

JSC INTERVIEW ROUND: APRIL 2024

CANDIDATE: JUDGE ASHTON SCHIPPERS

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. BProc, University of South Africa (1982);

1.1.2. LLB, University of South Africa (1986);

1.1.3. LL.M. (Constitutional Law, Administrative Law, Conflict Resolution), Harvard University (1991);

1.1.4. LL.M. (Company Law and International Law), University of Cape Town (1998); and

1.1.5. Post-graduate diploma theology (*cum laude*), Stellenbosch University (2019).

1.2. The candidate was admitted:

1.2.1. as an attorney in 1985;

1.2.2. as an advocate of the High Court in 1993; and

1.2.3. to the New York Bar in 1995.

1.3. The candidate was appointed a Judge of the High Court of South Africa (Western Cape Division) on 15 February 2013 and a Judge of the Supreme Court of Appeal in November 2016.

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 10 full time Judges on the Constitutional Court bench, 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 black (Coloured) 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. At the time of the interviews, the candidate will be approximately 65 years and 9 months old and will have completed a period of approximately 11 years and 2 months of active service.

4.5. If appointed, the candidate would be eligible to complete a period of 4 years and 2 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 is undoubtedly committed to the values of the Constitution. This was and is evident from:

5.1.1. his leadership of the Cape Bar when he was Chairperson of the Cape Bar Council;

5.1.2. the arguments he advanced as counsel in matters relating to human rights (as listed on page 11 of his application);

5.1.3. the subject of his postgraduate studies; and

5.1.4. from his judgments as a Judge of the High Court and of the Supreme Court of Appeal.

- 5.2. The candidate always presents as dignified and demonstrates by word and deed his consideration for the dignity of others. His service to the Cape Bar attests to the premium he places on the core value of human dignity.
- 5.3. The candidate shows a particular commitment to the achievement of equality and freedom through his sensitivity to the suffering by victims of gender-based violence. This appears from his dissenting judgment in the matter of *C v C and Others* (205/2019) [2021] ZASCA 12 (3 February 2021), which he listed as one of his 10 most significant judgments. In that judgment, without departing from his characteristic measured and analytical style of writing, he demonstrated an acute empathy for the mental, psychological and physical abuse suffered by the victim of gender-based violence which was at the heart of the case.
- 5.4. The candidate indicated in his questionnaire that he made a deliberate choice to work “*virtually*” exclusively with black and women junior counsel when he practiced as a Senior Counsel, in an effort to share his knowledge and experience with junior advocates who are prejudiced by discriminatory briefing patterns.

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

- 6.1. The candidate enjoys a comprehensive knowledge of the law, gained through his extensive academic studies as well as his considerable experience as a practitioner and Judge. Both in his capacity as an advocate and as a Judge, he has been engaged in an array of cases traversing a wide range of legal subject matter. In each matter, he applies the relevant area of law and addresses the pertinent legal issues with due regard to the legal principles.

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

- 7.1. The candidate indicated that he has penned more than 80 reported judgments in his seven years on the bench of the Supreme Court of Appeal.
- 7.2. The candidate indicated that only two of his judgments as a Judge of the High Court were overturned on appeal to the Supreme Court of Appeal. The reviewing team did not consider these judgments.
- 7.3. The candidate indicated that only one of his judgments in the Supreme Court of Appeal has been overturned on appeal to the Constitutional Court, namely the judgment in *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (2) SA 81 (SCA); overturned on appeal to the Constitutional Court in *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30; 2019 (11) BCLR 1358 (CC); 2019 (6) SA 597 (CC)
- 7.4. The candidate held in his judgment that the Land Claims Court overreached in appointing a special master and, consequently, reversed the LCC's appointment. On appeal, Cameron J, writing for the majority, stated that a careful consideration was required of where judicial power stops as well as the practical question as to when a court intervention on that scale was justified.

The majority held that the LCC had exercised a true discretion as a specialist court in assessing its own capacity and expertise to

ensure an effective remedy within a field the statute specially entrusted to it, and accordingly restored the LCC's order.

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

8.1. The candidate has been active in the legal profession for nearly 40 as an attorney, Prosecutor, Magistrate, advocate, and Judge. These various roles would have afforded him valuable insight into the operation of lower courts, and the experiences of the public who have recourse to the courts.

8.2. His judgments attest to the diverse areas of law in which he has practised and exercised judgment.

9. The candidate's linguistic and communication skills:

9.1. The candidate's judgments are written in a clear and accessible style, are structured sensibly and are well-reasoned.

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

10.1. No information has been provided to the reviewer to contradict the candidate's account at paragraph 16.5 of his application regarding his limited outstanding judgments. There are no known instances where he has taken longer than three months to hand down a judgment.

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

11.1. The candidate's career successes and his ascendancy in the legal profession have never diminished his respect and his attentiveness to the needs of others, which qualities are conducive to the conduct

of legal proceedings in an orderly and respectful manner. The candidate has a reputation for fairness, preparedness, courtesy and respect for all. His calm temperament is ideally suited to hearing disputes. He listens carefully and asks pertinent questions of counsel.

12. The candidate's independent mindedness:

12.1. The candidate's independent-mindedness is reflected in his judgments where, even where the subject matter is such as may stir emotion and provoke strong opinions, he has retained professional detachment and a fair-minded analytical judgment.

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

13.1. The candidate led the Cape Bar as the Chairperson of the Cape Bar Council from January 2004 to December 2006. This would tend to indicate that the candidate has administrative ability.

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

14.1. The appointment to the Constitutional Court of a person such as the candidate, who has conscientiously applied himself for more than 40 years, who has committed himself to the legal profession in multiple roles, and who has an admirable work ethic, while remaining true to his values and mindful of his roots and the greater community that he serves, will send a powerful message that merit and assiduous application to the job are valued just as much as the importance of diversity on the bench.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *Afriforum NPC v Nelson Mandela Foundation Trust and Others* 2023 (4) SA 1 (SCA)
- 1.2. *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* 2022 (4) SA 57 (SCA)
- 1.3. *Commissioner for the South African Revenue Service v Big G Restaurants (Pty) Ltd* 2019 (3) SA 90 (SCA)
- 1.4. *Director-General for the Department of Rural Development and Land Reform and Another and Others v Mwelase and Others* 2019 (2) SA 81 (SCA)
- 1.5. *Gongqose & Others v Minister of Agriculture, Forestry and Others* 2018 (5) SA 104 (SCA)

1. Unreported judgments:

- 1.1. *Minister of Cooperative Governance and Traditional Affairs and Another v British American Tobacco South Africa (Pty) Ltd and Others* [2022] ZASCA 89; 2022 JDR 1641 (SCA)
- 1.2. *C v C and Others* (205/2019) [2021] ZASCA 12 (3 February 2021) (please see comments at paragraphs 5.3 and 5.4 above)

2. Judgments upheld on appeal:

- 2.1. *Commissioner for the South African Revenue Service v Big G Restaurants (Pty) Ltd* 2019 (3) SA 90 (SCA)
Upheld on appeal in: *Big G Restaurants (Pty) Ltd v Commissioner*

for the South African Revenue Service (CCT13/19) [2020] ZACC 16; 2020 (6) SA 1 (CC); 2020 (11) BCLR 1297 (CC)

2.2. *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* 2022 (4) SA 57 (SCA); Upheld on appeal in: *Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC and Others* (CCT132/22) [2023] ZACC 19; 2023 (10) BCLR 1153 (CC)

3. Judgments overturned on appeal:

3.1. *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (2) SA 81 (SCA); overturned on appeal to the Constitution Court in *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30; 2019 (11) BCLR 1358 (CC); 2019 (6) SA 597 (CC)