

## **JSC INTERVIEW ROUND: MAY 2024**

### **CANDIDATE: JUDGE LEONIE WINDELL**

### **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 holds the following qualifications:

1.1.1. B Iuris, North-West University, obtained 1989; and

1.1.2. LLB, Unisa, obtained 1994.

1.2. The candidate was a Prosecutor from 9 January 1989 to 31 October 1993.

1.3. The candidate's judicial appointments:

1.3.1. Magistrate, 1 November 1993 – 30 June 2013; and

1.3.2. Judge, 1 July 2013 to date.

#### **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. 11 black women (8 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. 2 white men.

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. The candidate is 56.

4.5. If appointed, the candidate could serve up to 14 years in office.

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

5.1. The candidate is part of on-going training at SAJEI and has trained newly appointed judges and aspirant judges on many occasions. The candidate presented the following topics: i) conducting a criminal trial; ii) appeals and reviews; iii) unopposed motion court; iv) eviction and foreclosures.

5.2. The candidate was a trainer in the 2023 Woman Aspirant Judges course under the auspices of Deputy Judge President Mojaelo.

5.3. During her career the candidate mentored several final year law students who were provided with the opportunity to spend time in her chambers and observe court proceedings.

5.4. The candidate assisted in the JUTA moot court competition at the North-West University in 2014, 2015, 2017 and 2019.

5.5. The candidate was involved as a facilitator at the Law, Race and Gender Research Unit, University of Cape Town and attended their first National Conference in May 1998.

5.6. The candidate trained and was selected as a facilitator in Social Context workshops for magistrates on the following dates:

- 5.6.1. North West “Magistrates making a Difference” - June 1999;
- 5.6.2. Western Cape “Social Context in Judicial Decision Making” - July 1999;
- 5.6.3. Northern Province “Developing Skills for Effective Delivery” - June 2001;
- 5.6.4. Gauteng “Refresher Course in Social Context Training” - March 2002;
- 5.6.5. Gauteng “Social Context Training Workshop” - May 2002;
- 5.6.6. Northern Cape Province “Advancing Equality, applying social context” - May 2003;
- 5.6.7. North West Province “Social Context, Equality and Land” - September 2003.
- 5.7. The candidate lectured Civil Procedure in the Magistrate Court for final year law students at the Law School (LEAD) at the North-West University from 2006 to 2008 and again in 2013.
- 5.8. The candidate has been a Member of the International Association of Women Judges (IAWJ) - South African Chapter since 2009.
- 5.9. The candidate was the Provincial Co-Ordinator for the IAWJ North- West Province (2010-2013) and Gauteng Province (2015-2018).
- 5.10. The candidate was Assistant Vice President Publications SAC-IAWJ (2017-2018).

5.11. The candidate is a member of ARMOUR: Action for responsible management of our rivers (2018 to date).

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

6.1. The candidate appears to have a good knowledge of the law, including constitutional law, and in both civil and criminal respects.

6.2. The candidate’s judgments reflect a sound understanding of legal principles.

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

7.1. *Deez Realtors v SA Securitisation Program* (175/2016) [2016] ZASCA 194 (2 December 2016)

The matter dealt with a debt arising from a non-payment of monies as and when they fell due in terms of two lease agreements. The Plaintiffs alleged that they were entitled to immediate payment of all amounts which would have been payable until the expiry of the rental period regardless of whether or not such amounts were then due for payment (i.e. accelerated payments). The Defendants pleaded that the Plaintiffs had elected to cancel the lease agreements. The Plaintiffs then sought to amend their pleadings to allege the cancellation, but still claim the balance outstanding as damages. The Defendants objected as such an amendment would introduce a new debt which had prescribed. The SCA held that the nature of the debt claimed remained the same and “*for substantially the same reasons the court a quo gave*”, dismissed the appeal.

7.2. *Meechan v Naude and Another* (A5003/2019) [2020] ZAGP JHC 272

The candidate was criticised by the appellant that she did not follow the approach that where there is contradictory evidence a presiding judge should first assess credibility of witnesses, thereafter reliability and then only proceed to probabilities of evidence. The full court stated at paragraph 34 that, although the judgment did not refer to credibility or reliability, the candidate, without specifically stating it, expressly found the appellant not to be credible as this is mentioned where she said the appellant failed to explain the circumstances how the amount of R6 million was arrived at. At paragraph 37 of the judgment the full court also said the following:

*“The findings of the court a quo without expressly stating so clearly find evidence of the appellant’s incredulous whereas the evidence of Naude is credible. The court therefore finds no rational basis to interfere with the decision of the court a quo”.*

7.3. *Imbuko Wines (Pty) Ltd v Reference Audio CC* (405/2021) [2022] ZASCA 110 (15 July 2022)

The matter pertained to whether or not an oral cession was established. The trial court held that it was. The majority of the full court, which included the candidate, held the evidence did not sufficiently establish a cession, but at best, a tripartite arrangement. In this regard, the majority found that the failure to call Dr Singh to confirm the cession was fatal to Imbuko’s case. It also found that the cession (if established) was not brought to the knowledge of Reference Audio. The SCA overturned the full court’s decision and said the following at paragraph 8 of its judgment:

*“The decision by the majority of the full court to non-suit Imbuko because Dr Singh was not called to confirm the cession on behalf of Dipole, cannot be supported, especially given that the threshold to establish cession is not stringent.”*

7.4. *Moraitis Inv (Pty) Ltd v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA)

It is difficult to make observations on this decision as it appears that it was an appeal from a full court which had overturned the judgment of the court of the first instance, which, as not mentioned by name, we presume must be the candidate. No comments were made in respect of the court of first instance.

7.5. *Fluxmans Inc v Levenson* 2017 (2) SA 520 (SCA)

The matter concerned the question of the prescription of a claim for money paid pursuant to an agreement that was invalid due to non-compliance with the Contingency Fees Act. Although the minority judgment would not have upheld the appeal, both the minority and majority made comments of the candidate’s judgment *a quo* as follows:

Minority at paragraph 10:

*“As has been alluded to above, the High Court found that ‘(t)he invalidity of a common-law contingency fee agreement is a fact and not a legal conclusion’ and that the respondent was not aware that an Act prohibiting the agreement existed. It also found that the respondent had been overcharged. Two things need to be clarified. The first is that the Act does not prohibit a contingency fees agreement. As has been mentioned above, it legitimises an agreement otherwise prohibited at*

*common law. The second is that counsel for the appellant submitted, correctly so, that the High Court erred in its finding that the invalidity of the agreement is a fact and not a legal conclusion. In Claasen v Bester 2012 (2) SA 404 (SCA) ([2011] ZASCA 197) Lewis JA referred to Truter and Minister of Finance and Others v Gore NO 2007 (1) SA 111 (SCA) ([2007] 1 All SA 309; [2006] ZASCA 98) 8 as well as Van Staden, where this court had left open the question whether the nullity of a contract (a legal conclusion) was a fact for purposes of s 12 of the Act, and said:*

*‘These cases [Truter and Gore] clearly do not leave open the question posed and not answered in Van Staden. They make it abundantly clear that knowledge of legal conclusions is not required before prescription begins to run. There is no reason to distinguish delictual claims from others.’*

*Claasen was referred to by the High Court in its judgment, but regrettably, the court must have missed or misunderstood the authoritative statement just quoted.”*

Majority at paragraph 32:

*“I also agree with Mpati AP's conclusion that the High Court erred in finding first, that 'the invalidity of a common law contingency fees agreement is a fact and not a legal conclusion' and secondly, that the Act prohibits contingency fees agreements. I am in full agreement with the reasons that Mpati AP advances in support of that conclusion. I wish to emphasise in relation to the High Court's second finding, that it is incorrect that the Act prohibits the conclusion of a 'common law'*



*contingency fees agreement. The Act permits the parties to conclude such agreement. It in fact allows them to do something that would otherwise be unlawful under the common law. In other words, the Act was enacted to overcome the prohibition which existed under the common law (Price Waterhouse Coopers Inc para 41), which is quite the opposite of the High Court's second finding.”*

7.6. Save to the extent of the comments outlined above, no further affirmative, adverse or negative comments have been made on the candidate’s judgments in the above decisions.

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

8.1. The candidate has vast professional experience as a prosecutor (4 years, 9 months), magistrate (19 years, 8 months), acting judge (6 months), judge (10 years, 10 months) and acting judge of appeal (three terms). The candidate’s experience is sufficient for the appointment sought.

8.2. The candidate sits as a judicial officer in civil, criminal, tax, family, insolvency, and equality court matters, demonstrating a wide range of experience very well suited for the position she is being considered.

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

9.1. The candidate’s linguistic skills are very good. Her judgments are well-structured and reasoned.

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

- 10.1. The applicant generally produces judgments with diligence. However, the reviewers did not research the candidate's judgments to make any recordal as to the expeditiousness with which her reserved judgments are delivered.
- 10.2. According to the candidate, as of 20 March 2024, she had five outstanding judgments, reserved on 23 November 2023, 30 January 2024, 15 February 2024, 15 March 2024 and 20 March 2024.

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

- 11.1. The candidate's ample experience as a magistrate and judge demonstrates that she has the ability to conduct court proceedings.
- 11.2. No adverse comments were received about the candidate in this regard.
- 11.3. A senior junior counsel of the Johannesburg Society of Advocates who appeared before the candidate in the High Court, Gauteng Division, Johannesburg indicated that the candidate has a good judicial temperament.
- 11.4. A senior member of the Johannesburg Society of Advocates commented that the candidate is a very good judge.

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

- 12.1. The candidate's judgments demonstrate that she is independently minded.
- 12.2. By way of example, in the substantial matter of *Nkala and Others v Harmony Gold Mining Company Limited and Others* (48226/12, 31324/12, 31326/12,

31327/12, 48226/12, 08108/13) [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) (13 May 2016), where the majority judgment was written by the deputy judge president and another judge who was her senior by a year, the candidate wrote a minority judgment which demonstrates her independent mindedness. She commenced her judgment as follows at paragraph 231:

*“I dissent with the majority judgment on one issue only; that issue concerns the question of the transmissibility of general damages prior to litis contestatio. I consider it necessary to express my perspective on this aspect only, as the majority judgment encompasses my views on the certification of the class action. I agree with my brothers’ interpretation of the common law and the exposition of the facts and issues. I further agree with the reasoning as to why it is incumbent for this court to develop the common law. I, however, respectfully differ with the extent of the development, for the reasons that follow.”*

12.3. No adverse comments were received about the candidate in this regard.

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

13.1. The candidate is involved in professional bodies outside of her role as judge, as a provincial co-ordinator and vice president of publications.

13.2. During her time as a judge the candidate has also served on the Education, Family Court, High Court Precinct and Lunch Club Committees.

13.3. This foregoing demonstrates that she has good administrative abilities.

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

14.1. The candidate is a vastly experienced judicial officer whose experience is the type expected to be employed at the SCA. Her appointment would enhance the public view of the SCA bench as an experienced and trustworthy institution.

## **ANNEXURE: LIST OF JUDGMENTS CONSIDERED**

### **1. Reported judgments:**

- 1.1. *Moraitis Investments (Pty) Ltd and Others v Montie Diary (Pty) Ltd and Others* (799/2016) [2017] ZASCA 54; [2017] 3 All SA 485 (SCA); 2017 (5) SA 508; (SCA) (18 May 2017)
- 1.2. *Fluxmans Incorporated v Levenson* (523/2015) (2016) ZASCA 183; [2017] 1 All SA 313 (SCA); 2017 (2) SA 520 (SCA) (29 November 2016)
- 1.3. *Tembu Convenience Centre CC and Another v City of Johannesburg and Others* (270/2018) [2018] ZASCA 160; 20 I 9 (4) SA I 94 (SCA) (28 November 2018)
- 1.4. *First National Nominees (Pty) Ltd v Capital Appreciation Limited Ltd* 2022 (6) SA 67 (SCA)
- 1.5. *DRD Gold Ltd v Nkala* 2023 (3) SA 461 (SCA)

### **2. Unreported judgments:**

- 2.1. *Various Parties obo Minors v Anglo-American South Africa Limited and Others* (2020/32777) [2023] ZAGPJHC 1474 (14 December 2023)
- 2.2. *In2IT Tech (Pty) Ltd v Gijima Holdings (Pty) Ltd and others* [2023] JOL 59047 (GJ)
- 2.3. *Imbuko Wines (Pty) Ltd v Reference Audio CC* (405/2021) [2022] ZASCA 110 (15 July 2022)
- 2.4. *Anabella Resources CC v Genric Insurance Company Limited* (A5025/2019) [2020] ZAGP JHC 163 (2 July 2020)
- 2.5. *Deez Realtors v SA Securitisation Program* (175/2016) [2016] ZASCA 194 (2 December 2016)
- 2.6. *Meechan v Naude and Another* (A5003/2019) [2020] ZAGP JHC 272

2.7. *ABSA Bank Ltd v Innovent Rental and Asset Management Solutions (Pty) Ltd* (17212/2013) [2015] ZAGPJHC (9 February 2015)

### **3. Judgments upheld on appeal:**

3.1. *Tembu Convenience Centre CC and Another v City of Johannesburg and Others* (270/2018) [2018] ZASCA 160; 2019 (4) SA 194 (SCA) (28 November 2018)

3.2. *First National Nominees (Pty) Ltd v Capital Appreciation Limited Ltd* 2022 (6) SA 67 (SCA)

3.3. *Deez Realtors v SA Securitisation Program* (175/2016) [2016] ZASCA 194 (2 December 2016)

3.4. *Meechan v Naude and Another* (A5003/2019) [2020] ZAGP JHC 272

3.5. *DRD Gold Ltd v Nkala* 2023 (3) SA 461 (SCA)

### **4. Judgments overturned on appeal:**

4.1. *Moraitis Investments (Pty) Ltd and Others v Montie Dairy (Pty) Ltd and Others* (799/2016) [2017] ZASCA 54; [2017] 3 All SA 485 (SCA); 2017 (5) SA 508; (SCA) (18 May 2017)

4.2. *Fluxmans Incorporated v Levenson* (523/2015) (2016) ZASCA 183; [2017] 1 All SA 313 (SCA); 2017 (2) SA 520 (SCA) (29 November 2016)

4.3. *In2IT Tech (Pty) Ltd v Gijima Holdings (Pty) Ltd and others* [2023] JOL 59047 (GJ)

4.4. *Imbuko Wines (Pty) Ltd v Reference Audio CC* (405/2021) [2022] ZASCA 110 (15 July 2022)

4.5. *Anabella Resources CC v Genric Insurance Company Limited* (A5025/2019) [2020] ZAGP JHC 163 (2 July 2020)