

**JSC INTERVIEW ROUND: OCTOBER 2022**

**CANDIDATE: JUDGE ANDRE JOHANN VAN NIEKERK**

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

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

1.1. The candidate is appropriately qualified.

1.2. The candidate holds the following qualifications:

1.2.1. BA – University of the Witwatersrand (1978);

1.2.2. LLB – University of the Witwatersrand (1980);

1.2.3. Certificate Programme in Industrial Relations – University of the Witwatersrand (1987);

1.2.4. LLM – University of the Witwatersrand (1992); and

1.2.5. MA, Applied Ethics for Professional – University of Leicester (2009).

1.3. The candidate was admitted as an attorney in 1984.

1.4. The candidate was appointed as a Judge of the Labour Court on 1 January 2009.

**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 6 judges permanently appointed to the Labour Appeal Court. Based on the names listed on the judiciary's website, the Labour Appeal Court's racial and gender composition appears to be:

3.1.1. 1 black (African) woman;

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

3.1.3. 1 white man.

3.2. 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 66 and has completed a period of 14 years of active service as a judge.
- 4.5. If appointed, the candidate could serve up to 4 years actively in office.
5. **The candidate's personal commitment to the values of the constitution:**
  - 5.1. The candidate has been actively involved in developing labour legislation in South Africa for many years, including drafting the bill to replace the Labour Relations Act, 1956, and drafting the Labour Relations Act, 66 of 1995.
  - 5.2. The candidate has advised on labour legislation in Swaziland, Botswana, and South Africa.
  - 5.3. The candidate has been involved in several varying capacities with the International Labour Organisation, many of which have had a direct impact on SADAC countries and their legal systems.
  - 5.4. The candidate held professorships for twenty years through various universities and taught postgraduate students interested in pursuing their studies in labour law.
  - 5.5. The candidate was a member of the Rules Board and contributed towards the drafting of the Rules for the Labour Court and Labour Appeal Court and the Practice Manual for the Labour Court.

5.6. Through education and a profound contribution to the development of labour legislation and labour law, the candidate has no doubt furthered the constitutional goal of promoting access to justice.

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

6.1. The candidate has been appointed to the positions of:

6.1.1. Professor Extraordinarius, Department of Mercantile Law, University of South Africa, 1995 – 1997;

6.1.2. Professor (part-time), Faculty of Law, University of Johannesburg, January 2001 to 2009;

6.1.3. visiting Professor, Faculty of Law, University of Johannesburg, 2009 to 2015;

6.1.4. visiting Professor, School of Law, University of Witwatersrand, January 2002 to 2015; and

6.1.5. from January 2009, the candidate has occupied the position of Judge of the Labour Court

6.2. In addition, the candidate has obtained degrees and certificates in the subjects mentioned above. The candidate has had various international appointments and taken part in various international activities relating to the International Labour Organisation. These roles have included investigative research, report writing, research, advisory roles and training across various jurisdictions, including Botswana, Swaziland, Kuala Lumpur, Malaysia, and Thailand.

6.3. The candidate has co-authored the following books:

6.3.1. The South African Law of Unfair Dismissal (Juta 1994);

- 6.3.2. Practice in the Labour Courts (Juta 1998); and
- 6.3.3. Law@work (Lexis Nexis Butterworths 2008) – Fourth edition published January 2018.
- 6.4. The candidate has authored the following books:
- 6.4.1. *What You Must Know about Unfair Dismissal* (First edition Siber Ink 2002, Fourth edition, January 2008); and
- 6.4.2. *What You Must Know about Employing a Domestic Worker* (Siber Ink 2003).
- 6.5. He has also written or co-authored 64 articles, 2 chapters, contributed to publications, and to a published research paper covering a variety of labour law subjects.
- 6.6. The candidate has more than 210 reported judgments (spanning 1999 to present). Of these, only around 22 have been taken on appeal and, of those, the appeal was upheld in only 10. This reaffirms the candidate's accurate knowledge of the law. Four judgments have been considered by the Constitutional Court, with two having been overturned and the Constitutional Court concurring with the candidate in the other two.
- 7. Judgments of the candidate that have been overturned, upheld or commented on, on appeal:**
- 7.1. *Booi v Amathole District Municipality & others* (2022) 43 ILJ 91 (CC):
- 7.1.1. This matter concerned the question of whether a court or arbitrator is entitled or obliged, in terms of section 193(2)(b)

of the Labour Relations Act, to consider whether a continued employment relationship would be intolerable when considering the remedy of reinstatement in respect of an unfair dismissal.

7.1.2. The Constitutional Court held that a review court is confined to strict grounds of review and can only interfere if the decision reached by the arbitrator was not one that a reasonable decision-maker could reach. It found that in substituting the award of reinstatement made by the arbitrator with one of compensation, the Labour Court erred because it had considered itself at large to conduct the enquiry that had been before the arbitrator afresh, as if it were sitting as a court on appeal. The Constitutional Court thus set aside the order of the Labour Court and ordered the first respondent to reinstate the applicant retrospectively.

7.2. *Amalungelo Workers Union & others v Philip Morris SA (Pty) Ltd & another* (2020) 41 ILJ 863 (CC) (in respect of one claim of five):

7.2.1. The Constitutional Court held that the Labour Court erred in concluding that it did not have jurisdiction to entertain the applicants' claim, set aside the order, and remitted the matter to the Labour Court.

7.3. *Appels v Education Labour Relations Council (ELRC) and Others* (JA19/18) [2019] ZALAC 49; [2019] 10 BLLR 985 (LAC); (2019) 40 ILJ 2284 (LAC) (10 July 2019):

7.3.1. In this decision, an appeal against the candidate's judgment in *Appels v Education Labour Relations and Others* (J2264/17)

[2017] ZALCJHB 428; (2018) 39 ILJ 816 (LC) (7 November 2017) was dismissed.

7.4. *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & others* (2017) 38 ILJ 527 (CC):

7.4.1. This matter dealt with the question of whether an arbitration award issued in terms of the Labour Relations Act will expire after three years from the date on which the award was issued.

7.4.2. The LAC had considered three similar matters involving orders by the candidate and two other judges of the LC. In two of the three matters (one of which concerned the candidate), the LC had held that arbitration awards prescribed after three years. In the other, the LC had held that the Prescription Act was not applicable to awards made in terms of the LRA.

7.4.3. The LAC concluded that an arbitration award made in terms of the LRA is a debt envisaged in the Prescription Act. The LAC concluded further that such award is a simple debt that prescribes on the expiry of three years and that the institution of a review application would not interrupt the running of prescription. Accordingly, the LAC held that the award had prescribed and dismissed the appeal.

7.4.4. The Constitutional Court held that the Prescription Act does not apply to the LRA, but that, even if it did, an arbitration award could not prescribe because it is not a debt as contemplated in the Prescription Act. In the circumstances, the appeal succeeded, and the orders of the LC and the LAC were set aside.

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

- 8.1. The candidate has a long and illustrious professional history. It includes the following:
- 8.1.1. He has obtained four degrees (BA, LLB and MA and LLM).
- 8.1.2. He practiced as an attorney between 1984 and 1986 and thereafter between 1998 until his appointment as a judge in 2009.
- 8.1.3. He was a Professor Extraordinarius between 1995 – 1997 at the University of South Africa, a Professor between 2001 and 2009 at the University of Johannesburg, and a Visiting Professor at the University of Johannesburg and the University of the Witwatersrand between 2009 to 2015 and 2002 to 2015 respectively.
- 8.2. The candidate held various ministerial appointments between 1992 and 2001 relating to the drafting of legislation and the drafting of rules for the LC and the LAC.
- 8.3. He held various international appointments and took part in various international activities and training with the International Labour Organization between 1994 and 2007.
- 8.4. The candidate held various acting appointments between February 1999 December 2008. Thereafter he was appointed permanently.
- 8.5. During this time the candidate has also written extensively, been widely published and has been actively involved in lecturing.



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

9.1. The candidate's judgments read well and show advanced linguistic and communication skills.

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

10.1. The candidate has no outstanding judgments. His record indicates an ability to work efficiently and to produce judgments promptly.

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

11.1. The candidate is an experienced judge, who has held a seat at the Labour Court for nearly a decade. For approximately a decade prior to that, the candidate held various acting positions. With this judicial track record, it must be accepted that the candidate has the requisite ability to conduct court proceedings properly. His demeanour in court is firm and robust.

11.2. There is no reason to doubt his ability to conduct court proceedings.

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

12.1. There is no record of any complaint or incident indicating a lack of independent mindedness on the part of the candidate.

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

13.1. The candidate's record of producing judgments promptly appears indicative of his ability to administer his role efficiently.

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

14.1. The candidate's appointment would further the following important objectives:

14.1.1. ensuring that persons with demonstrated knowledge and experience are appointed to specialist appeal courts; and

14.1.2. preserving and enhancing the integrity of the court as the candidate's appointment would be seen in the public and legal domain as being fitting and appropriate to aid the continued efficiency and effectiveness of the courts.

**ANNEXURE: LIST OF JUDGMENTS CONSIDERED**1. Reported judgments:

- 1.1. *Vodacom (Pty) Ltd v Motsa & another* (2016) 37 ILJ 1241 (LC)
- 1.2. *Amalungelo Workers Union & others v Philip Morris SA (Pty) Ltd & another* (2020) 41 ILJ 863 (CC)
- 1.3. *Appels v Education Labour Relations Council & others* (2018) 39 ILJ 816 (LC)

2. Unreported judgments:

- 2.1. None

3. Judgments upheld on appeal:

- 3.1. None

4. Judgments overturned on appeal:

- 4.1. *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & others* (2017) 38 ILJ 527 (CC)
- 4.2. *Booi v Amathole District Municipality & others* (2022) 43 ILJ 91 (CC)