

JSC INTERVIEW ROUND: APRIL 2024

CANDIDATE: ADVOCATE MATTHEW CHASKALSON SC

COURT FOR WHICH CANDIDATE APPLIES: CONSTITUTIONAL 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. BA (Hons) LLB – all obtained *cum laude* from the University of the Witwatersrand;

1.1.2. member of the Johannesburg Society of Advocates;

1.1.3. member of PABASA; and

1.1.4. silk conferred in 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 ten full time Judges on the Constitutional Court, comprising (as far as could be ascertained):

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

3.1.2. 5 black men (3 African, 1 Indian, 1 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(1) of the Constitution provides that a Constitutional Court Judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court Judge.

4.2. Section 4(1) of the Judges Remuneration and Conditions of Employment Act 47 of 2001 provides that where a Constitutional Court Judge's 12-year term of office would expire before they have completed 15 years' active service as a Judge, their term is extended until they have served 15 years.

4.3. Section 4(1) is subject to the provisions of section 4(2), which allows a Judge who has turned 70 to continue serving until they have completed 15 years' active service as a Judge, or turned 75, whichever comes first.

4.4. In terms of definition (b) of "*active service*" in section 1(1) of the Act, active service includes "*any continuous period*" of "*any service performed as a Constitutional Court judge or judge*" "*in an acting capacity prior to assuming office as a Constitutional Court judge or judge in a permanent capacity*".

- 4.5. It would appear, therefore, that the candidate's acting stints in the Constitutional Court during the last term of 2023 and first term of 2024 constitute "*active service*" in terms of the Act.
- 4.6. At the time of the interviews, the candidate will be approximately 60 years and 8 months old.
- 4.7. If appointed, the candidate would be eligible to complete a period of 14 years and 3 months' active service as a Judge of the Constitutional Court.

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

- 5.1. The candidate has shown a strong personal commitment to the values of the Constitution. As the candidate notes in his application, he spent six years at the Centre for Applied Legal Studies, a human rights organisation based at the Wits School of Law. While there he created and headed the Constitutional Law Project.
- 5.2. The candidate has been extensively involved in two Commissions of Inquiry over the past ten years, namely the Marikana Commission and the State Capture Commission. These Commissions of Inquiry are intended to protect the values of the Constitution within our democracy. The candidate's service to the Commissions, over a period of some ten years, illustrates his commitment to the values of the Constitution.
- 5.3. In addition, the reviewing team conducted a detailed analysis of the articles written by the candidate. As will be evident from the

discussion below, these articles demonstrate that the candidate has a real commitment to justice and constitutionalism.

5.4. For instance, the candidate argued against the constitutional protection of property, precisely because this would risk entrenching existing privilege further.

5.5. Another example is the candidate's article entitled "The Constitution and the Bill of Rights: their Implications for Language Education" in which the candidate showed his appreciation – as early as 1997 – for the critical role that languages play in our society in general and the education sector in particular. He noted that language had in the past been used as a tool for oppression and social engineering in the education sector.

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

6.1. The candidate is one of South Africa's leading advocates in the field of constitutional law, with an enviable knowledge of the law in this area. The list of reported cases in which the candidate has appeared, most of which are in the field of constitutional law, speaks for itself in this regard.

6.2. In addition, the candidate's academic writings, while mostly produced more than two decades ago, illustrate a deep and prescient understanding of the social and economic issues that continue to oppress South Africans today.

6.3. For example, the candidate has written extensively on the "land question", including publications in *Consultus* (1997) dealing with The Land Claims Court; an article in the *South African Journal on Human Rights* (1993) titled "The Problem with Property: Thoughts

on the Constitutional Protection of Property in the United States and the Commonwealth”; an article in the *South African Journal on Human Rights* (1994) titled “The Property Clause: Section 28 of the Constitution”; and an article titled “Stumbling towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution” published in the 1995 *South African Journal on Human Rights*.

- 6.4. These articles expertly dissect the constitutional offering on the subject and remain relevant today. The candidate’s writing traverses historical injustices and the deliberately-crafted government policies which were intended to address land disputes. At that time, although the Constitutional Court was still new, the candidate showed substantial appreciation of its important role, its jurisdiction, and the rules governing its procedures.
- 6.5. Many of the candidate’s articles have been reviewed by other authors and cited by the courts. For example, his writings on the interpretation of section 25 of the Constitution were referred to with approval in the Constitutional Court decision in *FNB of SA Ltd t/a Wesbank v CSARS; FNB of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 47 fn 79.
- 6.6. Paragraph 47 of the judgment reads:

“Constitutional property clauses are notoriously difficult to interpret, and it is unlikely that the interpretation of section 25 of the Constitution will be wholly spared these problems. A court is therefore fortunate, at this relatively early stage of section 25 jurisprudence, to have at its disposal a considerable body of work produced by South African

scholars in the field. In this judgment heavy reliance is placed on such work and the assistance derived therefrom gratefully acknowledged.”

6.7. In footnote 79, three articles by the candidate are listed as “*significant contributions*” in the field, together with a number of other publications.

6.8. The candidate’s knowledge of constitutional law extends beyond the issue of land, however.

6.8.1. The candidate’s article titled “Democracy and Constitutionalism”, which was co-authored with Davis and de Waal, covers the topic of constitutional law more broadly. The article has been generously and frequently referred to by other academic writers and the courts. For instance, the article is positively referred to by Van der Walt in an article titled “Transformative constitutionalism and the development of South African property law” *Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg* (2006) 2006:1;

6.8.2. In an article titled “The Constitution and the Bill of Rights: their Implications for Language Education”, the candidate explores the overall scheme of the Constitution on the legislative competencies of national and provincial legislatures around matters pertaining to language policy, generally. The article also sets out the obligations and limits laid down by Chapter 2 of the Constitution on the right of access to basic education and the right to receive education in one’s official language or languages of one’s choice in

public educational institutions (whenever reasonably practicable), as well as how these fundamental rights, in effect, dictate the use and channelling of state resources and finances “*to make education available in official language of choice, subject to questions of practicability and balancing considerations of practicability, equity and redress*”.

6.8.3. In an article titled “Constitutionalism, the Rule of Law, and the First Certification Judgment: Ex Parte Chairperson of the Constitutional Assembly in Re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)”, the candidate discusses the first judgment that the Constitutional Court delivered in certifying whether the first constitutional draft adopted by the then Constitutional Assembly complied with the 34 Constitutional Principles laid down by section 71(2) of the interim Constitution.

6.9. The candidate has also listed the loose-leaf (three-volume) book titled *South African Mineral and Petroleum Law*, which he co-authored with Dale, Bekker, Bashall, Dixon, Grobler, Loxton, Ash, Cox, and Gildenhuys (LexisNexis, Service Issue 19, April 2016). Unfortunately, the book does not list which of the authors wrote which sections of the publication.

6.9.1. The reviewing team contacted Dr Michael Otto Dale and asked that he provide insight into the candidate’s individual contributions to chapters or sections of the book. Dr Dale indicated that the candidate had been asked to co-author the book specifically because the other co-authors did not have

his knowledge or experience in the field of constitutional law, and without which knowledge or experience the book would have suffered lacunae as far as constitutional law aspects of and impacts on mineral/mining and petroleum law are concerned.

6.9.2. Dr Dale indicated further that, although the candidate was not responsible for specific sections or chapters in this three-volume loose-leaf text, he was involved from inception in writing and/or commenting on any constitutional law issues and cases arising throughout the book.

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

7.1. The candidate has not handed down any judgments.

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

8.1. The candidate's professional experience is set out in his application. He obviously has vast experience as an advocate and, before that, as an academic. His reputation is such that he was asked to act in the Constitutional Court, having never previously acted as a Judge. This is of course an enormous credit to him, but at the same time highlights the candidate's lack of experience as a Judge.

9. The candidate's linguistic and communication skills:

9.1. It is clear from the candidate's academic writings that the candidate's linguistic and communication skills are exceptional, and that he has a remarkable ability to analyse and present complex

questions of law in a clear and accessible manner. Merely by way of example, the article dealing with the Constitutional Court's certification judgment (mentioned above) epitomises the candidate's intellectual capacity, language skills, writing and analytic skills, and deep knowledge of the law and its underlying principles. In the article, the candidate digests what is one of the longest and most highly technical judgments produced by the Constitutional Court. He produces an analysis thereof which is accessible to legal scholars, legal practitioners, and lay-people alike.

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

10.1. Not applicable.

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

11.1. Not applicable.

12. The candidate's independent mindedness:

12.1. The candidate's independent mindedness is evident from the views expressed in the articles he has written. He articulates competing arguments fairly and engages with them respectfully, while explaining his points of disagreement and motivating his own view.

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

13.1. The reviewing team cannot comment on the candidate's administrative ability beyond noting that he has occupied leadership positions within the group structure of the bar.

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

14.1. The candidate's appointment would send a message to the public at large that excellence in judicial candidates is valued and sought out, with a view to maintaining the high standards of judicial decision-making in this country, particularly in our highest court.

14.2. The candidate's appointment would also reflect a willingness to appoint Judges to the Constitutional Court directly from practice.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

1.1. None

2. Unreported judgments:

2.1. None

3. Judgments upheld on appeal:

3.1. None

4. Judgments overturned on appeal:

4.1. None