

**JSC INTERVIEW ROUND: APRIL 2024**

**CANDIDATE: PROFESSOR DAVID ISRAEL BILCHITZ**

**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 tertiary qualifications:

1.1.1. Bachelor of Arts, University of the Witwatersrand (1996);

1.1.2. Bachelor of Arts (Honours), University of the Witwatersrand (1997);

1.1.3. Bachelor of Laws, University of the Witwatersrand (1999);

1.1.4. MPhil, University of Cambridge (2001); and

1.1.5. PhD, University of Cambridge (2004).

1.2. The candidate was –

1.2.1. admitted as an attorney in 2007 (but has not practised subsequently);

1.2.2. appointed as Associate Professor, University of Johannesburg, in January 2010;

1.2.3. appointed as Full Professor, University of Johannesburg, in December 2012; and

1.2.4. appointed as Full Professor (part-time), University of Reading, England, in July 2020.

**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 Constitutional Court Judges hold office for a non-renewable term of 12 years or until they turn 70, whichever occurs first, unless this is extended by an Act of Parliament.

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 stint in the Constitutional Court during the first term of 2024 constitutes "*active service*" in terms of the Act.

4.6. At the time of the interviews, the candidate will be approximately 48 years and 7 months old.

4.7. If appointed, the candidate would be eligible to complete a period of 15 years' 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 commitment to the values of the Constitution by participating as a member of the following community and academic organisations:

5.1.1. the South African Law Reform Commission;

- 5.1.2. the Society for Law Teachers for Southern Africa;
  - 5.1.3. The Business and Human Rights Journal;
  - 5.1.4. South African Young Academy of Science;
  - 5.1.5. The Academy of Science of South Africa; and
  - 5.1.6. The International Journal of Human Rights and Constitutional Studies.
- 5.2. Part of the candidate's work in the South African Law Reform Commission was to revise the apartheid-era law relating to witchcraft.
- 5.3. The candidate has also –
- 5.3.1. assisted in the drafting process of the Tunisian and Egyptian constitutions;
  - 5.3.2. trained Judges in Kenya and Tunisia (as a constitutional expert); and
  - 5.3.3. served as a legal advisor to a collection of LGBTQS organisations and assisted in drafting parliamentary submissions in relation to the right to full marriage equality for LGBTQ persons.

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

- 6.1. The candidate has a vast knowledge of the law, particularly the areas of constitutional and human rights law. Indeed, his academic career has largely focused on constitutional and international law, fundamental rights, and the philosophy of law.

- 6.2. In particular, the candidate's work has focused on socio-economic rights, business, and human rights, the limitation of rights and proportionality, the separation of powers, the tension between religious freedom and equality, and LGBTQ rights, amongst others.
- 6.3. In addition to considering these broad constitutional questions, he has focused a significant number of his journal articles on critiques of court judgments, including most recently *Democratic Alliance v Minister of Home Affairs* [2021] ZAGPPHC 500, dealing with the automatic loss of South African citizenship for those acquiring citizenship in other jurisdictions.
- 6.4. Since the article was published, an appeal against the High Court judgment has been upheld by the SCA. In its judgment, the SCA cited the candidate's article with approval. (The matter has now been referred to the Constitutional Court for confirmation.)
- 6.5. The candidate clerked at the Constitutional Court early on in his legal career.
- 6.6. The candidate obtained a PhD from Cambridge University that focused on the adjudication and enforcement of socio-economic rights.
- 6.7. The candidate is an admitted (non-practising) attorney, and currently teaches law as a Full Professor. His academic teaching and focus have been on the advancement of constitutionalism and fundamental rights in South Africa, in Africa, and globally.
- 6.8. The candidate developed the current LLM in Human Rights at the University of Johannesburg.

6.9. The candidate has also published widely in the field of constitutional and human rights law.

6.10. The candidate therefore has considerable knowledge and expertise in the field of constitutional law.

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

7.1. Prior to his current acting appointment at the Constitutional Court, which only began earlier this month, the candidate had neither sat nor acted as a Judge in any court. He has therefore not written any judgments that could be considered.

7.2. Some of his academic writings have been considered by appellate courts, including both in South Africa and abroad. (A list of these judgments is provided in the annexure to this review.) While some of these judgments have placed significant reliance on the candidate's academic writings, others have cited his published work to support more modest propositions.

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

8.1. The candidate has been in the legal profession, predominantly in the academic field, for approximately 24 years, with the majority of that time – 14 years – as a Professor of law.

8.1.1. The candidate served as a law clerk to Deputy Judge President Langa (as he then was) from January to September 2000.

8.1.2. He was employed as a legal consultant at Ashira Consulting (Pty) Ltd from September to November 2004.

- 8.1.3. The candidate served articles as a candidate attorney at Ross Kriel Attorneys from December 2004 to January 2007, leading to his admission as an attorney in 2007.
- 8.1.4. He was employed as a part-time lecturer at the University of the Witwatersrand from 2005 to 2009.
- 8.1.5. He was employed as a senior researcher at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) from February 2007 to December 2008.
- 8.1.6. He has been employed as the Director of SAIFAC since 2009.
- 8.1.7. He was employed as Associate Professor at the University of Johannesburg from 2010 to 2012, and as Full Professor from 2012 to date. He has also served as Full Professor (on a part time basis) at the University of Reading since July 2020.

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

- 9.1. The candidate has not written any judgments. However, his academic writings demonstrate that he possesses excellent linguistic and communication abilities, with his journal articles focusing on court judgments being particularly accessible.

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

- 10.1. The candidate has not written any judgments.

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

11.1. As the candidate has neither sat nor acted as a Judge of any court prior to his current acting stint at the Constitutional Court, there is no basis upon which to assess his ability to conduct court proceedings.

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

12.1. There are no reported circumstances that would suggest that the candidate is not independently minded. His academic writings strongly suggest that he is fiercely independent.

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

13.1. The candidate has been a lecturer and university professor for many years and has, in that role, supervised postgraduate students. The candidate has also performed faculty duties and has been a director of SAIFAC for many years. Furthermore, he has been an editor of various journals, including the South African Journal on Human Rights. The candidate's experience therefore displays strong administrative ability.

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

14.1. The information currently available does not permit an evaluation of the candidate's anticipated performance as a Judge through an analysis of written judgments and conduct in court proceedings. The candidate is, however, currently serving as an Acting Judge of



the Constitutional Court and will therefore produce at least one judgment in the course of his acting appointment. Given the time ordinarily taken by the Constitutional Court to deliver judgment, it is highly unlikely that any such judgment would have been delivered by the time the candidate is interviewed by the Judicial Service Commission.

- 14.2. At this stage, it is thus simply not possible to evaluate the candidate in accordance with the criteria ordinarily applied to other candidates.
- 14.3. What can be ascertained from the information currently available is that the candidate's appointment would reflect a commitment to appointing Judges from academia and outside of the ordinary pool of attorneys and advocates. Insofar as appellate courts are concerned, it would reflect a commitment to appointing Judges from outside of the ordinary pool of High Court and SCA Judges.

## 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

5. As the candidate has neither sat nor acted as a Judge prior to his current acting appointment at the Constitutional Court and has yet to write any judgments in that Court, there were no judgments to consider.

6. The following journal articles in which the candidate has critiqued judgments were considered:

6.1. “Is automatic loss of South African citizenship for those acquiring other citizenships constitutional? *Democratic Alliance v Minister of Home Affairs*” (2023) 39 *South African Journal on Human Rights* 97 – 112

6.2. “Socio-Economic Rights and Expanding Access to Justice in South Africa: What Can Be Done?” in P. Dann, M. Riegner and M. Bönnemann, *The Global South and Comparative Constitutional Law* (Oxford University Press: Oxford, 2020) 210 – 234.

- 6.3. “Why Incitement to Harm Against those with Different Political Opinions is Constitutionally Impermissible” (2019) *Journal of South African Law* 364 – 374
- 6.4. “Fundamental Rights as Bridging Concepts: Straddling the Boundary Between Ideal Justice and Imperfect Reality” (2018) 40 *Human Rights Quarterly* 119 – 143
- 6.5. “Exploring the Relationship Between the Environmental Right in the South African Constitution and the Protection of Animals’ Interests” (2017) 134 *South African Law Journal* 740 – 777
- 6.6. “Necessity and Proportionality: Towards a Balanced Approach?” in L Lazarus, C McCrudden and N Bowles (eds), *Reasoning Rights* (Hart: Oxford, 2015) 41 – 62
- 6.7. “What was Left Unsaid: The Unconstitutionality of the Performing Animals Protect Act in *NSPCA v Minister of Agriculture, Forestry and Fisheries*” (2014) 30 *South African Journal on Human Rights* 183 – 195
- 6.8. “Socio-Economic Rights, Economic Crisis and Legal Doctrine” (2014) 12 *International Journal of Constitutional Law* 710 – 739
- 6.9. “Avoidance Remains Avoidance: Is It Desirable in Socio-Economic Rights Cases?” (2014) 5 *Constitutional Court Review* 297 – 308
- 6.10. “P.I.E. in the Sky: Where's the constitutional framework in high court eviction proceedings? *Marlboro Crisis Committee and Others v City of Johannesburg*” (2014) 131 *South African Law Journal* 521 – 537

- 6.11. “How Should Rights be Limited? Exploring *Road Accident Fund v Mdeyide*” (2011) *Journal of South African Law (Tydskrif vir die Suid-Afrikaanse Reg)* 568 – 579
- 6.12. “Should Religious Associations Be Allowed to Discriminate?” (2011) *27 South African Journal on Human Rights* 219 – 248
- 6.13. “Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*” (2010) *South African Law Journal* 591 – 605
- 6.14. “For whom does the bell toll? The challenges and possibilities of the Civil Union Act for Family Law in South Africa” (2008) *23 South African Journal on Human Rights* 466 – 499
- 6.15. “South Africa: Right to Health and Access to HIV/AIDS Drugs Treatment” (2003) 1(3) *International Journal of Constitutional Law* 524 – 534
7. The following judgments, in which the candidate’s academic writing has been relied on or referenced, were considered:
- 7.1. *Makana Peoples Centre v Minister of Health* [2023] ZACC 15 at footnotes 147 and 149
- 7.2. *Democratic Alliance v Minister of Home Affairs* [2023] ZASCA 97 at footnote 15
- 7.3. *Naidoo v Director of Public Prosecutions* [2020] ZAKZDHC 39 at footnote 98
- 7.4. *Economic Freedom Fighters v Minister of Justice and Constitutional Development* [2019] ZAGPPHC 283 at footnote 37

- 7.5. *Justice KS Puttaswamy v Union of India*, Writ Petition 494 of 2012 (26 September 2018) at paragraphs 123 and 126
- 7.6. *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* [2014] ZASCA 151 at footnote 3.
- 7.7. *Mazibuko v City of Johannesburg* [2009] ZACC 28 at footnote 46
- 7.8. *S v Tandwa* [2007] ZASCA 34 at footnote 14
- 7.9. *Madhyamam Broadcasting Limited v Union of India* at paragraph 103