

JSC INTERVIEW ROUND: OCTOBER 2022

CANDIDATE: JUDGE BARATANG CONSTANCE MOCUMIE

**COURT FOR WHICH CANDIDATE APPLIES: CHAIRPERSON OF THE
ELECTORAL COURT**

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

1.1. The candidate holds the following qualifications:

1.1.1. B.Iuris, University of Zululand (1988);

1.1.2. LLB, University of the Northwest, Mahikeng (2000); and

1.1.3. LLM, University of South Africa (2005).

1.2. The candidate is appropriately qualified.

1.3. The candidate's professional admissions and honours:

1.3.1. Magistrate: 1988 – 1990, 2001 – 2005;

1.3.2. Public Prosecutor: 1991 – 2001; and

1.3.3. Admission as Advocate (2003).

1.4. The candidate's formal qualifications represent a diversity of qualifications which are suited for the expertise necessary for the Electoral Court.

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 3 full time judges on the Electoral Court comprising (as far as could be ascertained):

3.1.1. 2 black men (African); and

3.1.2. 1 white man.

- 3.2. The candidate is a black African woman.

4. The maximum time period the candidate could serve if appointed:

- 4.1. Section 176(2) of the Constitution provides that all judges other than Constitutional Court judges "hold office until they are discharged from active service in terms of an Act of Parliament." The Act in question is the Judges Remuneration and Conditions of Employment Act 47 of 2001.

- 4.2. Section 3(2)(a) of the Act provides that, subject to section 4(4), a judge will ordinarily be discharged from active service upon reaching the age of 70 if, by that date, they have completed a period of active service of not less than ten years. If not, they will be discharged from active service after having completed ten years of active service.

4.3. Section 4(4) allows for a judge who reaches the age of 70 to continue serving until the age of 75 if, at the time of turning 70, they have not yet served 15 years' active service.

4.4. The candidate is 57 and has completed a period of 14 years of active service as a judge.

4.5. If appointed, the candidate could serve up to 13 years actively in office.

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

5.1. The candidate's extensive involvement in the many different organisation listed below indicates her personal commitment to the values of the Constitution outside the scope of her professional capacity.

5.2. The candidate was or presently still is a member of the following organisations:

5.2.1. The Hague Conference on Private International Law (present);

5.2.2. Aids Foundation South Africa, board member (2005 – 2013);

5.2.3. Restorative Justice Centre, SA, board member (2005 – 2012);

5.2.4. Magareng Educational Trust Fund, founding member (trust presently disestablished);

5.2.5. United Nations Office on Drugs and Crime, Global eLearning: Gender Sensitivity, Handbook for the Judiciary on Effective Criminal Justice for Women and Girls, Trainer (present);

- 5.2.6. LLB Academic Advisory Board – University of the Free State, member (2021 – present);
- 5.2.7. Liaison Judge, the Hague Convention on Child Abduction (2021 – present);
- 5.2.8. South African Chapter of the International Association of Women Judges, member of the Presidential Advisory Council (2018 – present);
- 5.2.9. South African Chapter of the International Association of Women Judges, Education Trust – Curriculum Development Committee, member (2019 – present);
- 5.2.10. South African Chapter of the International Association of Women Judges, Advisory Council, Journal (2019 – present);
- 5.2.11. University of Zululand Council, Deputy Chairperson (2013 – 2015);
- 5.2.12. South African Chapter of the International Association of Women Judges, President (2010 – 2014);
- 5.2.13. South African Chapter of the International Association of Women Judges, Deputy President (2009 – 2010);
- 5.2.14. University of Cape Town, Democratic, Governance & Rights Unit, Judges’ Forum member (2010 – present);
- 5.2.15. South African Chapter of the International Association of Women Judges, Founder Member, (2004 – present);

- 5.2.16. Judicial Officers of South Africa, National Secretary and National Deputy Secretary (2001 – 2003);
 - 5.2.17. Presiding Officer Municipal Elections, Klerksdorp (1995);
 - 5.2.18. Black Lawyers Association, Member (2001 – 2004); and
 - 5.2.19. National Association of Democratic Lawyers, Member (1991 – 1995).
- 5.3. The candidate was instrumental in the development of training manuals on Child Law for Prosecutors, Child Law for Judicial Officers, the Criminal Law Bench Book, and Social Context whilst she was a trainer at the Justice College between 2001 – 2004.
- 5.4. The candidate’s further role, ever since she was appointed as a judge of the Supreme Court of Appeal (“SCA”) during July 2016, in the committee system of the SCA on issues pertaining to research and appointment of researchers and the induction of newly appointed judges and acting judges is further testimony of her commitment to the values of the Constitution and her eagerness to promote and empower other persons, including members of the judiciary.
- 5.5. The candidate’s commitment to the values of the Constitution is also manifest in her judgments, and her commitment to appreciate and identify the hardships suffered by the most vulnerable groups in our society, being women and children, is undeniable.

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

6.1. The candidate's judgments cover the complete spectrum of areas of the law and her vast experience equipped her to have a thorough knowledge of constitutional law. In *A B and another v Pridwin Preparatory School* 2019 (1) SA 327 (SCA) the candidate dissented from the majority in the SCA to hold that the right of a private school to terminate the contract between the school and the parents of two children contravened the best interests of a child as guaranteed in section 28(2), as well as impeaching upon the right to education guaranteed in section 29 of the Constitution. The Constitutional Court confirmed the candidate's minority ruling and overturned the SCA's judgment in its judgment reported as *A B and another v Pridwin Preparatory School* 2020 (5) SA 327 (CC). The Constitutional Court confirmed the candidate's finding that the termination clause in the contract between the private school and the parents was unconstitutional, against public policy, and unenforceable to the extent that it purports to allow the school to terminate the parent contract without following fair procedure and without considering the views of the affected children.

6.2. In *Beijers v Harlequin Duck Properties 231 (Pty) Ltd t/a Office Space Online* [2019] ZASCA 89 (31 May 2019) the candidate, writing the unanimous judgment of the SCA, logically and chronologically dealt with the various considerations pertaining to the effect of a non-variation clause in a contract and thus upheld an appeal against the decision of the Gauteng Full Bench to confirm that evidence contradicting the express terms of a written contract is inadmissible.

- 6.3. In the matter of *Tshaka N.O. & others v Standard Bank of South Africa Ltd* [2020] ZASCA 73 (25 June 2020) the candidate considered the claim by a trust against a bank which allowed monies to be transferred out of the trust's bank account and confirmed the fundamental rule of trust law, being that trustees should act jointly.
- 6.4. In *C B & Another v H B* [2020] ZASCA 178 the candidate, writing for the majority of the Supreme Court of Appeal, effectively interpreted the meaning of the word "remarriage" in terms of its context in the South African law and in concluding by overturning the award of a cost order which was granted *de bonis propriis*.
- 6.5. In *Moyeni v De Vries and Others NNO* [2020] ZASCA 128 the candidate, writing the unanimous decision of the Supreme Court of Appeal, through a logical examination of the pleadings ruled that a material error was made by the court *a quo* in the consideration of the pleadings. The candidate found that the pleadings confirmed that the widow of a farmworker was in fact to be recognised as an "occupier" for the purposes of ESTA. The candidate accentuated that ESTA was intended to provide protection to vulnerable people such as women. The candidate furthermore confirmed the SCA's requirements for the lodging of an application for condonation and ordered the successful appellant's attorneys to pay the costs of the appeal as a result of their repeated flagrant disregard of the SCA rules, thereby underlining her consistency and fairness.
- 6.6. In the matter of *Johannes G Coetzee & Seun and Another v Le Roux and Another* [2022] ZASCA 47 (8 April 2022) the candidate examined

the provisions of section 12(3) of the Prescription Act and thoroughly dealt with the applicable caselaw. The candidate methodically applied the relevant principles to ultimately come to the conclusion that the court *a quo* should have upheld the special plea of prescription.

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

- 7.1. The Constitutional Court upheld the minority judgment of the candidate, in the SCA-judgment of DG: *Department of Rural Development and Land Reform & another and Mwelase & Others v DG: Department of Rural Development and Land Reform* 2019 (2) SA 81 (SCA) when it dismissed the majority decision of the Supreme Court of Appeal. The candidate expressed the opinion that the scope of powers of the Land Claims Court and existing judicial methods of interpreting transformative legislation meant that the Land Claims Court's appointment of a special master was appropriate.
- 7.2. The Constitutional Court upheld the candidate's minority decision in the matter of *A B and Another v Pridwin Primary School* 2019 (1) SA 327 (SCA) where the candidate was the lone voice in her recognition of the rights of children and the right to education which should have been considered in the contractual obligation engaged into between parents of school-going children and the school.
- 7.3. The Constitutional Court agreed with the candidate's minority judgment in the matter of *Minister of Home Affairs v Ruta* 2018 (2) 450 (SCA) in recognising the protection that our law should grant to

immigrants by following international commitments to do the same, when it overturned the SCA-majority judgment in this matter.

- 7.4. None of the judgments that the candidate penned during her time at the SCA have been overturned, as far as could be established.

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

- 8.1. The candidate has extensive experience as a judge and acting judge in the superior courts and has been a justice of the Supreme Court of Appeal since July 2016.
- 8.2. The candidate's legal career commenced more than 30 years ago, when she served as a public prosecutor for a period of 10 years, whereafter she was appointed as a Magistrate in 2001.
- 8.3. The candidate provided training to judicial officers as a lecturer at the Justice College and was appointed as an acting regional court magistrate during this time.
- 8.4. Between 2005 and 2008 the candidate acted as a judge in the Free State Division, Northern Cape, and North West Divisions.
- 8.5. In 2008 the candidate was appointed as a judge of the Free State Division of the High Court. She served as an acting judge of the Labour Appeal Court during 2011 and acted in the Supreme Court of Appeal prior to her permanent appointment there in 2016.
- 8.6. The candidate furthermore served as an acting judge of the Competition Appeal Court during 2015 – 2016 and served as a judge of the Military

Court from 2015 – 2019. She currently serves as a judge of the Military Court of Appeal.

- 8.7. The positions that the candidate has held and holds currently in various legal organisations demonstrates her exceptional and concomitant skills and ability to share her wide knowledge of the law, provide guidance to others in the profession, and be able to manage court proceedings effectively.
- 8.8. The candidate has sufficient experience to serve as the chairperson of the Electoral Court.

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.
- 9.3. It had been reported that the candidate's communication skills exude confidence, assertiveness, and wisdom.

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

- 10.1. The candidate delivers her judgments promptly and it was only the matter of *Canton Trading 17 (Pty) Ltd* that was found to have been produced after a period of 3 months, but still within 4 months from the date of hearing the arguments.
- 10.2. The candidate's record indicates that she produces judgments promptly.

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

11.1. According to reports received from senior members of the bar, the candidate is polite and engaging and always well prepared when hearing matters.

11.2. The candidate is known to engage in constructive debates with counsel presenting arguments before her and has been known to offer guidance in a helpful manner to junior members of the bar while she was still a judge of the Free State Division of the High Court.

11.3. The candidate is furthermore known to be punctual and adheres to procedural rules to treat all that present argument before her equally and fairly.

11.4. The candidate's fairness in the treatment of litigants was demonstrated in the unanimous judgment in *Moyeni v De Vries and Others NNO* [2020] ZASCA 128 when she recognised the need of the appellant as a woman to be protected by the provisions of ESTA, being remedial legislation linked to the Constitution. She also articulated the court's displeasure with the flagrant disregard that was shown by the appellant's attorneys to the court's rules.

12. The candidate's independent mindedness:

12.1. The candidate demonstrates independent-mindedness in her judgments and has already been proven correct on three occasions where her minority judgments brought in the Supreme Court of Appeal were followed by the Constitutional Court in dismissing the majority's

judgment in the matters of *A B and Another v Pridwin Preparatory School*, *Minister of Home Affairs v Ruta and DG: Department of Rural Development*, and *Land Reform v Mwelase*, as referred to above in paragraph 7. The candidate furthermore penned the minority judgment in the matter of *Arcus v Arcus* 2022 (3) SA 149 (SCA), where she agreed with the finding of the majority but arrived at that decision through a different application of the law.

12.2. The candidate further wrote the minority judgment in *LD v Central Authority (RSA) and Another* [2022] ZASCA 6, in which matter she found that the majority judgment would have upset precedents set by the SCA and the Constitutional Court and therefore disagreed with the ruling of the majority.

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

13.1. The candidate has served on several committees of the Supreme Court of Appeal which require distinct administrative skills, such as the committee dealing with library and researchers, the house committee dealing with functions, and the induction committee.

13.2. The candidate's vast experience spanning over 30 years in various different positions as a presiding officer attest to the conclusion that she has excellent administrative skills and abilities.

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

- 14.1. The candidate is a 57-year-old black woman who succeeded, despite the initial barriers experienced at the beginning of her career during Apartheid, in building an exceptional legal career.
- 14.2. The candidate's varied and extensive experience makes her ideally suited for appointment to the position for which she has been nominated.
- 14.3. The candidate's appointment further advances the commitment to the development and advancement of black women.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED1. Reported judgments:

- 1.1 *Minister of Home Affairs v Ruta* 2018 (2) SA 450 (SCA)
- 1.2 *DG: Department of Rural Development and Land Reform and Another v Mwelase & Others; and Mwelase & Others v DG: Department of Rural Development & Land Reform & Another* 2019 (2) SA 81 (SCA)
- 1.3 *A B and Another v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA)
- 1.4 *Aquarius Platinum (SA) (Pty) Ltd v Bonene and Others* 2020 (5) SA 28 (SCA)
- 1.5 *Arcus v Arcus* 2022 (3) SA 149 (SCA) – minority judgment

2. Unreported judgments:

- 2.1 *Beijers v Harlequin Duck Properties 231 (Pty) LTD T/A Office Space Online* (1216/2017) [2019] ZASCA 89 (31 May 2019)
- 2.2 *Tshaka NO v Standard Bank* (141/2019) [2020] ZASCA 73 (25 June 2020)
- 2.3 *Phakula v Minister of Safety and Security* (454/19) [2020] ZASCA 109 (23 September 2020)
- 2.4 *Chester v Snowy Owl Properties and Another* (23/2020) [2021] ZASCA 30 (30 March 2021)

- 2.5 *Venter Du Plessis v Road Accident Fund* (138/2020) [2021] ZASCA 64 (26 May 2021)
- 2.6 *Kunene and Others v Minister of Police* (260/2020) [2021] ZASCA 76 (10 June 2021)
- 2.7 *L[...] H[...] v Z[...] H[...]* (775/2020) [2021] ZASCA 130 (30 September 2021)
- 2.8 *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh NO* (479/2020) [2021] ZASCA 163 (1 December 2021)
- 2.9 *LD v Central Authority (RSA) and Another* (Case No 803/2020 and 812/2020) [2022] ZASCA6 (8 January 2022)
- 2.10 *Raphoolo Edwin Manyaka v The State* (434/2020) [2022] ZASCA 21 (21 February 2022)
- 2.11 *Johannes G Coetzee & Seun and Another v Le Roux and Another* (969/2020) [2022] ZASCA 47 (8 April 2022)
- 2.12 *Van Zyl v Old Mutual Life Assurance Company* (A133/2013) [2013] ZAFSHC 194 (31 October 2013) *CC van Zyl v Old Mutual Life Assurance Company*

3. Judgments upheld on appeal:

- 3.1 *Minister of Home Affairs v Ruta* 2018 (2) SA 450 (SCA) *upheld in Ruta v Minister of Home Affairs* 2019 (2) 329 (CC)
- 3.2 *Director- General: Department of Rural Development and Land Reform and Another v Mwelase & Others; and Mwelase & Others v*

DG: Department of Rural Development & Land Reform & Another 2019 (2) SA 81 (SCA) upheld in Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another 2019 (6) SA 597 (CC)

3.3 *A B and Another v Pridwin Preparatory School and Others 2019 (1) SA 327 (SCA) upheld in A B and Another v Pridwin Preparatory School and Others 2020 (5) SA 327 (CC)*

4. Judgments overturned on appeal:

4.1 None of the candidate's judgments written for the Supreme Court of Appeal has been overturned, as far as could be established.