

JSC INTERVIEW ROUND: APRIL 2024

CANDIDATE: JUDGE SUSANNAH JANE COWEN

COURT FOR WHICH CANDIDATE APPLIES: LAND COURT (JUDGE PRESIDENT)

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

1.1. The candidate holds the following degrees:

1.1.1. BA (University of Cape Town, 1992);

1.1.2. LLB (University of Cape Town, 1994); and

1.1.3. BCL (University of Oxford, 1999).

1.2. The candidate was admitted and practised as an advocate from January 2001 to December 2021.

1.3. In July 2018 the candidate received a conferment of status as Senior Counsel whilst she was a member in good standing of the Johannesburg Society of Advocates.

1.4. The candidate served as an Acting Judge between 1 January 2018 to December 2021 for a period of approximately 57 weeks (41 weeks of which was in the Land Claims Court.)

1.5. The candidate was appointed as a Judge of the High Court, Gauteng – Secondment to the Land Claims Court effective from 1 January 2022.

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. The permanently appointed heads of the Superior Courts comprise (as far as could be ascertained):

3.1.1. three black women (three African);

3.1.2. nine black men (eight African, one Coloured); and

3.1.3. one white man.

3.2. The candidate is a white woman.

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 53 years old and will have completed a period of approximately 2 years and 3 months of active service.

4.5. The candidate is eligible to complete a further period of 16 years and 11 months' active service as a judge.

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

5.1. The candidate has demonstrated commitment to the values of the Constitution throughout her young adult life and professional career. The candidate served on the following bodies and positions:

5.1.1. Human Rights Committee (1995-1997);

5.1.2. Law Researcher in the Constitutional Court (1999-2000);

5.1.3. Legal Resources Centre, Constitutional Litigation Unit (2010-2011);

- 5.1.4. Council for the Advancement of the South African Constitution - late 2010 until mid-2018 as a member of its Advisory Board (non-executive position);
- 5.1.5. Acting Judge (2018-2021); and
- 5.1.6. Judge of the High Court and Land Claims Court (2022 to present).
- 5.2. The candidate's judgments demonstrate a commitment to constitutional values and an understanding of constitutional imperatives.
- 5.3. The candidate's judgments and the passion she has for issues associated with land restitution clearly illustrate that the candidate has acquitted herself as a judicial officer whose understanding and application of law would advance the constitutional objective of representativity in the judiciary.

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

- 6.1. Considering that the candidate practiced as an advocate for 20 years and was conferred with the status of Senior Counsel, served as an Acting Judge for 3 years and served as a Judge for 2 years, the candidate has a good knowledge of the law, including constitutional law. This much is also evident from the candidate's judgments, many of which deal with constitutional issues, albeit focussed on land matters and housing. In this respect, the candidate has a full understanding of land issues and to some extent, it might be said, she specialises in land-related disputes.

- 6.2. The candidate's judgments across different areas of the law demonstrate her knowledge of law, including constitutional law.
- 6.3. The candidate has published the following extra-curial works that show her proficiency on constitutionally protected procedural rights:
- 6.3.1. Sarkin and Cowen S "Draft National Prosecuting Authority Bill 1997: A Critique" *South African Journal of Criminal Justice* 1997;
- 6.3.2. Cowen S "Can Dignity Guide South Africa's Equality Jurisprudence?" *South African Journal on Human Rights* Vol 17 Part 1 2001 (cited with approval in *South African Police Service v Solidarity obo Barnard (POPCRU as amicus curiae)* 2014 (10) BCLR 1195 (CC) at paras 175 to 177 (fn 186, 190 and 196, per Van der Westhuizen, separate concurrence); *Dendy v University of Witwatersrand, Johannesburg and others* [2005] 2 All SA 490 (W) per Boruchowitz J (whose decision was upheld on appeal);
- 6.3.3. Cowen S "Judicial Selection: What qualities do we expect in a South African Judge" 2010 Monograph published by UCT Faculty of Law under auspices of the Democratic Governance and Rights Unit (cited with approval in *Lawrence v Magistrates Commission and others* [2020 JOL 46442 (FB) at para 43 per JP Daffue ADJP and Molitsoane J; and
- 6.3.4. Cowen S "Judicial Selection: What qualities make for a good Judge", chapter in *Falls the Shadow: Between the promise and the reality of the South African Constitution* (2013) Bentley,

Nathan and Call (eds) 2013 UCT Press (reworked portion of monograph above) (cited with approval by Constitutional Court in *AmaBhungane Centre for Investigative Journalist NPC and another v Minister of Justice and Correctional Services and others (Media Monitoring Africa Trust and others as amici curiae) and a related matter* 2021 (4) BCLR 349 (CC) para 89 and 91 (fn 124 and 135) per Madlanga J (for majority).

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

- 7.1. Of the approximately 70 judgments of the candidate found by the reviewers, none of them were overturned or upheld on appeal.
- 7.2. One judgment, *Mphatsoi v Van Staden* 2021 (5) SA 267 (LCC), was referred to and approved in *Moladora Trust v Mereki and Others* 2023 (3) SA 209 (LCC).
- 7.3. Another judgment, *Mpofana Community Land Claimants and another v Regional Land Claims Commissioner KwaZulu-Natal Province and others* 2023 JDR 3078 (LCC), was also referred to and approved in *Lombardy Development (Pty) Limited and others v City of Tshwane Metropolitan Municipality and another* 2024 JDR 0117 (GP). The candidate presided over both cases.
- 7.4. We could find no adverse comments made on the candidate or her judgments in decisions by appeal courts.

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

8.1. Considering that the candidate practiced as an advocate for 20 years, served as an Acting Judge for 3 years and served as a Judge for 2 years, the candidate has demonstrated concomitant knowledge of the law, communication skills, and the ability to manage court proceedings. The candidate's forensic skills contribute considerably to her judicial philosophy.

8.2. The candidate has more than sufficient professional experience, coupled with the requisite skills for the position applied for.

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

9.1. The candidate's judgments are well written in plain language and well reasoned.

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

10.1. By far the majority of the candidate's judgments were delivered within a three-month period – a large number of them on the same day as the hearing according to the reports.

10.2. There are however a few instances in which the candidate delivered a judgment longer than three months after hearing the matter. Even then, the delay was for a short period of time. For example, in *Napier Grunstucks GMBH and others v Fredericks and others* 2023 JDR 0124 (LCC), the candidate delivered the judgment one month and fifteen days later than the norm of three months. Considering that this is an exception, we do not believe that this should adversely affect the candidate's application.

10.3. The candidate has listed in her application, four matters in which judgment was reserved and outstanding at the time of her application. In three of those matters, judgments were handed down as follows:

10.3.1. *Lombardy Development (Pty) Ltd v City of Tswane Metropolitan Municipality* – Appeal High Court – reserved 6 September 2023 – judgment handed down on 12 January 2024;

10.3.2. *Du Plessis and another v Kriel NO and another* - Appeal Land Claims Court – reserved 11 September 2023 – judgment handed down on 14 December 2023; and

10.3.3. *Pepler NO v Lombard and another* – reserved 6 October 2023 – judgment handed down on 24 January 2024.

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

11.1. Based on the judgments of the candidate under consideration, the candidate has the requisite judicial temperament and treats litigants and legal practitioners fairly and affords them sufficient time to ventilate any issue of dispute before her without undue interference.

11.2. No adverse comments have been received from members in this regard.

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

12.1. In *Moladora Trust v Mereki and Others* 2023 (3) SA 209 (LCC), the candidate displayed her independent mindedness when she had to adjudicate an application in which the applicant therein sought a

determination concerning the nature of rights held by occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) when grazing cattle, and what protections applied when such rights were terminated. The application was unopposed. The candidate highlighted certain difficulties she had with the application before her and granted counsel for the applicant an opportunity to address those difficulties. After the matter had stood down and counsel for the applicant had addressed the issues raised, the candidate dismissed the application with no order as to costs. This is evidence of a candidate who had independently, and without submissions made by any other party besides the one before her, produced a well-reasoned judgment which introduced something novel within the branch of land claims. Essentially, the candidate's judicial candour makes her suitable for the position she has applied for.

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

13.1. The candidate has deputised for Acting Judge President Meer in shortlisting and selecting for the Court Manager role in 2022 and the Court Researcher role in 2023 and she attended the Heads of Court meeting in August 2023.

13.2. The candidate has also attended a number of meetings with Legal Aid South Africa in 2023 to discuss their new land unit and matters of mutual concern, LAMOSAs to engage the Commission in challenges in finalising restitution claims and she assisted the Acting Judge President with liaison meetings between the Court and the OCJ.

13.3. The candidate has conducted a review of court performance statistics and supported the Acting Judges President in finalisation of quarterly performance reviews for the year 2023.

13.4. This process, albeit short, would likely have given the candidate valuable experience in understanding the dynamics and technicalities associated with managing the court. It would also have nurtured some of the skills needed to manage the court on an ongoing basis. Further, the candidate has been exposed and interacted with key stakeholders with interests in land issues.

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

14.1. There is a steady movement towards increasing the number of women heads of court within the judiciary. The appointment of the candidate as a Judge President of the Land Claims Court would send a positive message to the public at large as it would affirm efforts towards promoting diversity in heads of court.

14.2. Through her judgments, the candidate has proved herself more than capable in dealing with specialised and sensitive aspects of land restitution despite her racial background. This clearly proves that the candidate's appointment would indeed send a positive message to the legal fraternity and society in general.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *Stellenbosch University v Retolla and Others* 2024 (1) SA 284 (LCC)
- 1.2. *Moladora Trust v Mereki and Others* 2023 (3) SA 209 (LCC)
- 1.3. *Mphatsoi v Van Staden* 2021 (5) SA 267 (LCC)
- 1.4. *Tsotetsi and Others v Raubenheimer NO and Others* 2021 (5) SA 293 (LCC)
- 1.5. *The Fonarun Naree Trustees, Copenship Bulkiers A/S (in liquidation) and Others v Afri Grain Marketing (Pty) Ltd and Others* 2020 (4) SA 188 (GJ)

1. Unreported judgments:

- 1.1. *Crookes Brothers Limited and another v Makhatha and others* 2023 JDR 4905 (LCC)
- 1.2. *Du Plessis and another v Kriel NO and another* 2023 JDR 4808 (LCC)
- 1.3. *Exxaro Coal (Pty) Limited and another v Sindane and others* 2023 JDR 4606 (LCC)
- 1.4. *Iswelethu Cemforce CC v Trustees for the Time Being of the National Education Collaboration Trust and another* 2023 JDR 3208 (GP) ([2023] ZAGPPHC 720 (21 August 2023))

- 1.5. *Investec Bank Limited v Big Business Innovations Group (Pty) Ltd* 2023 JDR 4340 (GP) ([2023] ZAGPPHC 1895 (6 November 2023))
- 1.6. *Investec Bank Limited v Singh and another (Counter-Application)* 2023 JDR 4341 (GP) ([2023] ZAGPPHC 1887 (6 November 2023))
- 1.7. *Dutch Reformed Presbytery: Mafikeng v Minister of Public Works and Others* 2022 JDR 3106 (LCC)
- 1.8. *Bakgatla-Ba-Kgafela Communal Property Association v Chief Land Claims Commissioner and Others* 2022 JDR 3105 (LCC)
- 1.9. *Dutch Reformed Presbytery: Mahikeng v Minister of Public Works and Others* 2022 JDR 3107 (LCC)
- 1.10. *Green NO. and Others v Khumalo and Others* 2022 JDR 3102 (LCC)
- 1.11. *Dangazele and others v Minister of Agriculture, Land Reform and Rural Development and others* 2022 JDR 3099 (LCC)
- 1.12. *Napier Grunstucks GMBH and Others v Fredericks and Others* 2023 JDR 0124 (LCC) ([2022] ZALCC 42 (23 December 2022))
- 1.13. *Mahlangu and Others v Van Der Merwe and Others* 2022 JDR 0427 (LCC)
- 1.14. *Manenzhe Community v Regional Land Claims Commissioner and Others; Ramphabana Tribe and Others v Regional Land Claims Commissioner, Limpopo and Others* (2022) ZALCC 29 (30 March 2022)

- 1.15. *Henning and Others v Baloyi and Others (Nkuna and Land Claimants of Moddervlei Community Intervening Parties)* 2022 JDR 3103 (LCC) ([2022] ZALCC 31 (6 May 2022))
- 1.16. *Ga-Mabohlatjana Community v Capricorn District Municipality* 2021 JDR 3361 (LCC)
- 1.17. *Business Partners Limited v Securo Traders (Pty) Ltd and Others* 2021 JDR 2960 (GJ)
- 1.18. *CDH Watson NO and Others v Tsoanyane and Another* [2020] ZALCC 35 (21 December 2020).
- 1.19. *Du Plessis and Another v Ross and Others* [2020] ZALCC 20 (31 August 2020) (decision on application for leave to appeal).
- 1.20. *Delta 200 Properties (Pty) Ltd v Dale* 2020 JDR 2780 (LCC) ([2020] ZALCC 24 (12 August 2020))
- 1.21. *Du Plessis v Ross* 2020 JDR 2802 (LCC) ([2020] ZALCC 30 (26 May 2020))
- 1.22. *Changing Tides 17 (Pty) Limited v Muriritirwa* 2020 JDR 0717 (GP) ([2020] ZAGPPHC 132 (7 April 2020))
- 1.23. *Firststrand Bank Ltd v Mogodiri* 2020 JDR 0719 (GP) ([2020] ZAGPPHC 126 (7 April 2020))
- 1.24. *Makgahlela v Maboï 6 Community Trust* 2020 JDR 2801 (LCC) ([2020] ZALCC 29 (10 November 2020))

1.25. *Mosenogi v Webster* 2020 JDR 0724 (GP) ([2020] ZAGPPHC 127 (7 April 2020))

1.26. *Kim v Agri Staff Pension Fund and Others* [2019] ZAGPJHC 156 (6 Feb 2019) ([2019] ZAGPJHC 156 (6 February 2019))

2. Judgments upheld on appeal:

2.1. None

3. Judgments overturned on appeal:

3.1. No judgments were found that had been overturned on appeal.

3.2. In *The Fonarun Naree: Afgri Grain Marketing (Pty) Ltd v Trustees, Copenship Bulklers A/S (In Liquidation) and Others* 2024 (1) SA 373 (SCA), the SCA did not overturn the judgment of Cowen J in *The Fonarun Naree Trustees, Copenship Bulklers A/S (in liquidation) and Others v Afri Grain Marketing (Pty) Ltd and Others* 2020 (4) SA 188 (GJ) but instead overturned a judgment by Weiner J in the same matter.