

JSC INTERVIEW ROUND: APRIL 2022

CANDIDATE: JUDGE OWEN LLOYD ROGERS

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. BA *Cum Laude*, University of Cape Town (1982);

1.1.2. BA Hons (Latin), University of Cape Town (1983); and

1.1.3. LLB *Magna Cum Laude*, University of Cape Town (1985).

1.2. The candidate's professional admissions and honours:

1.2.1. Attorney (1987);

1.2.2. Advocate (1988); and

1.2.3. Senior Counsel (1999).

1.3. The candidate possesses the requisite qualifications for the position for which he has applied. He 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 eight permanent judges on the Constitutional Court bench:

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.

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 63 years old and has completed 9 years' active service as a permanent judge.

4.5. If appointed, the candidate will serve for a period of approximately 6.5 years.

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

5.1. The candidate's commitment to the values of the Constitution is plain from his judicial and other writings.

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

5.3. 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.

5.4. Other judgments include:

- 5.4.1. *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);
- 5.4.2. *Gaertner v Minister of Finance* 2013 (4) SA 87 (WCC) (right to privacy in context of search of premises);
- 5.4.3. *Democratic Alliance v President of RSA* 2014 (4) SA 402 (WCC) (validity of enactment of legislation);
- 5.4.4. *Democratic Alliance v President of the Republic of South Africa and Another* (5950/2017) [2017] ZAWCHC 34 (31 March 2017) (importance of separation of powers in tempering interim judicial intervention in executive action prior to review proceedings);
- 5.4.5. *WWF South Africa v Minister of Agriculture, Forestry and Fishing* 2019 (2) SA 403 (WCC) (constitutional impact on performance of environmental management function);
- 5.4.6. *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* (4305/18) [2020] ZAWCHC 164 (20

November 2020) (proper application of delay in assessing just and equitable relief in judicial review proceedings); and

5.4.7. *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs and Others* (CCT 245/21) [2021] ZACC 29 (3 September 2021) (importance of constitutional requirement to hold regular elections).

5.5. The candidate's extensive involvement in advocacy training for junior members of the Bar 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 Constitutional Court by both the former and current GCB National Advocacy Training Convenors.

5.6. 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.

5.7. 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.

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

- 6.1. 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.
- 6.2. The candidate has experience in numerous areas of the law, particularly administrative law, competition law, tax law and commercial and corporate law.
- 6.3. 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,
- 6.4. In the nine 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.
- 6.5. In his time as an acting judge of the Supreme Court of Appeal, he has had 17 reported judgments.
- 6.6. He has handed down 2 judgments in his time acting on the Constitutional Court, one of which has been reported since he was nominated (*Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob and Others* 2022 (2) BCLR 197 (CC))

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

6.8. 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 5 have ultimately been reversed on appeal. These judgments are referred to under paragraph 6 and in the Annexure below.

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

7.1. Only five of the candidate's numerous judgments (listed in the annexure) appear to have been overturned on appeal.

7.2. 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 and reaffirmed on further appeal to the Constitutional Court.

7.3. 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.

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

8.1. The candidate has served in the legal profession as a candidate attorney from 1986 to 1987, as an advocate from 1988 to 2012 (senior counsel have been conferred on him in October 1999), as a judge of the Cape High Court from 2013 to date, as a judge of the Competition Appeal

Court from January 2017, as an acting judge of the Supreme Court of Appeal for eight separate terms between 2017 and 2021, and as an Acting Justice of the Constitutional Court for two terms in 2021.

- 8.2. 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.
- 8.3. 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.
- 8.4. 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.

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

- 9.1. The candidate is known in the profession to have exceptional linguistic and communication skills in English.
- 9.2. He understands and communicates well in Afrikaans.

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

- 10.1. The candidate is known to produce his judgments extremely promptly. Most of his judgments have been handed down within weeks of the conclusion of a matter.
- 10.2. While acting at the Constitutional Court, he handed down the two judgments he wrote within two-and-a-half months (*Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob and Others* 2022 (2) BCLR 197 (CC)) and within one month, the order having been issued two weeks after the hearing (*Electoral Commission v Minister of Cooperative Governance and Traditional Affairs and Others* (CCT 245/21) [2021] ZACC 29 (3 September 2021)).
- 10.3. The candidate records one judgment being outstanding, which was reserved on 30 November 2021.
- 10.4. He also has a reputation of being exceptionally well-prepared, 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 as a court of first instance).

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

- 11.1. The candidate's fairness and impartiality have been above reproach.
- 11.2. 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.

11.3. 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, argument and the resolution of disputes. Time in his court tends to be well used.

11.4. 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.

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

12.1. There is no reason to doubt the candidate's independent-mindedness.

12.2. On the contrary, members of the Bar consider the candidate to be strongly independently-minded, as is apparent from his judgments, many of which are the product of his own research and the application of law to the issues before him.

12.3. The candidate's judgments also reveal his focus on applying the Constitution and the law without fear or favour.

12.4. A recent example is his majority judgment in *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs and Others* (CCT 245/21) [2021] ZACC 29 (3 September 2021), concerning

the Electoral Commission's request to the Constitutional Court to postpone the general local government elections past the deadline imposed by the Constitution, due to the Covid-19 pandemic. The candidate's majority judgment ultimately did not grant such relief to the Commission.

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

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 of the Bar who served with him on those structures have emphasised his thoroughness, efficiency and pragmatism.

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

14.1. To members of the profession, the candidate's appointment would send a message that outstanding candidates who contribute significantly to the practise and development of the law, embrace Constitutional values and have shown a commitment to transformation of the profession and skills transfer, are not precluded from appointment.

14.2. The candidate's appointment would also send a message to the legal and wider community that candidates of integrity and competence, who show a commitment to Constitutional values, are recognised as

contributing value to the judiciary in our Constitutional democracy,
whatever their race might be.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported judgments (e.g. SALR; All SA; SACR; BCLR; CPLR; SATC; ILJ; BLLR; ALR; BIP):

Shelfplett 46 (Pty) Ltd v MEC for Environmental Affairs and Development Planning
2012 (3) SA 441 (WCC)

Gaertner v Minister of Finance 2013 (4) SA 87 (WCC)

Democratic Alliance v President of RSA 2014 (4) SA 402 (WCC)

Nkata v First Rand Bank Limited 2014 (2) SA 412 (WCC)

Road Accident Fund v Mohohlo 2018 (2) SA 65 (SCA)

Drake Flemmer & Orsmond Inc v Gajjar 2018 (3) SA 353 (SCA)

South African National Parks v MTO Forestry (Pty) Ltd & another 2018 (5) SA 177
(SCA) (dissent)

WWF South Africa v Minister of Agriculture, Forestry and Fishing 2019 (2) SA 403
(WCC)

Commissioner, South African Revenue Service v Glencore Operations SA (Pty) Ltd
[2021] 4 All SA 14 (SCA)

Unreported judgments (e.g. judgments attached to application and judgments only available on JDR; JOL and SAFLII):

Electoral Commission v Minister of Cooperative Governance and Traditional Affairs and Others (CCT 245/21) [2021] ZACC 29 (3 September 2021)

Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others (4305/18) [2020] ZAWCHC 164 (20 November 2020)

Democratic Alliance v President of the Republic of South Africa and Another (5950/2017) [2017] ZAWCHC 34 (31 March 2017)

Judgments upheld on appeal:

Financial Services Board & another v De Wet NO 2002 (3) SA 525 (C), upheld in *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA)

De Jong & others v Trustees, Simcha Trust & others 2014 (4) SA 73 (WCC), upheld in *Trustees of the Simcha Trust (IT 1342/93) v De Jong and Others* 2015 (4) SA 229 (SCA)

De Klerk v Minister of Police [2018] 2 All SA 597 (SCA) (dissenting) – a further appeal to the Constitutional Court was upheld on the grounds set out in the candidate’s dissenting judgment, *De Klerk v Minister of Police* 2021 (4) SA 585 (CC)

Scalabrini Centre Cape Town v Minister of Home Affairs 2013 (3) SA 531 (WCC), the Supreme Court of Appeal however disagreed with some of the candidate’s findings and granted narrower relief in *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA)

Judgments overturned on appeal:

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

CV v Commissioner for the South African Revenue Service [2020] ZAWCHC 140

Mediclinic Southern Africa (Pty) Ltd v The Competition Commission [2020]
ZACAC 3