

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

### **CANDIDATE: JUDGE RAYLENE MAY KEIGHTLEY**

### **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. BA - University of KwaZulu-Natal (1982);

1.1.2. LLB (*summa cum laude*) - University of KwaZulu-Natal (1984);  
and

1.1.3. LLM (first class) – Cambridge University, United Kingdom (1988).

1.2. The candidate's professional admissions are:

1.2.1. Attorney (1987 – 1988) (admitted in 1986);

1.2.2. Senior State Advocate (National Prosecuting Authority: Asset Forfeiture Unit) (December 1999 to July 2006) (admitted in 2001);

1.2.3. Member of the Johannesburg Society of Advocates (July 2006 to December 2006; January 2007 to April 2008; October 2011 to January 2016).

1.3. The candidate's judicial appointments:

1.3.1. Acting Judge – Gauteng Division (intermittently from October 2014

to August 2015);

1.3.2. Judge – Gauteng Division (January 2016 to present); and

1.3.3. Acting Judge – SCA (July 2023 to present).

## **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 63 and has completed a period of 8 years of active service as a judge.
- 4.5. If appointed, the candidate could serve up to 7 years actively in office.

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

- 5.1. The candidate held the following positions at the National Prosecuting Authority (Asset Forfeiture Unit):
  - 5.1.1. Senior State Advocate (December 1999 to October 2001);
  - 5.1.2. Deputy Director of Public Prosecutions (October 2001 to October 2003); and
  - 5.1.3. Regional Head: Johannesburg (October 2003 to July 2006).
- 5.2. The candidate has held the following positions in civil society organisations:

- 5.2.1. Director: Centre for Applied Legal Studies, WITS (2008 to 2011);
- 5.2.2. Editorial Committee Member: South African Journal on Human Rights (2008 to 2016);
- 5.2.3. Member: South Africa Chapter – International Association of Women Judges (2016 to present). The candidate has also participated in the association’s Mentorship Programme since 2019;
- 5.2.4. Transport and General Workers Union – Aid Service – member (1985 to about 1987);
- 5.2.5. Detainees Parents Support Committee (Woodstock) – member (1985 to about 1987); and
- 5.2.6. Society for the Abolition of the Death Penalty – member (1988 to about 1992).
- 5.3. The candidate appeared as an advocate for NGOs including the Centre for Child Law.
- 5.4. The candidate has been a judge in various school and pupil Moot Court competitions and a trainer for the General Council of the Bar, Johannesburg Bar Pupil Advocacy Training Programme since 2021.
- 5.5. The candidate, in her academic writings, centred the experiences of women and township communities during apartheid, writing about the impact of the Trespass Act, the negative judicial discretion towards political activism that came out in mob violence cases, and apartheid’s injustices in hangings as a form of punishment for political crimes. The candidate also contributed to some of the first academic writings on women, children, and the family.

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

6.1. The candidate has throughout her numerous judgments demonstrated an excellent knowledge of the law across almost all areas of law. The candidate has demonstrated an ability to move between different areas of law with ease and has written many judgments involving complex and novel issues of law.

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

Judgments overturned on appeal:

7.1. *CM v EM*

The candidate was part of a full bench sitting as a court of appeal against the trial court’s judgment in a divorce action. The reviewers have been unable to find the judgment of the full bench, but the decision was overturned by the SCA in *CM v EM* 2020 (5) SA 49 (SCA). The SCA found that the full bench had “*perpetuated [a] misdirection*” by the trial court after the parties failed to define the issue properly.

7.2. *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy and Others* 2014 (6) 403 (GP)

The matter concerned the interpretation and application of section 56(c) of the Mineral and Petroleum Resources Development Act 28 of 2002. The candidate found that Palala’s prospecting right has lapsed upon its deregistration as a company and that its subsequent restoration did not revive the lapsed right. The SCA overturned the candidate’s decision largely based on a case that had not been decided when the candidate was dealing

with the matter (*Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA)), which held that re-registration of a company in terms of section 82(4) of the Companies Act had full retrospective effect.

7.3. *Minaar v Van Rooyen N.O* (27788/04) [2013] ZAGPPHC 375 (20 November 2013)

The candidate refused an application for rescission in terms of Rule 42(1)(a) on the basis that the order (a default judgment) had not been erroneously sought and Mr Minaar was in wilful default. In doing so, the candidate found that an order declaring liability under section 424(1) of the Companies Act can be granted by default. The SCA held that such an order cannot be granted without any evidence being lead. The SCA commented that it was “*inconceivable that an order would be made declaring a director liable for the debts of a company on the basis of reckless or fraudulent conduct where no evidence was led to support the allegations made*” (at paragraph 17).

7.4. *Afriforum NPC v Chairperson of the Council of the University of South Africa and Others* [2018] ZAGPPHC 295

The candidate dismissed an application by Afriforum to review and set aside decisions of the Senate and Council of UNISA relating to its adoption of a new language policy. In doing so, the candidate found that UNISA’s new language policy did not contravene section 29(2) of the Constitution because UNISA was not liable to ensure effective access to and implementation of that right. The SCA found that the candidate’s finding was contrary to a finding by the Constitutional Court in *Afriforum & Another v University of the Free State* 2018 (2) SA 185 (CC) that section 29

of the Constitution applies to the education sector. The judgment of the SCA was upheld by the Constitutional Court in *Chairperson, Council of the University of South Africa and Others v Afriforum NPC* 2022 (2) SA 1 (CC).

- 7.5. *Innovent Rental and Asset Management Solutions v Transnet SOC*, Case no: 46297/13 (2 September 2016).

The candidate ordered Transnet to pay to Innovent such residual value as could be proven at trial in respect of leased equipment returned to Innovent without being de-commissioned and in a state of disrepair. The appeal (*Transnet SOC v Innovent Rental and Asset Management Solutions* [2018] ZAGPJHC 936) concerned an interpretation of a clause of the agreement between the parties. The Appeal Court disagreed with the candidate's interpretation of the clause and ordered absolution from the instance. The SCA dismissed an appeal against the judgment of the full bench in *Innovent Rental & Asset Management Solutions (Pty) Ltd v Transnet SOC Ltd* [2019] ZASCA 106 (5 September 2019).

- 7.6. *Mokau v Eskom Holdings SOC Ltd* (19825/14) [2015] ZAGPJHC 135 (3 July 2015)

In a claim for delictual damages against Eskom, the candidate upheld Eskom's special plea of prescription on the basis that it had satisfied the burden on it to establish a *prima facie* case that the plaintiff had the requisite knowledge to institute his claim on 3 June 2012. The burden of proof having shifted to the plaintiff to rebut the *prima facie* case, he did not do so. On appeal (*Mokau v Eskom Holdings SOC Ltd* (A5066/15) [2017] ZAGPJHC 135 (9 May 2017)), it was held that Eskom had failed to establish a *prima facie* case, that the onus had not shifted to the plaintiff, and that the candidate erred in excluding trial particulars from her consideration and

holding against the appellant on the basis of the paucity of information furnished in his replication and trial particulars.

- 7.7. *NVM obo VKM v Thembisa Hospital*, unreported judgment, Case No 14/26684 (24 March 2017)

The case concerned delictual liability of the hospital in respect of the birth of a child and brain injuries suffered by the child. The reviewers have been unable to find the candidate's judgment or the appeal judgment in *Thembisa Hospital v NVM obo VKM* Case No A5010/2018 (20 September 2019). However, the case was appealed further to the Constitutional Court in *NVM obo VKM v Thembisa Hospital & Another* 2022 (6) BCLR 707 (CC). The Constitutional Court noted that the candidate found that causation had been established on the facts, while the full court found that causation had not been established on the facts. Accordingly, the main issue before the Constitutional Court was the interpretation and application of the test for factual causation. The minority judgment (of Majiedt J) held that the Court's jurisdiction was engaged by that question and would have upheld the appeal against the decision of the full bench. The majority judgment (of Rogers AJ) held that the Court's jurisdiction was not so engaged.

- 7.8. The following comments were made by other courts in respect of judgments of the candidate, not in the context of an appeal:

- 7.8.1. In *Mashinini v MEC for Health, Gauteng* 2023 (5) SA 137 (SCA) at para 25, the SCA found that the candidate erred in finding that she was developing the common law in *MSM obo KBM v MEC for Health, Gauteng Provincial Government* 2020 (2) SA 267 (GJ). Instead, it found that the candidate had granted relief based on delictual principles.



7.8.2. In *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another* 2023 (5) SA 601 (SCA) at paras 6 and 7, the SCA found that the candidate conflated the two sub-sections of section 172(1) of the Constitution in *South African Broadcasting Corporation SOC Ltd and Another v Mott MacDonald SA (Pty) Ltd*. In that case, the candidate found that she was enjoined under section 172(1)(a) of the Constitution to declare a contract to be void *ab initio* and to set it aside. The SCA found that such order falls under section 172(1)(b) of the Constitution.

Judgments upheld on appeal:

7.9. *Engen Petroleum Limited South Africa v Jai Hind EMCC CC and Another* (11752/2020) [2021] ZAGPJHC 540. Upheld in *Jai Hind EMCC CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited South Africa: In re: Engen Petroleum Limited South Africa v Jai Hind EMCC CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited South Africa* 2023 (2) SA 252 (GJ).

7.10. *Mawenzi Resources and Finance Company (Pty) Ltd (in liquidation) and Others v Nestlife Assurance Corporation Limited and Another* Case no 2238/2015. Upheld in *Mawenzi Resources and Finance Company (Pty) Ltd (In liquidation) and Others v Nestlife Assurance Corporation Limited and Another* [2018] ZAGPJHC 587.

7.11. *BMW South Africa (Pty) Ltd v Commissioner for the South African Revenue Service* (unreported judgment of the Tax Court, Case no.: IT13775 (April 2016)). Upheld in *BMW South Africa (Pty) Ltd v Commissioner for the South African Revenue Service* [2018] ZAGPJHC 720 (A553/16) [2018] ZAGPJHC 720 (28 June 2018) and *BMW South Africa (Pty) Ltd v*

- Commissioner for the South African Revenue Service* 2020 (1) SA 484 (SCA).
- 7.12. *President of the Republic of South Africa and Another v Public Protector and Others* 2018 (2) SA 100 (GP). Upheld in *Public Protector and Others v President of the Republic of South Africa and Others* (CCT 62/20) [2021] ZACC 19; 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) (1 July 2021).
- 7.13. *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] 1 All SA 706 (GP). Upheld in *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC).
- 7.14. *Mr. L.E.D (Pty) Ltd v Waxfam Investments (Pty) Ltd and Others* (14/15049) [2015] ZAGPJHC 137 (3 July 2015). Upheld in *Mr L.E.D. (Pty) Ltd v Waxfam Investments (Pty) Ltd and Others* 2018 (4) SA 308 (GJ).
- 7.15. *Sideralloys International SA v Rahida Investment Proprietary Limited* (2797/18) [2019] ZAGPJHC 227 (18 July 2019). Upheld in *Sideralloys International SA v Rahida Investment (PTY) Ltd* (A5050/19; GJ 2797/18) [2022] ZAGPJHC 936 (24 November 2022).
- 7.16. *Minister of Police v Kunene and Others* [2020] 1 All SA 451 (GJ). Upheld in *Kunene v Minister of Police* (260/2020) [2021] ZASCA 76 (10 June 2021).
- 7.17. *Imbuko Wines (Pty) Ltd v Reference Audio CC* (405/2021) [2022] ZASCA 110 (15 July 2022) in which the SCA upheld the candidate's dissenting judgment in the Full Court.

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

- 8.1. The candidate practised in the legal field for over 30 years before being appointed to the bench. In that time the candidate successfully practised as an attorney, a senior academic, an advocate in private practice, a state advocate at the National Prosecuting Authority (Asset Forfeiture Unit), and an employee within a prominent civil society organisation.
- 8.2. The candidate has an exceptional and notable breadth of professional experience which covers almost all fields of legal practice.
- 8.3. Since her appointment to the bench in 2016, the candidate estimates that she has written over 200 judgments in most areas of law. The reviewers were able to find at least 111 judgments that are attributable to the candidate (either because they were written by the candidate or because the candidate formed part of a bench).

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

- 9.1. The candidate's judgments are well written, well reasoned, and easy to follow. The judgments are clear and concise. The candidate's linguistic and communication skills cannot be faulted.
- 9.2. Several of the candidate's judgments concerned complex factual matrices which were meticulously and sensibly mapped out as a foundation for the analysis which followed.

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

- 10.1. The reviewers came across only one judgment which took longer than three months to produce. *National Director of Public Prosecutions v Wood and*

*Others* 2022 (2) SACR 245 (GJ) was heard on 15 to 19 November 2021 and judgment was delivered on 3 May 2022. However, the matter was heard just before recess began, is a judgment of a full bench, and is 88 pages long.

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

11.1. The candidate is able to conduct court proceedings fairly, efficiently, and effectively. The candidate’s interactions with counsel are good. She is always well prepared and engages in lively and robust debate with counsel. The questions which she poses to counsel are clear, concise, and lucid, resulting in dialogue and debate. The candidate is patient, engaging and open-minded.

11.2. One exchange brought to the attention of the reviewers appears to have been the subject of debate, in which the candidate granted leave to appeal against her judgment in *Afriforum v Chairman of the Council of UNISA and Others* [2018] ZAGPPHC 295 (26 April 2018). The exchange took place on 15 June 2018 (almost six years ago). Despite having been granted leave to appeal, Afriforum appears to have taken issue with certain remarks made by the candidate, for example that “*as South Africans who have less melanin than our fellow South Africans we could learn to move more forward than more back*”.

11.3. The exchange does not, in the view of the reviewers, cast doubt upon the candidate’s record of sound judicial temperament.

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

12.1. The candidate enjoys an excellent reputation among practitioners and has

demonstrated robust open-mindedness in her exchanges with counsel and in her judgments.

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

13.1. The candidate has demonstrated good administrative ability. She has produced a large number of judgments, almost all of them within three months.

13.2. The candidate has held high-level positions within the State (at the National Prosecuting Authority), within civil society, and within academia. As an academic, the candidate contributed to five books and published at least 11 journal articles, indicating an ability to manage a large workload.

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

14.1. It is not often that candidates have a wealth of knowledge and experience across academia, attorney's practice, advocate's practice, State practice, private practice, civil society, criminal law, and civil law. This candidate does. She has achieved excellence in each of the sectors in which she has practised. Her contributions to academia, civil society, and state and private practice are significant. She is liked and respected as a member of the bench in the Gauteng Division and every indication is that her contribution to the appellate court will be equally significant.

**ANNEXURE: LIST OF JUDGMENTS CONSIDERED**

**1. Reported judgments:**

- 1.1. *Knoop NO & Others v NDPP* [2024] 1 All SA 50 (SCA)
- 1.2. *Ericsson South Africa (Pty) Ltd v City of Johannesburg Metropolitan Municipality* [2023] 2 All SA 378 (GJ)
- 1.3. *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of SA* [2022] 1 All SA 706 (GP)
- 1.4. *NDPP v Wood & Others* 2022 (2) SACR 245 (GJ)
- 1.5. *Bayer Intellectual Property v Dr Reddy's Laboratories* 2022 BIP 291 (CP)
- 1.6. *Bayer Intellectual Property v Dr Reddy's Laboratories* 2021 BIP 6 (CP)
- 1.7. *Andalusite v Investec* 2020 (1) SA 140 (GJ)
- 1.8. *Standard Bank Nominees v Hospitality Property Fund Ltd* 2020 (5) SA 224 (GJ)
- 1.9. *MSM v MEC for Health, Gauteng* 2020 (2) SA 567 (GJ)
- 1.10. *Discovery v Liberty* 2020 (4) SA 160 (GJ)
- 1.11. *Minister of Police v Kunene & Others* [2020] 1 All SA 451 (GJ)
- 1.12. *National Credit Regulator v Standard Bank of SA LTD* 2019 (5) SA 512 (GJ)
- 1.13. *S v YG* 2018 (1) SACR 64 (GJ)
- 1.14. *Palala Resources v Minister of Mineral Resources and Energy* 2014 (6) SA 403 (GP)
- 1.15. *Oosthuizen v Van Heerden* 2014 (6) SA 423 (GP)

## **2. Unreported judgments:**

None

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

- 3.1. *Engen Petroleum Limited South Africa v Jai Hind EMCC CC and Another* (11752/2020) [2021] ZAGPJHC 540. Upheld in *Jai Hind EMCC CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited South*

- Africa: In re: Engen Petroleum Limited South Africa v Jai Hind EMCC CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited South Africa* 2023 (2) SA 252 (GJ).
- 3.2. *Mawenzi Resources and Finance Company (Pty) Ltd (in liquidation) and Others v Nestlife Assurance Corporation Limited and Another* Case no 2238/2015. Upheld in *Mawenzi Resources and Finance Company (Pty) Ltd (In liquidation) and Others v Nestlife Assurance Corporation Limited and Another* [2018] ZAGPJHC 587.
- 3.3. *BMW South Africa (Pty) Ltd v Commissioner for the South African Revenue Service (unreported judgment of the Tax Court, Case no.: IT13775 (April 2016))*. Upheld in *BMW South Africa (Pty) Ltd v Commissioner for the South African Revenue Service* [2018] ZAGPJHC 720 (A553/16) [2018] ZAGPJHC 720 (28 June 2018) and *BMW South Africa (Pty) Ltd v Commissioner for the South African Revenue Service* 2020 (1) SA 484 (SCA).
- 3.4. *President of the Republic of South Africa and Another v Public Protector and Others* 2018 (2) SA 100 (GP). Upheld in *Public Protector and Others v President of the Republic of South Africa and Others* (CCT 62/20) [2021] ZACC 19; 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) (1 July 2021).
- 3.5. *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] 1 All SA 706 (GP). Upheld in *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC).
- 3.6. *Mr. L.E.D (Pty) Ltd v Waxfam Investments (Pty) Ltd and Others* (14/15049) [2015] ZAGPJHC 137 (3 July 2015). Upheld in *Mr L.E.D. (Pty) Ltd v Waxfam Investments (Pty) Ltd and Others* 2018 (4) SA 308 (GJ).

- 3.7. *Sideralloys International SA v Rahida Investment Proprietary Limited* (2797/18) [2019] ZAGPJHC 227 (18 July 2019). Upheld in *Sideralloys International SA v Rahida Investment (PTY) Ltd* (A5050/19; GJ 2797/18) [2022] ZAGPJHC 936 (24 November 2022).
- 3.8. *Minister of Police v Kunene and Others* [2020] 1 All SA 451 (GJ). Upheld in *Kunene v Minister of Police* (260/2020) [2021] ZASCA 76 (10 June 2021).
- 3.9. *Imbuko Wines (Pty) Ltd v Reference Audio CC* (405/2021) [2022] ZASCA 110 (15 July 2022) in which the SCA upheld the candidate's dissenting judgment in the Full Court.

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

- 4.1. *CM v EM*. The candidate was part of a full bench sitting as a court of appeal against the trial court's judgment in a divorce action. The reviewers have been unable to find the judgment of the full bench, but the decision was overturned by the SCA in *CM v EM* 2020 (5) SA 49 (SCA).
- 4.2. *Afriforum NPC v Chairperson of the Council of the University of South Africa and Others* [2018] ZAGPPHC 295. Overturned in *AfriForum NPC v Chairperson of the Council of UNISA and Others* [2020] ZASCA 79. The judgment of the SCA was upheld by the Constitutional Court in *Chairperson, Council of the University of South Africa and Others v Afriforum NPC* 2022 (2) SA 1 (CC).
- 4.3. *NVM obo VKM v Thembisa Hospital*, unreported judgment, Case No 14/26684 (24 March 2017). Overturned in *Tembisa Hospital v NVM obo VKM* Case No A5010/2018 (20 September 2019). See also *NVM obo VKM v Tembisa Hospital & Another* 2022 (6) BCLR 707 (CC).
- 4.4. *Innovent Rental and Asset Management Solutions v Transnet SOC*, Case no: 46297/13 (2 September 2016). Overturned in *Transnet SOC v Innovent*



- Rental and Asset Management Solutions* [2018] ZAGPJHC 936). The SCA dismissed an appeal against the judgment of the full bench in *Innovent Rental & Asset Management Solutions (Pty) Ltd v Transnet SOC Ltd* [2019] ZASCA 106 (5 September 2019).
- 4.5. *Mokau v Eskom Holdings SOC Ltd* (19825/14) [2015] ZAGPJHC 135 (3 July 2015). Overturned in *Mokau v Eskom Holdings SOC Ltd* (A5066/15) [2017] ZAGPJHC 135 (9 May 2017).
- 4.6. *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy and Others* 2014 (6) 403 (GP). Overturned on appeal in *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy and Others* 2016 (6) SA 121 (SCA).
- 4.7. *Minaar v Van Rooyen N.O* (27788/04) [2013] ZAGPPHC 375 (20 November 2013). Overturned in *Minaar v Van Rooyen N.O* 2016 (1) SA 117 (SCA).