

JSC INTERVIEW ROUND: APRIL 2022

CANDIDATE: JUDGE BRIAN SOLOMON SPILG

**COURT FOR WHICH CANDIDATE APPLIES: COMPETITION
APPEAL COURT**

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

1.1. The candidate holds the following professional qualifications:

1.1.1. B Comm – University of Witwatersrand (1971);

1.1.2. LLB – University of Witwatersrand (1974);

1.1.3. H Dip (Tax) – University of Witwatersrand (1988);

1.1.4. H Dip (Company Law) – University of Witwatersrand (1990);

1.1.5. Advanced Company Law 1 & 2 – University of Witwatersrand (2013);

1.1.6. Accredited Mediator (PABASA) and family law mediator (2021);

1.1.7. Intellectual Property & Public Health Certificate – South Centre Geneva (May 2022);

1.1.8. Competition Law course for acting Judges of Competition Appeal Court: SAJEI (David JP) (January 2022); and

1.1.9. Mediation: SAJEI (July 2022).

1.2. The candidate has held the following professional positions:

1.2.1. Articled Clerk & Attorney; Article clerk (1972 to 1975);

1.2.2. Practising advocate (1976 to 1996);

1.2.3. Senior Counsel (1996 to 2009); and

1.2.4. Judge (2009 to current).

1.3. The candidate has held the following professional memberships:

1.3.1. Attorneys Association: Member (1975);

1.3.2. Society of Advocates: Member (1976 to 2009), including serving as a member of Bar Council in 1996;

1.3.3. General Council of the Bar: Convenor Human Rights Committee (2001 to 2009);

1.3.4. Lawyers for Human Rights: Committee member (1979);

1.3.5. NADEL: Member (1987 to date);

1.3.6. CDR Trust: (Community dispute resolution trust) Member (2 years in the 1990s);

1.3.7. ADRASA: (Alternative Dispute Resolution Association of South Africa) elected to National Council (1992 – 1995);

1.3.8. The Arbitration Foundation of SA: commercial panel member (1996 – 2009);

1.3.9. Advocates for Transformation (AFT): Member (1998 to date); and

1.3.10. Advocates for Transformation (AFT): Treasurer (2019 to date).

1.4. The candidate has held the following professional memberships (Judiciary):

1.4.1. IT Committee (Gauteng Division) (2011 to 2019) (2020 to date); and

1.4.2. Remuneration Committee (Gauteng Division) (2019 to date).

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

2.1. Save as follows, 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.

2.2. The candidate mentions two issues in his application. First, the candidate deeply regrets that his conduct, criticised by the SCA in the matter of *City of Johannesburg Metropolitan Council v Ngobeni* [2012] ZASCA55 (30 March 2012) created a perception of bias with the potential of bringing the judiciary into dispute. The SCA held that the candidate should not have directed an inspection of the scene of the incident and that the candidate had committed a number of irregularities including descending into the arena.

2.3. These observations by the SCA were made 10 years ago. There are no other judgments that the reviewers considered where the candidate's conduct as a judge was so criticised.

2.4. The second issue is a complaint the candidate is informed is still pending before the Judicial Conduct Tribunal regarding a reserved judgment. The candidate disclosed that he has made attempts since

early 2020 to establish the details of the outstanding complaint, without success. As a result of this “pending matter” the candidate was informed in February 2020, February 2022, and July 2022 that he would not be considered for an interview. The candidate believes that he should be afforded the opportunity to address the complaint at the JSC hearings.

2.5. The reviewers have not been able to ascertain the existence or status of the complaint. The JSC has in recent hearings not permitted questions to be put to applicants regarding complaints that have not been raised with the applicant in writing and where the applicant was not given an opportunity to respond, prior to the interview.

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

3.1. There are currently 13 permanent and acting Judges on the Competition Appeal Court, comprising (as far as the reviewers could ascertain):

3.1.1. 4 black women (3 African, 1 Indian);

3.1.2. 4 black men (3 African, 1 Indian);

3.1.3. 1 white woman; and

3.1.4. 4 white men.

3.2. The statistics above are taken from the Competition Appeal Court webpage, which includes the candidate.

3.3. The candidate is a white man.

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 74 years of age.
- 4.5. If appointed, the candidate could serve up to one more year actively in office.

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

- 5.1. From a consideration of the candidate’s membership of organisations such as Lawyers for Human Rights (LHR), the National Association of Democratic Lawyers (NADEL), the Community Dispute Resolution Trust (CDR), the Alternative Dispute Resolution Association (ADRASA) pre democracy,

retaining membership post democracy and attaining membership of Advocates for Transformation (AFT) illustrates the candidate's commitment to the constitutional values in his personal capacity.

- 5.2. The candidate's judgments reflect this commitment to the Constitution. The candidate has dealt with a number of cases addressing constitutional issues. The candidate, both in practice as an advocate and in his secondment to the Land Claims Court, has dealt with constitutional issues as these relate to land claims.
- 5.3. For example, in the matter of *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* [2010] JOL 25031 (GSJ); [2010] ZAGPJHC 3 the candidate addressed the right to housing. While the candidate granted the eviction orders, the judgment canvasses the importance of the local government's primary authority to provide temporary housing in emergency situations.
- 5.4. The candidate identifies in his application that his approach has received academic support in two South African Law Journal (SALJ) articles, commending the remedy he proposed to comparable international housing policies.
- 5.5. The reviewers conclude that this recognition by academia demonstrates the candidate's commitment to the values of the constitution and an understanding of how constitutional rights can be given expression through judicial reasoning.

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

6.1. The candidate has on his reckoning penned over 400 decisions found in SAFLII of which 160 are reported in the formal law reports. These judgments cover all areas of law, including all aspects of commercial law including competition law. The candidate's judgments comprehensively and extensively detail the relevant facts and law. The judgments are carefully reasoned. The judgments articulate the candidate's extensive knowledge of the law.

6.2. The candidate has dealt with several cases which canvas constitutional issues. The reviewers have referenced the decision of *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another above* as an example.

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

7.1. The candidate identifies that the following judgments were upheld on appeal:

7.1.1. In the matter of *Erf 179 Bedfordview (Pty) Ltd v Bedford Square Properties (Pty) Ltd and Another* (44500/10) [2011] ZAGPJHC 29 (28 March 2011), the SCA refused to grant leave to appeal.

7.1.2. In *Mkhwanazi v Quarterback Investment (Pty) Ltd and Another* 2013 (2) SA 549, the judgment was upheld in the SCA in *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA).

- 7.1.3. In *Blue Moon Light Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* [2010] JOL 25031 (GSJ); [2010] ZAGPJHC 3, the judgment was upheld by both the SCA and CC.
- 7.1.4. In *TS v TS* 2018 (3) SA 572 (GJ), the CC referred to the judgment with approval in *S v S and Another* 2019 (6) SA 1 (CC), amongst others.
- 7.2. The candidate identifies that the following judgments were overruled on appeal:
- 7.2.1. *Road Accident Fund & another v Mouton & others* 2003 (5) SA 212 (WLD) rescinded a decision of the candidate under case 26177/2001. The rescission was based on a mistake common to the parties, which mistake formed the basis of the application that served before the candidate.
- 7.2.2. *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA93 (SCA) overruled a decision of the candidate handed down in February 2002. The area of the law, namely in what circumstances a creditor can realise property of its debtor without the sanction of the court, developed between the time the candidate handed down his judgment and when the appeal was argued in November 2004; this included a decision of the SCA in 2004.
- 7.2.3. *Cathay Pacific Limited Airways v Lin* [2017] All SA 722 (SCA) overruled the decision of the candidate in *Lin v Cathay Pacific Limited Airways* [2016] 1 All SA 543 (GJ), holding that the candidate was incorrect to hold Cathay Pacific in

contempt of court as the court order was not competently issued in law as it was beyond the jurisdiction of the court *a quo*.

7.3. The reviewers did not identify any other judgments of the candidate which were overruled on appeal.

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

8.1. The candidate is appropriately qualified to be appointed to the Competition Appeal Court. The candidate's experience both as legal practitioner in all areas of commercial law including his experience as a member of the security regulations panel (dealing with mergers, takeovers and structured finance) and as a judge means the candidate is well placed for appointment to the Competition Appeal Court, where he has been appointed in an acting capacity in 2022 and 2023.

8.2. As a practitioner, the candidate specialised in the areas of corporate law, commercial law, tax and intellectual property.

8.3. The candidate has significant experience over a 13-year period as a permanently appointed Judge in the Gauteng Division, Johannesburg. Prior to his appointment as a permanent Judge, the candidate practised as an attorney and thereafter an advocate, including 13 years as senior counsel at the Johannesburg Bar. The candidate has 51 years of experience.

8.4. The candidate has dealt with a diverse range of matters as a judge as reflected in the judgments referred to in the application.

8.5. The candidate has dealt with matters ranging from criminal to civil (commercial, family, land claims and competition law).

8.6. The candidate listed two specific competition law judgments which are clearly and soundly reasoned. These judgments record an understanding of the law of competition. The Competition tribunal is the forum where competition matters originate before taken on appeal to the Competition Appeal Court. There are few matters canvassing competition matters heard in the Gauteng Division. The paucity of judgments that the candidate has written are not necessarily a complete reflection on the candidate's understanding and grasp of the law of competition.

8.7. The candidate has extensive experience as an appellate judge in full bench appeals in his 13 years as a judge of the Gauteng Division. For example, the candidate references his judgment in *Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC* 2013 (4) SA 607 (GSJ), where the candidate was the senior judge and wrote the judgment.

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

9.1. The judgments of the candidate indicate that he has good linguistic skills in English. His judgments are well reasoned.

9.2. There is no reason to find that the candidate does not have the necessary linguistic and general communication skills required of a Competition Appeal Court Judge.

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

10.1. The candidate has one judgment that took more than a year to deliver *Mkhwanazi v Quarterback Investment (Pty) Ltd and Another* 2013 (2) SA 549 (GSJ). The candidate delivered an *ex tempore* judgment. The reasons for that judgment were delivered later.

10.2. There is one judgment which the candidate delivered after 7 months, *Blue Moonlight Properties 39(Pty) Ltd v Occupiers of Saratoga Avenue and Another* [2010] JOL 25031 (GSJ); [2010] ZAGPJHC 3.

10.3. The candidate mentions personal circumstances which may have affected his ability to provide judgments timeously, including a divorce and other personal circumstances which he indicates that he is willing to disclose to the commission, if necessary. It does however appear in the last few years the candidate has timeously delivered all of his judgments. Mention must be made that most of his recent judgments were delivered on the same day the matter was heard.

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

11.1. The reviewers received no adverse comments or complaints from any member of the Johannesburg Bar.

11.2. From experience, the candidate is always prompt, prepared and courteous. The candidate appears to comply with all procedural rules with optimal use of court time and resources.

12. The candidate's independent mindedness:

12.1. There appears to be no indication that the candidate does not apply his mind independently to the issues arising from matters which the candidate has adjudicated.

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

13.1. The candidate appears to have more than adequate administrative abilities, his application is concise and contains all the relevant material in a sequential order.

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

14.1. The candidate's appointment would send a positive message to the public at large, as the candidate has shown his dedication to the profession for over 51 years.

14.2. The reviewers raise that age limitation for judges service may be an adverse factor for appointment at this stage of the candidate's career.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *Mkhwanazi v Quarterback Investment (Pty) Ltd and Another* 2013 (2) SA 549 (GSJ)
- 1.2. *Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC* 2013 (4) SA 607 (GSJ); [2013] All SA 449 (GSJ)
- 1.3. *TS v TS* 2018 (3) SA 572 (GJ)
- 1.4. *eBotswana (Pty) Ltd v Sentech (Pty) Ltd* 2013 (6) SA 327 (GSJ)
- 1.5. *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ)

2. Unreported judgments:

- 2.1. *Erf 179 Bedfordview (Pty) Ltd v Bedford Square Properties (Pty) Ltd* 2011 JDR 0409 (GSJ)
- 2.2. *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* [2010] JOL 25031 (GSJ); [2010] ZAGPJHC 3
- 2.3. *The Nyavana Traditional Authority v MEC for Limpopo Department of Agriculture* 2020 JDR 2268 (LCC)
- 2.4. *Maredi v Anderson* [2022] ZALCC 15 (18 May 2022)
- 2.5. *Kalagadi Manganese (Pty) Ltd and others v Industrial Development Corporations of South Africa Ltd and others* [2021] JOL 50895 (GJ)

3. Judgments upheld on appeal:

- 3.1. *Erf 179 Bedfordview (Pty) Ltd v Bedford Square Properties (Pty) Ltd* 2011 JDR 0409 (GSJ)

- 3.2. *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* [2010] JOL 25031 (GSJ); [2010] ZAGPJHC 3
- 3.3. *TS v TS* 2018 (3) SA 572 (GJ)
- 3.4. *Mkhwanazi v Quarterback Investment (Pty) Ltd and Another* 2013 (2) SA 549 (GSJ)
4. Judgments overturned on appeal:
 - 4.1. *SA Bank of Athens v van Zyl* 2005 (5) SA 93 (SCA)
 - 4.2. *RAF & another v Moutin & others* 2003 (5) SA 212 (WLD)
 - 4.3. *Cathay Pacific Limited Airways v Lin* [2017] All SA 722 (SCA)
 - 4.4. *Lin v Cathay Pacific Limited Airways* [2016] 1 All SA 543 (GJ)