

JSC INTERVIEW ROUND: OCTOBER 2023

CANDIDATE: JUDGE FAYEEZA KATHREE SETILOANE

COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL

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 formal qualifications:

1.1.1 Bachelor of Arts, University of Natal (1988);

1.1.2 LLB, University of Natal (1991); and

1.1.3 LLM, Georgetown University Law School, Washington DC (1993).

1.3. The candidate's professional admissions and honours:

1.1.4 Advocate from April 1997 – September 2006 and then again from February 2010 to 30 October 2010.

1.1.5 The candidate was a director of Werksmans Advisory Services (Pty) Ltd, a subsidiary to Werksmans Attorneys, from October 2006 to January 2010, when she returned to the bar.

1.1.6 The candidate acted as a judge of the High Court from February 2010 to October 2010 and was appointed

permanently toas a judge at the Gauteng Divisions on 31 October 2010.

- 1.1.7 Since 2014, the candidate has acted in the Constitutional Court, Supreme Court of Appeal, Competition Appeal Court, and Labour Appeal 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 22 judges permanently appointed to the SCA. Based on the names listed on the SCA website, the SCA’s racial and gender composition appears to be:

3.1.1. 10 black women (7 African, 1 Indian, 2 coloured);

3.1.2. 2 white women;

3.1.3. 7 black men (5 African, 1 Indian, 1 coloured); and

3.1.4. 3 white men.

- 3.2. The candidate is a black woman of Indian descent.

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 was appointed as a judge on 31 October 2010. She will turn 70 on 19 August 1935, at which point she will have served as a judge for more than 15 years.
- 4.5. If appointed, the candidate could serve almost 12 further years.

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

- 5.1. The candidate has a long history of activism and commitment to social causes that align with the values enshrined in the Constitution. It is evident from the organisations to which she belongs and in which she participates that she is committed to the transformation of our society, to gender equality, and to the pursuit of justice.
- 5.2. The candidate has, by virtue of her permanent appointment and various intermittent acting appointments, served as a judge for more than 13 years.

- 5.3. The candidate authored a publication which considered the socio-economic circumstances of poor and vulnerable members of society against the transformative vision of the Constitution.
- 5.4. The candidate has authored many publications which relate to women's rights, the advancement of women's rights, and the elimination of discrimination against women. These publications are both in the field of law and outside the field of law.
- 5.5. The candidate was an advocate in the Constitutional Litigation Unit of the Legal Resources Centre in Johannesburg. This undertaking demonstrates a personal commitment to values enshrined in the Constitution as the candidate dedicated her time as well as the income she would have earned if she had spent this time in private practice.
- 5.6. The candidate was a lecturer in international human rights law in the Department of Public Law at the University of the Western Cape.
- 5.7. The candidate's judgments seek to give effect to constitutional principles and display an evident and genuine compassion for the litigants who appear before her.
- 5.8. The candidate also refers to her involvement in several organisations that reflect a commitment to the Constitution, including:
- 5.8.1. The International Association of Women Judges;
 - 5.8.2. National Library Advisory Committee for Courts (NLAC)
Department of Justice;
 - 5.8.3. Advocates for Transformation;

- 5.8.4. AFT representative at the Bar Council; and
- 5.8.5. Honorary Secretary and Assistant Honorary Secretary of the Committee of the General Council of the Bar.

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

- 6.1. The candidate is well-versed in the law and its underlying principles and has given judicially sound judgments as an acting judge in the Labour Appeal Court, Supreme Court of Appeal, Competition Appeal Court as well as in the Constitutional Court.
- 6.2. The candidate was involved in the Constitutional Litigation Unit, Legal Resources Centre in Johannesburg from January 1996 to March 1997 and acted in the Constitutional Court during 2017. Her judgments show that she has a good grasp of constitutional law and is capable of applying it where necessary.
- 6.3. The candidate's judgments are generally indicative of a judicial officer with a deep and developed sense of justice.
- 6.4. The candidate has authored many judgments in which constitutional principles were applied correctly.
- 6.5. As an example of the candidate's grasp of constitutional law she referred to the matter of *SOS Support Public Broadcasting Coalition and others v South African Broadcasting Corporation (SOC) Limited* 2018(12) BCLR 1553 (CC) 2019 (1) SA 370 (CC) which was written by the candidate and concurred in by eight other justices.
- 6.6. The candidate has reported judgments in a range of other areas of law.

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

7.1. Ten of the candidate's judgments have been unsuccessfully appealed against and six of the candidate's judgment have been overturned on appeal.

7.2. In general, the successful appeals against the candidate's judgments have not been on account of obvious errors on her part but due to the complexity of the matters, on issues in respect of which judges could reasonably differ. Given the extent of the candidate's judicial career, six reversals do not detract from the strength of her application.

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

8.1. The candidate was an advocate at the Johannesburg Bar for 9 years and a director at Werksmans Advisory Services (Pty) Ltd, which is a subsidiary of Werksmans Attorneys, where she was employed as in-house counsel for 4 years before her appointment to the bench.

8.2. During the period 2010 to date, the candidate has held a permanent appointment at the High Court of South Africa and has had various acting appointments in the Constitutional Court, the Supreme Court of Appeal, the Labour Appeal Court, the Labour Court and the Competition Appeal Court.

9. The candidate's linguistic and communication skills:

9.1. The candidate is proficient in English, her judgments are well structured, written, and reasoned.

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

- 10.1. The candidate demonstrates an ability to produce judgments promptly.
- 10.2. She has delivered all judgments considered by the review team within 3 months of hearing.
- 10.3. The candidate also states that she has no outstanding judgments.

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

- 11.1. The candidate presents herself as assertive, confident, and formidable.
- 11.2. There have been no adverse comments regarding the candidate's fairness, punctuality, preparedness, adherence to procedural rules, optimal use of court time and resources, responsiveness, performance of case management functions, or management of administrative matters.
- 11.3. The candidate is able to conduct court proceedings, having regard to her judgments.

12. The candidate's independent mindedness:

- 12.1. From the candidate's judgments it is clear that she exhibits independent-mindedness and a lack of bias.

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

13.1. The candidate has a reputation for being hardworking, administratively sound, and organised.

13.2. The candidate is administratively proficient which is proven by her prompt preparation and the excellent manner in which her judgments are written.

13.3. Her career record and practice as an advocate since 1997, her vast experience over the years in various court, and her academic work in the form of publications illustrate her administrative ability.

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

14.1. The candidate is a woman who has vast experience in the appeal courts of the country and has widely published on various topics.

14.2. The candidate is a pioneer. She was one of the first law researchers at the Constitutional Court and the first of such researchers to ascend to the bench and later to act as a judge at the Constitutional Court.

14.3. The candidate's judgments illustrate that she is unbiased, has a solid grasp of the law, including constitutional law principles and the interrelation thereof, which she can explain excellently in her judgments.

14.4. The candidate demonstrates potential to further contribute to the judiciary at the Supreme Court of Appeal, having regard to her considerable number of judgments, experience, capabilities, and demeanour.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *Nova property Group Holdings v Cobbett* 2016 (4) SA 317 (SCA)
- 1.2. *UASA- The Union and Others v Western Platinum (Pty) Ltd & Others* (2021) 42 ILJ 371 (LAC)
- 1.3. *Techniflex CC & Another v Manaso and Another* (2021) 42 ILJ 366 (LAC)
- 1.4. *South African Workers Union obo Mosoma v Greater Tubatse Local Municipality* [2021] 5 BLLR 494 (LAC)
- 1.5. *Legal Aid South Africa v Theunissen* (2020) 41 ILJ 625 (LAC)
- 1.6. *Rappo v Rustenburg Local Municipality* [2020] 6 BLLR 553 (LAC)
- 1.7. *SA Breweries (Pty) Ltd v Hansen & Others* (2017) 38 ILJ 1766 (LAC)
- 1.8. *Pharmaco Distribution (Pty) Ltd V W* (2017) 38 ILJ 2496 (LAC)
- 1.9. *Rukwaya and Others v Kitchen Bar Restaurant* (2018) 39 ILJ 180 (LAC)
- 1.10. *SAEWA obo Bester v Rustenburg Platinum Mine and Another* (2017) 38 ILJ 1779 (LAC)
- 1.11. *Kukard v GKD (Pty) Ltd* [2015] 1 BLLR 63 (LAC)
- 1.12. *SAMWU obo Manentza v Ngwathe Local Municipality and Others* [2015] 9 BLLR 894 (LAC)

- 1.13. *Cele v Avusa Media Ltd* (08/10831) [2013] ZAGPJHC 15; [2013] 2 All SA 412 (GSJ) (14 February 2013)
- 1.14. *Export Development Canada and Another v Westdawn Investments Proprietary and Others* [2018] 2 All SA 783 (GJ)
- 1.15. *Legal Aid South Africa v Theunissen* (2020) 41 ILJ 625 (LAC); [2020] 4 BLLR 370 (LAC)
- 1.16. *McBride v Minister of Police and Another* [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP)
- 1.17. *Rapoo v Rustenburg Local Municipality* [2020] 6 BLLR 533 (LAC)
- 1.18. *Rukwaya and Others v Kitchen Bar Restaurant* (2018) 39 ILJ 180 (LAC); [2018] 2 BLLR 161 (LAC)
- 1.19. *South African Breweries (Pty) Ltd v Hansen and Others* (2017) 38 ILJ 1766 (LAC); [2017] 9 BLLR 892 (LAC)
- 1.20. *South African Municipal Workers Union obo Manentza v Ngwathe Local Municipality and Others* (2015) 36 ILJ 2581; [2015] 9 BLLR 894 (LAC)
- 1.21. *ABSA Bank Ltd v Botha NO And Others* 2013 (5) SA 563 (GNP)
- 1.22. *African Banking Corporation Of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd And Others* 2013 (6) SA 471 (GNP)
- 1.23. *Booyesen v Safety and Security Sectoral Bargaining Council* 2021 JDR 0540 (LAC)
- 1.24. *BR and Another v TM* 2016 (3) SA 417 (GJ)

- 1.25. *Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and Others* 2017 (4) SA 207 (GJ)
- 1.26. *Msimang NO v Katuliiba* 2012 JDR 2391 (GSJ)
- 1.27. *Residents, Industry House v Minister of Police and Others* 2021 (2) SA 220 (GJ)
- 1.28. *S v Liesching and Others* 2019 (4) SA 219 (CC)
- 1.29. *Standard Bank of South Africa Ltd v Kruger; Standard Bank Of South Africa Ltd v Pretorius* 2010 (4) SA 635 (GSJ)
- 1.30. *BMW (South Africa) (Pty) Ltd v National Union of Mineworkers of South Africa and Another* (2020) 41 ILJ 1877 (LAC); [2020] 11 BLLR 1079 (LAC)
- 1.31. *Communication Workers Union and Others v Mobile Telephone Networks (Pty) Ltd and Another* (2020) 41 ILJ 2072 (LAC); [2020] 5 BLLR 1096 (LAC)
- 1.32. *South African Transport and Allied Workers Union of South Africa v Algoa Bus Company (Pty) Ltd* [2019] 3 BLLR 262 (LAC); [2019] 40 ILJ 827 ILJ (LAC)
- 1.33. *National Education Health and Allied Workers Union obo Kgekwanne v Department of Development Planning and Local Government, Gauteng* [2015] 6 BLLR 575 (LAC)
- 1.34. *SACCAWU obo Mokebe and Others v Pick'n Pay Retailers* [2017] 12 BLLR 1196 (LAC); (2018) 39 ILJ 201 (LAC)
- 1.35. *Palluci Home Depot (Pty) Ltd v Herskowitz and Others* [2015] 5 BLLR 484 (LAC); (2015) 36 ILJ 1511 (LAC)

- 1.36. *Quest Flexible Staffing Solutions (Pty) Ltd (a division of ADCORP Fulfilment Services (Pty) Ltd) v Lebogate* [2015] 2 BLLR 105) LAC)
- 1.37. *INCP Chlorochem (Pty) Ltd v National Energy Regulator and Others* [2017] All SA 950 (GJ); 2017 (6) SA 158 (GJ)
- 1.38. *De Montlehu v Mayo N.O. and Others* 2015 (3) SA 253 (GJ)
- 1.39. *Wright v Wright and Another* 2013 (3) SA 360 (GSJ)
- 1.40. *Council for Medical Schemes and Ors v Liberty Medical Scheme and Another* [2013] 3 All SA 508 (GNP)
- 1.41. *Minister of Finance v Public Protector and others* 2022 (1) SA 244 (GP)
- 1.42. *Minerals Council of South Africa v Minister of Mineral Resources and energy and others* 2022(1) SA 535 (GP)
2. Unreported judgments:
 - 2.1. *Motladile v Minister of Police* 2023 JOL 59486 SCA
 - 2.2. *Firm- o-seal CC v Wynand Prinsloo & Van Eeden INC and another* 2023 JDR 2274 (SCA) (co-authored with Judge Ponnann)
 - 2.3. *Greater Taung Local Municipality v South Africa Local Government Bargaining Council* 2023 JDR 2635 (LAC)
 - 2.4. *Ekurhuleni Municipality v Sibanda* 2022 JDR 1183 (GJ)
 - 2.5. *Uitspan Colliery (Pty) Ltd v Lombaard Insurance Company Ltd* 2022 JDR 1652 (GJ)

2.6. *Minister of Justice and Constitutional Development of the Republic of South and others v Pennington and another* 2023 JDR 1158 (SCA)

3. Judgments upheld on appeal:

3.1. *Belet Industries CC t/a Belet Cellular v MTN Service Provider (Pty) Ltd* (Case No: 46378/2011) – upheld by the SCA in *MTN Service Provider (Pty) Ltd Belet Industries CC t/a Belet Cellular* [2020] ZASCA 07 (15 January 2021)

3.2. *SA Air/ink (Pty) Ltd v South African Airways (SOC) Limited (In Business Rescue) and Others* (Case No: 2020/01078) – upheld by the SCA in *SA Air/ink (Pty) Ltd v South African Airways (SOC) Limited (In Business Rescue) and Others* [2020] ZASCA 156 (30 November 2020)

3.3. *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* 2013 (2) SA 583 (GNP); [2013] 2 All SA 96 (GNP) – upheld by the Constitutional Court in *Ronald Bobroff & Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* 2014 (3) SA 134 (CC); 2014 (4) BCLR 430 (CC)

3.4. *De Montlehu v Mayo and Others* 2015 (3) SA 253 (GJ) – upheld by the SCA in *Mayo NO v De Montie* 2016 (1) SA 36 (SCA)

3.5. *Wright v Wright and Another* 2013 (3) SA 360 (GJ) – upheld by the SCA in *Wright v Wright and Another* 2015 (1) SA 262 (SCA)

- 3.6. *Nova Property Group Holdings Ltd and Others v Cobbett and Another* 2016 (4) SA 317 (SCA) (application for leave to appeal refused by the Constitutional Court)
- 3.7. *McBride v Minister of Police and Another* 2016 (4) BCLR 539 (GP); [2016] 1 All SA 811 (GP) – confirmed by the Constitutional Court in *McBride v Minister of Police and Another (Helen Suzman Foundation as amicus curiae)* 2016 (11) BCLR 1398 (CC)
- 3.8. *Glen Morare v SA Rail Commuter Corporation Limited* 585/2013 (GSJ) – upheld by the SCA in *Glen Morare v SA Rail Commuter Corporation Limited* [2014] ZASCA 7 (13 March 2013)
- 3.9. *Madullammoho Housing Association (Pty) Ltd v Mbambo (MEC for Human Settlement and Local Government, Gauteng Province (Interested Party))* (2016/16069) [2016] ZAGPJHC 285 (28 June 2016) (upheld by the full court and application for leave to appeal refused by the Constitutional Court)
- 3.10. *Pillay v Hollard Insurance Company Ltd* Case No. 07/032984 - Upheld by the SCA in *Pillay v Hollard Insurance Company Ltd* [2014] ZASCA 175 (19 November 2014)

4. Judgments overturned on appeal:

- 4.1. *SAEWA obo Bester v Rustenburg Platinum Mine and Another* ((2017) 38 ILJ 1779 (LAC); [2017] 8 BLLR 764 (LAC))
- 4.2. *Walker v Mosdel* 2012 JDR 1739 (GSJ)
- 4.3. *Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and Others* 2017 (4) SA 207 (GJ)

- 4.4. *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* [2013] 4 All SA 432 (GNP); 2013 (6) SA 471 (GNP)
- 4.5. *Choma v Prasa* (16436/2011) ZAGPJHC 314 (15 November 2016) (GSJ)
- 4.6. *Ngonyama and Another v Ntsimbintle Holdings (Pty) Ltd and Another* (Case No: 2115779) [2021] ZAGP JHC 31 (26 February 2021)