

# **JSC INTERVIEW ROUND: OCTOBER 2024**

## **VACANCY: JUDGE, GAUTENG DIVISION OF THE HIGH COURT**

### **ADVOCATE GREGORY ALLY**

#### **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. BA (LLB), University of the Western Cape (1982)

1.1.2. LLB, Rhodes University (1989)

1.2. The candidate holds the following professional admissions and honours:

1.2.1. admitted as an advocate in 1990.

1.3. The candidate has never been permanently appointed to any judicial role.

#### **2. The candidate's integrity and ethics**

2.1. The candidate disclosed six outstanding reserved judgments. The earliest judgment was reserved on 10 July 2023.

2.2. The reviewers have, however, received reports that there are at least nine outstanding reserved judgments.

2.3. The reviewers have been provided with reports dealing with outstanding judgments. The candidate has failed to comply with undertakings made to the Deputy Judge President and the Judge President when their interventions were sought by parties awaiting judgments.

2.4. The Constitutional Court in the matter of *Social Justice Coalition and Others v Minister of Police and Others* [2022] ZACC 27 emphasized that there is both an ethical and constitutional duty on judges to act promptly and expeditiously when dealing with a matter. Having regard to the candidate's inability to deal with matters promptly and expeditiously, as discussed in paragraph 10 hereunder, his ability to comply with such duties is questioned.

### **3. The racial and gender composition on the bench**

3.1. As far as could be ascertained, there are currently 76 permanent judges of the Gauteng Division of the High Court:

3.1.1. 24 black women (19 African, 2 Coloured, 3 Indian)

3.1.2. 23 black men (17 African, 2 Coloured, 4 Indian)

3.1.3. 14 white women

3.1.4. 15 white men

3.2. According to the questionnaire, the candidate is a Coloured man.

### **4. The maximum period the candidate could serve if appointed**

4.1. At the time of the interviews, the candidate will be approximately 63 years and 6 months old and will have completed a period of approximately 1 year and 1 months of service as an acting judge.

4.2. If appointed, the candidate would be eligible to serve as a judge for approximately 11 years and 5 months until the age of 75.

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

5.1. The candidate does not express such commitment specifically in his questionnaire.

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

6.1. The reviewers question the candidate's knowledge of substantive and constitutional law, based on the candidate's inability to promptly pronounce on issues, as well as the statement of Windell AJA as set out in paragraph 7.4 below.

6.2. In *Municipal Manager of the City of Johannesburg Metropolitan Municipality and Others v Twin City Realty (Pty) Ltd and Another* (2939/2017) [2024] ZAGPJHC 140 (19 February 2024), which was reserved for two years, the candidate was asked to consider and rule on a cost argument. The judgment itself provides very little guidance and as such, the heads of argument, submitted by the parties, were obtained.

6.2.1. The judgment totals eleven paragraphs, with no reference to any authority, save to state that it is "*trite law that a decision on costs to be awarded in legal proceedings vest in the discretion of the Court which discretion must be exercised judicially taking into account the circumstances of the case.*"

- 6.2.2. None of the authorities referred to in either heads of argument (21 and 7 pages respectively) were considered, debated, applied, or distinguished.
- 6.2.3. The judgment is furthermore silent on why it took two years to hand down.
- 6.3. *P.S.M v R.V.M* (34561/2019) [2023] ZAGPJHC 1170 (6 October 2023) the candidate presided over a divorce action, which judgment the candidate reserved for nearly a year. Albeit that the judgment itself identifies the issue as being one of forfeiture, the judgment reflects various underlying legal issues which the candidate did not deal with.
- 6.3.1. In his judgment the candidate rejected the parties' contention that they concluded a customary marriage in 1993, yet found that there was a valid customary marriage, in community of property, which finding does not deal with the requirements of section 3 of the Recognition of Customary Marriages Act.
- 6.3.2. The candidate does not, in his judgment, state when this marriage was concluded, which date has a material bearing on the status of the marriage and its matrimonial regime.
- 6.3.3. The candidate accepted a matrimonial regime, being in community of property, yet did not consider whether the customary marriage was concluded prior to the commencement of the Recognition Act, which was the evidence of the parties, or thereafter.
- 6.3.4. The candidate did not deal with the possible impact of other polygamous marriages (there were three). If the candidate found that the customary marriage was concluded after 2005, which the judgment implies, then the marriage before court was a polygamous marriage without a contract envisaged by section 7(6) of the Recognition of Customary Marriages Act, resulting in a marriage regarded as being out of community of property with profit and loss.
- 6.3.5. The judgment evidences a failure, by the candidate, to identify and resolve legal issues. The judgment itself, specifically the lack of proper detail and analysis, further underscores the fact that the writing thereof took nearly a year.
- 6.4. In the judgment of Windell AJA in *The Commissioner for the South African Revenue Service v Airports Company for South Africa* (785/2021) [2022] ZASCA 132; 2023

(2) SA 506 (SCA) where she, with reference to the judgment of the candidate, stated at paragraph 12:

- 6.4.1. *“The tax court held that ‘rule 42 of the Tax Court Rules permits an applicant to approach a court for an amendment in terms of rule 28 of the Uniform Rules of Court’. This constitutes the full extent of the tax court’s analysis of the applicable provisions. It failed to address the legal arguments advanced on behalf of SARS and made no findings as to the legal basis for its conclusion. The approach adopted by the tax court, which offers no guidance, is regrettable.”*

## **7. Judgments of the candidate that have been taken on appeal**

7.1. The candidate did not disclose the details of his judgments that have been taken on appeal, save to state that there were two. The reviewers found two judgments of the candidate that have been taken on appeal. Both of his judgments were overturned. The reviewers are not aware of any other pending appeals. The reviewers could not find a judgment in which the candidate granted leave to appeal.

7.2. There are no judgments of the candidate that were upheld on appeal.

7.3. The known judgments of the candidate overturned on appeal are:

7.3.1. *The Commissioner for the South African Revenue Service v Airports Company for South Africa (785/2021) [2022] ZASCA 132; 2023 (2) SA 506 (SCA); and*

7.3.2. *Nel & Others v Cilliers (197/2023) [2024] ZASCA 57 (19 April 2024) (The candidate was the scribe of the full court judgment, sitting on appeal, sitting with Jansen van Nieuwenhuizen J and Bokako AJ. The SCA subsequently granted special leave to appeal this judgment).*

7.4. In addition to paragraph 6.4 above, the SCA (Windell AJA) commented on the candidate’s judgment in *The Commissioner for the South African Revenue Service v Airports Company for South Africa*, at para 26, that:

7.4.1. *“As I have shown the tax court wholly misconceived the matter. As a result, the order issued is plainly wrong and it can hardly be in the interests of justice to permit it to stand.”*

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

8.1. The candidate was admitted as an advocate in 1990. As an advocate his experience was mainly limited to criminal law, personal injury law, and family law.

8.2. The candidate has acted as a judge, albeit intermittently, for a lengthy period.

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

9.1. The candidate's judgments are written in English.

9.2. Nothing in the judgments considered by the reviewers indicates that the candidate's linguistic and communication skills are not adequate.

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

10.1. The candidate indicated that 6 judgments were outstanding at the time of completing the questionnaire.

10.2. As far as could be ascertained at the time of completing this review, all 6 of these judgments were still outstanding, all of which have been outstanding for more than three months. Two judgments have been outstanding for more than a year.

10.3. Reference has already been made to *Municipal Manager of the City of Johannesburg Metropolitan Municipality and Others v Twin City Realty (Pty) Ltd and Another* (2939/2017) [2024] ZAGPJHC 140 (19 February 2024), heard on 1 February 2022 which judgment was handed down on 19 February 2024, more than two years later.

10.4. In *Smith NO obo T.B.W v Road Accident Fund* (41898/2019) [2023] ZAGPJHC 722 (14 June 2023) the candidate heard the trial on 8 and 9 March 2022. The candidate handed down judgment on 14 June 2023. In the judgment the candidate omitted to appoint a trust, which he had to remedy subsequently (more than one year later).

10.5. In *E.M v A.T.M* (37007/2022) [2023] ZAGPPHC 1924 (16 November 2023) the candidate presided over an application for the setting aside of a writ of execution, which was heard on 24 October 2022. Judgment was handed down on 16 November 2023 (more than one year later).

10.6. In *P.S.M v R.V.M* (34561/2019) [2023] ZAGPJHC 1170 (6 October 2023) the candidate presided over a divorce action. The trial took place on 18, 19, 20 and 21 July 2022, 20 and 22 September 2022. Judgment was handed down on 6 October 2023 (more than one year later).

- 10.7. In *Kawasaki Robotics GmbH and Another v Directech* (43250/2020) [2022] ZAGPJHC 991 (12 December 2022) the candidate presided over an application dealing with trademark infringement and an interdict. The matter was heard on 3 February 2022, and judgment was handed down on 12 December 2022 (10 months).
- 10.8. In *Compensation Solutions (Pty) Ltd v Compensation Commissioner and Others* (56219/2021; 49156/2021) [2023] ZAGPPHC 572 (18 July 2023) the candidate heard a summary judgment application on 15 August 2022 and handed down judgment on 18 July 2023 (nearly a year).
- 10.9. In *Royeppen and Others v Masher and Others* (2019/15061) [2021] ZAGPJHC 355 (31 May 2021) the candidate presided over an opposed application for interdictory relief and the removal of a beneficiary from a will. The matter was heard on 31 August 2020 and judgment was handed down on 31 May 2021 (10 months).
- 10.10. In *Dreyer v Afristat Investment Holdings* (030942/22) [2024] ZAGPPHC 142 (20 February 2024) the candidate heard an urgent opposed winding up application on 8 and 9 June 2023. Judgment was handed down on 20 February 2024 (7 months).
- 10.11. In *ABSA Bank Limited v AA Diamonds (Pty) Ltd* (29174/2019) [2023] ZAGPJHC 1432 (8 December 2023) the candidate heard on opposed winding up application on 10 September 2020. He handed down judgment on 21 May 2021. Thereafter it took 25 months to have the application for leave to appeal heard on 29 June 2023, and a further six months for the judgment thereon, which was handed down on 8 December 2023. As no mention was made of condonation in the last judgment, the reviewers accepted that the application for leave to appeal was filed timeously.
- 10.12. In his application the candidate discloses that the judgment of *Alexander v MEC for Health* is outstanding since 10 July 2023.
- 10.12.1. This matter, cited as *Alexander obo Minor v MEC Health, Gauteng*; Case Number 13494/2018, was heard as a special trial on 15, 16, 17, 18, 19, 22, 23, 24, 25, and 26 May 2023 and 3, 4, 5, 6, 7 and 10 July 2023, on which last date the candidate was provided with detailed heads and oral argument.
- 10.12.2. Following various unanswered queries by the attorneys for the minor, addressed to the office of the candidate's registrar and following a written complaint to the Office of the Deputy Judge President on 6 March 2024, the DJP on 8 March 2024 informed the parties that "*Ally AJ informed me that judgment will be*

*delivered by on or before 29 March 2024*". The candidate did not meet this deadline and offered no reason.

10.12.3. On 3 April 2024, and through the Office of the Deputy Judge President, the candidate again undertook to finalise the judgment by 22 April 2024, but did not do so.

10.12.4. Following the escalation of the issue to the Office of the Judge President, and on 3 July 2024 the Office of the Judge President, Gauteng Division, addressed a letter to the parties stating:

*"Kindly note that the Judge has communicated that he will undertake to finalize the Judgement by the 5 July 2024, he also sincerely apologises for the inconvenience."*

10.12.5. The candidate did not meet this deadline and still has not handed down judgment.

10.12.6. The *Alexander* matter dealt with a minor child, Kelvenisha, who suffers from cerebral palsy, caused by the negligence of the MEC for Health, Gauteng. The candidate was called upon to do a proper judicial enquiry, both factual and constitutional, into the so-called "*public health defence*". The amount of damage to be awarded, in the event of the "*public health defence*" failing, had already been judicially determined previously. Payment of the minor's claim for future medical expenses, albeit already quantified in the region of R12m, was dependent upon the outcome of the issues to be decided by the candidate. Therefore, and until judgment is handed down, she cannot properly receive the required treatment. The delay in handing down this judgment, and others, calls into question the candidate's commitment to the rule of law.

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

11.1. The reviewers received no adverse comments relating to the candidate's ability to conduct court proceedings fairly in court.

11.2. The feedback received however indicate that the candidate, in court, displays a good understanding of court procedure and the law of evidence.

11.3. The failure to deliver judgments within a reasonable time or after giving undertaking

to senior judges and parties illustrates an inability to fairly, efficiently, and effectively finalise matters.

## **12. The candidate's independent-mindedness**

- 12.1. The candidate nominated himself.
- 12.2. The candidate discloses his previous employment with the South African Secret Service. It is uncertain exactly what the functions of the candidate were during such employment and what information exactly the candidate was exposed to. During the review process, views were received questioning the candidate's independence based on the secret nature of this employment.

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

- 13.1. The reviewers have already pointed out the candidate's failure to adhere to undertakings given by the Deputy Judge President and the Judge President, Gauteng as well as his failure to respond to queries from parties awaiting judgment.
- 13.2. The reviewers considered the Reserved Judgments Report for the Chief Justice, relating to reserved judgments up to the beginning of Term 4 of 2023. Such report contains no reference to *P.S.M v R.V.M (34561/2019) [2023] ZAGPJHC 1170 (6 October 2023)* or *Municipal Manager of the City of Johannesburg Metropolitan Municipality and Others v Twin City Realty (Pty) Ltd and Another (2939/2017) [2024] ZAGPJHC 140 (19 February 2024)*.
- 13.3. The Reserved Judgments at 31 December 2022, as published by the Chief Justice, also has no reference to any outstanding judgments by the candidate. The *Smith N.O.* matter should have been reported.

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

- 14.1. The reviewers believe that it would send an unacceptable message to the public at large in the event of the candidate's appointment.
- 14.2. The ability to deliver judgments within a reasonable time lies at the heart of dispensing justice.
- 14.3. The failure to address this inability spanning years, cannot be justified. The intervention of the Judge President and Deputy Judge President in these matters has not cured the problem.



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

### Reported judgments

1. None

### Unreported judgments

2. *South African Legal Practice Council v Phooka* (75966/2018) [2020] ZAGPPHC 515 (31 July 2020)
3. *Royeppen and Others v Masher and Others* (2019/15061) [2021] ZAGPJHC 355 (31 May 2021)
4. *Noble v Minister of Police* (16458/2016) [2022] ZAGPJHC 253 (22 April 2022)
5. *Nethonondo and Others v Nathcron CC* (44522/2018) [2022] ZAGPJHC 751 (23 September 2022)
6. *Nel and Others v Cilliers* (A208/2021) [2022] ZAGPPHC 856 (7 November 2022)
7. *Kawasaki Robotics GmbH and Another v Directech* (43250/2020) [2022] ZAGPJHC 991 (12 December 2022)
8. *Smith NO obo T.B.W v Road Accident Fund* (41898/2019) [2023] ZAGPJHC 722 (14 June 2023)
9. *Compensation Solutions (Pty) Ltd v Compensation Commissioner and Others* (56219/2021; 49156/2021) [2023] ZAGPPHC 572 (18 July 2023)
10. *P.S.M v R.V.M* (34561/2019) [2023] ZAGPJHC 1170 (6 October 2023)
11. *E.M v A.T.M* (37007/2022) [2023] ZAGPPHC 1924 (16 November 2023)
12. *ABSA Bank Limited v AA Diamonds (Pty) Ltd* (29174/2019) [2023] ZAGPJHC 1432 (8 December 2023)
13. *Municipal Manager of the City of Johannesburg Metropolitan Municipality and Others v Twin City Realty (Pty) Ltd and Another* (2939/2017) [2024] ZAGPJHC 140 (19 February 2024)
14. *Dreyer v Afristat Investment Holdings* (030942/22) [2024] ZAGPPHC 142 (20 February 2024)

### Judgments upheld on appeal

15. None

### Judgments dismissed on appeal

16. *The Commissioner for the South African Revenue Service v Airports Company for South*

*Africa* (785/2021) [2022] ZASCA 132; 2023 (2) SA 506 (SCA)  
17. *Nel & Others v Cilliers* (197/2023) [2024] ZASCA 57 (19 April 2024)