

JSC INTERVIEW ROUND: APRIL 2023

COMPETITION APPEAL COURT

CANDIDATE: JUDGE LISTER GCINIKAYA NUKU

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

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

1.1. The candidate holds the following professional qualifications:

1.1.1. B Proc – University of Transkei (1993);

1.1.2. Postgraduate Diploma: Corporate Law – University of South Africa (2004); and

1.1.3. Master of Laws: Commercial Law (2011/2014); and

1.2. The candidate was appointed as a Judge in the Western Cape Division (2016).

2. The candidate's integrity and ethics:

2.1. No circumstances are known to the reviewers 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 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 black 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 almost 52 years old. He was first appointed to the Western Cape Division in 2016 and has served almost 7 years as a Judge.

4.5. If appointed, the candidate could serve up to 18 years actively in office.

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

5.1. The candidate's application mentions that he has been a member of the Black Lawyers Association since 2000.

5.2. The candidate further mentions that he has been instrumental in training black and women legal practitioners.

5.3. There is nothing to suggest that the candidate is not personally committed to the values of the Constitution.

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

6.1. The candidate has an extensive knowledge of the law and appears to have a keen grasp of constitutional law principles.

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

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

- 7.1.1. *Kiewitz v Premier of the Western Cape;*
- 7.1.2. *GPC Developments CC and Others v Uys and Another;*
- 7.1.3. *Jordaan v The State;* and
- 7.1.4. *Gamiet and Another v City of Cape Town.*

- 7.2. The case of *Kiewitz v Premier Western Cape* (unreported), which was upheld in *Premier, Western Cape v Kiewitz 2017 (4) SA 202 (SCA)*, concerned whether a plea in mitigation, pursuant to which the provincial government tendered to provide future medical treatment at a provincial health facility rather than pay an award of damages for assessed future medical facilities, ought to be dismissed. The judgment of the candidate could not be located but it appears that the Supreme Court of Appeal concurred in the candidate's decision and the reasons therefor.

- 7.3. The case of *GPC Developments CC v Uys* (unreported), upheld in *GPC Developments CC v Uys [2017] 4 All SA 14 (WCC)*, turned on whether a notice of termination of a contract was valid. The candidate's judgment could not be located but it appears from the Appeal Court's judgment that he correctly summarised the legal principles and applied the law to the facts. The Appeal Court considered additional arguments which did not feature in the judgment of the candidate but which the Court noted may not have been argued before him.

- 7.4. The candidate indicates that the following judgments were successfully appealed against:
 - 7.4.1. *Saidi and Others v Minister of Home Affairs and Others;*

- 7.4.2. *Road Accident Fund v Bee;*
- 7.4.3. *The Trustees elect of the Ndabeni Communal Property Trust v The Master of the High Court, Western Cape and Others;*
- 7.4.4. *Van Zyl NO v MEC for Health, Western Cape;*
- 7.4.5. *Xantha Property 18 (Pty) Limited v NHBRC and Others;*
- 7.4.6. *ABC (Pty) Limited v The Commissioner for the South African Revenue Service;*
- 7.4.7. *Roos v Roos and Another;* and
- 7.4.8. *Seawright v The Nedgroup Ltd and Others.*
- 7.5. *Xantha Properties 18 (Pty) Limited v National Home Builders' Registration Council 2018 (6) SA 320 (WCC)* was overturned in *National Home Builders Registration Council and Another v Xantha Properties 18 (Pty) Ltd 2019 (5) SA 424 (SCA).*
- 7.6. The issue in this case was whether a registered 'home builder' as defined in s 1 of the Housing Consumers Protection Measures Act 95 of 1998 (the Act), is obliged to comply with the provisions of s 14(1) of the Act in respect of homes being built solely for the purpose of being let.
- 7.7. The SCA was critical of the reasoning of the candidate, finding that the respondent's argument was contrary to the clear meaning of the Act (paragraph 11) and convoluted (paragraph 11) and yet "*appears to have been accepted*" by the candidate (paragraph 12). The court went on to note that the respondent's and the candidate's interpretation of the relevant provision of the Act stumbled at the

first hurdle, being the ordinary meaning of the word “*acquire*” (paragraph 12). Ultimately, the Court upheld the appeal on the basis that the respondent’s argument (and the candidate’s finding) ran contrary to the purpose of the Act (paragraphs 13 to 21).

7.8. *Saidi and Others v Minister of Home Affairs and Others* (17770/15) [2015] ZAWCHC 201 (26 November 2015) was unanimously upheld by the Supreme Court of Appeal in *Minister of Home Affairs and Others v Saidi and Others* 2017 (4) SA 435 (SCA), but overturned by the Constitutional Court in *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC).

7.9. The issue in this case was again one of statutory interpretation. In particular, the question which arose for determination was whether a Refugee Reception Officer had the power to extend a temporary asylum permit pending the outcome of a review in terms of the Promotion of Administrative Justice Act. The candidate and the Supreme Court of Appeal held that it did. The Constitutional Court (Jafta J dissenting) found that it did not.

7.10. The Constitutional Court was not critical of the candidate’s findings or reasoning and in fact considered that the respondent’s argument before it (which was in line with the candidate’s finding) accorded with the textual reading of the section in question (paragraph 37).

7.11. *Road Accident Fund v Bee* ([2016] ZAWCHC 122 (20 September 2016)) was overturned in *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA).

7.12. The SCA decision was handed down in an appeal against a judgment penned by the candidate (Hlope JP and Steyn J concurring) in which

the full bench of the Western Cape High Court had overturned the finding of a trial court in an RAF matter relating to the quantification of damages. Leave to appeal to the SCA was granted on application to it.

- 7.13. The SCA (Seriti JA dissenting) was critical of the full bench in the Western Cape for going behind facts which had been agreed in the joint minutes of the experts; and instead finding that the plaintiff had not proven its case. It was also critical of the fact that the full bench had made findings of fact on issues which were beyond the remit of an appeal court (paragraph 78 and 80).
- 7.14. Although not overtly critical of the full bench's decision, it appears clear that the SCA considered that the full bench had misdirected itself in overturning several findings of fact made by the trial court.
- 7.15. *The Trustees Elect of the Ndabeni Communal Property Trust v Fesi (unreported)* was overturned by the Supreme Court of Appeal in *Fesi v the Trustees Elect of the Ndabeni Communal Property Trust* [2018] 2 All SA 617 (SCA).
- 7.16. The reviewers were unable to locate a copy of the candidate's decision. The SCA (per Navsa JA) was, however, strongly critical of his approach in paragraphs [65] to [69] of its judgment.
- 7.17. *ABC (Pty) Limited v The Commissioner for the South African Revenue Service* 2019 JDR 0144 (Tax) was overturned in *Commissioner, South African Revenue Service v Clicks Retailers (Pty) Ltd* 2020 (2) SA 72 (SCA).
- 7.18. This was an appeal in a tax matter which turned on the question of whether the expenditure incurred by Clicks in honouring certain

vouchers arose in terms of one overarching contract or separate and distinct contracts. The decision of the SCA is not overtly critical of the findings or reasoning of the candidate.

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

8.1. The candidate has the following professional experience:

8.1.1. Articles of Clerkship 1994 – 1996;

8.1.2. Admitted Attorney (1996), Notary (2002) and Conveyancer (2003);

8.1.3. Chairperson of the Black Lawyers' Association in the Western Cape (2013 – 2015);

8.1.4. Councillor at the Cape Law Society and the Law Society of South Africa (2010 – 2014); and

8.1.5. Appointed as Judge of the High Court (2016).

8.2. The candidate demonstrates extensive experience in the legal field.

9. The candidate's linguistic and communication skills:

9.1. The candidate's judgments display sound linguistic and communication skills.

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

10.1. The candidate advised that he has three outstanding judgments. It appears that all three matters were heard in the last term of 2022.

10.2. Furthermore, the candidate reports that he has two part-heard matters.

10.3. The reviewers are not aware of any special circumstances that contributed to the delay in delivering these judgments.

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

11.1. There is no evidence before the reviewers that would indicate that the candidate is unable to conduct proceedings fairly, efficiently and effectively.

12. The candidate's independent mindedness:

12.1. There is nothing to suggest that the candidate is not independent-minded.

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

13.1. There is nothing to suggest that the candidate lacks administrative ability. To the contrary, his service with the Law Society and with the Black Lawyers' Association demonstrate a strong administrative ability.

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

14.1. The candidate's judgments are of a high quality. They are well written and comprehensively reasoned.

14.2. The candidate, however, has relatively few reported judgments for a judge who was initially appointed in 2016; and even unreported judgments are difficult to locate. A significant percentage of the candidate's most notable judgments have been overturned on appeal.

- 14.3. A particular concern raised in feedback received from senior members of the profession in Johannesburg is that the candidate appears to have very little experience in competition law. The candidate does not indicate in his application that he has a particular interest, expertise, or experience as a practitioner in the field of competition law.
- 14.4. Insofar as experience on the bench is concerned, the candidate has to date written one minority judgment in *eMedia Investments (Pty) Ltd South Africa v Multichoice (Pty) Ltd and another* [2022] 2 CPLR 23 (CAC) and sat in two other cases as an acting judge in the Competition Appeal Court. The candidate's experience in this Court is therefore limited. The candidate also appears to have had limited experience as a Judge of Appeal in the Western Cape High Court.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *Tiso Blackstar Group (Pty) Ltd and Others v Steinhoff International Holdings NV* 2023 (1) SA 283 (WCC)
- 1.2. *eMedia Investments (Pty) Ltd South Africa v Multichoice (Pty) Ltd and another* [2022] 2 CPLR 23 (CAC)
- 1.3. *Public Protector of South Africa v Speaker of the National Assembly and others* [2022] 4 All SA 417 (WCC)
- 1.4. *Xantha Properties 18 (Pty) Limited v National Home Builders' Registration Council* 2018 (6) SA 320 (WCC)

2. Unreported judgments:

- 2.1. None

3. Judgments upheld on appeal:

- 3.1. *Kiewitz v Premier Western Cape* (unreported) upheld in *Premier, Western Cape v Kiewitz* 2017 (4) SA 202 (SCA)
- 3.2. *GPC Developments CC v Uys* (unreported) upheld in *GPC Developments CC v Uys* [2017] 4 All SA 14 (WCC)

4. Judgments overturned on appeal:

- 4.1. *Xantha Properties 18 (Pty) Limited v National Home Builders' Registration Council* 2018 (6) SA 320 (WCC) overturned in *National Home Builders Registration Council and Another v Xantha Properties 18 (Pty) Ltd* 2019 (5) SA 424 (SCA)

- 4.2. *Saidi and Others v Minister of Home Affairs and Others* (17770/15) [2015] ZAWCHC 201 (26 November 2015) unanimously upheld by the Supreme Court of Appeal in *Minister of Home Affairs and Others v Saidi and Others* 2017 (4) SA 435 (SCA) but overturned by the Constitutional Court in *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC)
- 4.3. *Road Accident Fund v Bee* ([2016] ZAWCHC 122 (20 September 2016) overturned in *Bee v Road Accident Fund* 2018 (4) SA 366 SCA
- 4.4. *The Trustees Elect of the Ndabeni Communal Property Trust v Fesi* (unreported) overturned by the Supreme Court of Appeal in *Fesi v the Trustees Elect of the Ndabeni Communal Property Trust* [2018] 2 All SA 617 (SCA)
- 4.5. *ABC (Pty) Limited v The Commissioner for the South African Revenue Service* 2019 JDR 0144 (Tax) overturned Commissioner, *South African Revenue Service v Clicks Retailers (Pty) Ltd* 2020 (2) SA 72 (SCA)