) 42 ILJ 371 (LAC)

*Techniflex CC & Another v Manaso and Another* (2021) 42 ILJ 366 (LAC)

*South African Workers Union obo Mosoma v Greater Tubatse Local Municipality* [2021] 5 BLLR 494 (LAC)

*Legal Aid South Africa v Theunissen* (2020) 41 ILJ 625 (LAC)

*Rappo v Rustenburg Local Municipality* [2020] 6 BLLR 553 (LAC)

*SA Breweries (Pty) Ltd v Hansen & Others* (2017) 38 ILJ 1766 (LAC)

*Pharmaco Distribution (Pty) Ltd V W* (2017) 38 ILJ 2496 (LAC)

*Rukwaya and Others v Kitchen Bar Restaurant* (2018) 39 ILJ 180 (LAC)

*SAEWA obo Bester v Rustenburg Platinum Mine and Another* (2017) 38 ILJ 1779 (LAC)

*Kukard v GKD (Pty) Ltd* [2015] 1 BLLR 63 (LAC)

*SAMWU obo Manentza v Ngwathe Local Municipality and Others* [2015] 9 BLLR 894 (LAC)

*Cele v Avusa Media Ltd* (08/10831) [2013] ZAGPJHC 15; [2013] 2 All SA 412 (GSJ) (14 February 2013)

*Export Development Canada and Another v Westdawn Investments Proprietary and Others* [2018] 2 All SA 783 (GJ)

*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)

*Rapoo v Rustenburg Local Municipality* [2020] 6 BLLR 533 (LAC)

*Rukwaya and Others v Kitchen Bar Restaurant* (2018) 39 ILJ 180 (LAC); [2018] 2 BLLR 161 (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)

*ABSA Bank Ltd v Botha NO And Others* 2013 (5) SA 563 (GNP)

*African Banking Corporation Of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd And Others* 2013 (6) SA 471 (GNP)

*Booyesen v Safety and Security Sectoral Bargaining Council* 2021 JDR 0540 (LAC)

*BR and Another v TM* 2016 (3) SA 417 (GJ)

*Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and Others* 2017 (4) SA 207 (GJ)

*Msimang NO v Katuliiba* 2012 JDR 2391 (GSJ)

*Residents, Industry House v Minister of Police and Others* 2021 (2) SA 220 (GJ)

*S v Liesching and Others* 2019 (4) SA 219 (CC)

*Standard Bank of South Africa Ltd v Kruger; Standard Bank Of South Africa Ltd v Pretorius* 2010 (4) SA 635 (GSJ)

*BMW (South Africa) (Pty) Ltd v National Union of Mineworkers of South Africa and Another* (2020) 41 ILJ 1877 (LAC); [2020] 11 BLLR 1079 (LAC)

*Communication Workers Union and Others v Mobile Telephone Networks (Pty) Ltd and Another* (2020) 41 ILJ 2072 (LAC); [2020] 5 BLLR 1096 (LAC)

*South African Transport and Allied Workers Union of South Africa v Algoa Bus Company (Pty) Ltd* [2019] 3 BLLR 262 (LAC); [2019] 40 ILJ 827 ILJ (LAC)

*National Education Health and Allied Workers Union obo Kgekwane v Department of Development Planning and Local Government, Gauteng* [2015] 6 BLLR 575 (LAC)

*SACCAWU obo Mokebe and Others v Pick'n Pay Retailers* [2017] 12 BLLR 1196 (LAC); (2018) 39 ILJ 201 (LAC)

*Palluci Home Depot (Pty) Ltd v Herskowitz and Others* [2015] 5 BLLR 484 (LAC); (2015) 36 ILJ 1511 (LAC)

*Quest Flexible Staffing Solutions (Pty) Ltd (a division of ADCORP Fulfilment Services (Pty) Ltd) v Lebogate* [2015] 2 BLLR 105) LAC)

*INCP Chlorochem (Pty) Ltd v National Energy Regulator and Others* [2017] All SA 950 (GJ); 2017 (6) SA 158 (GJ)

*De Montlehu v Mayo N.O. and Others* 2015 (3) SA 253 (GJ)

*Wright v Wright and Another* 2013 (3) SA 360 (GSJ)

*Council for Medical Schemes and Ors v Liberty Medical Scheme and Another* [2013]  
3 All SA 508 (GNP)

### **Unreported judgments**

None considered

### **Judgments upheld on appeal**

*Belet Industries CC t/a Belet Cellular v MTN Service Provider (Pty) Ltd* (Case No: 46378/2011) - Upheld by the SCA in *MTN Service Provider (Pty) Ltd Belet Industries CC t/a Belet Cellular* [2020] ZASCA 07 (15 January 2021)

*SA Air/ink (Pty) Ltd v South African Airways (SOC) Limited (In Business Rescue) and Others* (Case No: 2020/01078) – Upheld by the SCA in *SA Air/ink (Pty) Ltd v South African Airways (SOC) Limited (In Business Rescue) and Others* [2020] ZASCA 156 (30 November 2020)

*South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* 2013 (2) SA 583 (GNP); [2013] 2 All SA 96 (GNP) – Upheld by the Constitutional Court in *Ronald Bobroff & Partners Inc v De La Guerre*; *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* 2014 (3) SA 134 (CC); 2014 (4) BCLR 430 (CC)

*De Montlehu v Mayo and Others* 2015 (3) SA 253 (GJ) – Upheld by the SCA in *Mayo NO v De Montlehu* 2016 (1) SA 36 (SCA)

*Wright v Wright and Another* 2013 (3) SA 360 (GJ) – Upheld by the SCA in *Wright v Wright and Another* 2015 (1) SA 262 (SCA)

*Nova Property Group Holdings Ltd and Others v Cobbett and Another* 2016 (4) SA 317 (SCA) – Application for leave to appeal refused by the Constitutional Court

*McBride v Minister of Police and Another* 2016 (4) BCLR 539 (GP); [2016] 1 All SA 811 (GP) – confirmed by the Constitutional Court in *McBride v Minister of Police and Another (Helen Suzman Foundation as amicus curiae)* 2016 (11) BCLR 1398 (CC)

*Glen Morare v SA Rail Commuter Corporation Limited* 585/2013 (GSJ) – Upheld by the SCA in *Glen Morare v SA Rail Commuter Corporation Limited* [2014] ZASCA 7 (13 March 2013)

*Madullammoho Housing Association (Pty) Ltd v Mbambo (MEC for Human Settlement and Local Government, Gauteng Province (Interested Party))* (2016/16069) [2016] ZAGPJHC 285 (28 June 2016) – Upheld by a Full Court of GLD and application for leave to appeal was refused by the Constitutional Court

*Pillay v Hollard Insurance Company Ltd* Case No. 07/032984 – Upheld by the SCA in *Pillay v Hollard Insurance Company Ltd* [2014] ZASCA 175 (19 November 2014)

### **Judgments overturned on appeal**

*SAEWA obo Bester v Rustenburg Platinum Mine and Another* ((2017) 38 ILJ 1779 (LAC); [2017] 8 BLLR 764 (LAC)

*Walker v Mosdel* 2012 JDR 1739 (GSJ)

*Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and Others*  
2017 (4) SA 207 (GJ)

*African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers  
(Pty) Ltd and Others* [2013] 4 All SA 432 (GNP); 2013 (6) SA 471 (GNP)

*Choma v Prasa* (16436/2011) ZAGPJHC 314 (15 November 2016) (GSJ)

*Ngonyama and Another v Ntsimbintle Holdings (Pty) Ltd and Another* (Case No:  
2115779) [2021] ZAGP JHC 31 (26 February 2021)