

JSC INTERVIEW ROUND: OCTOBER 2024

VACANCY: JUDGE PRESIDENT, WESTERN CAPE DIVISION OF THE HIGH COURT

JUDGE BABALWA PEARL MANTAME

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. B. Juris, University of Transkei, now Walter Sisulu University (1996)

1.1.2. LLB, University of Transkei (1999).

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

1.2.1. admitted as an attorney in October 2000.

1.3. The candidate was permanently appointed to the following judicial roles:

1.3.1. Judge of the High Court (Western Cape Division) in February 2013

2. The candidate's integrity and ethics

2.1. No circumstances known to the reviewers 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. The racial and gender composition on the bench

3.1. As far as could be ascertained, there are 27 permanent judges of the Western Cape Division of the High Court:

3.1.1. 10 black women (4 African, 6 Coloured)

3.1.2. 12 black men (5 African, 5 Coloured, 2 Indian)

3.1.3. 2 white women

3.1.4. 3 white men

3.2. According to the questionnaire, the candidate is an African woman.

4. The maximum period the candidate could serve if appointed

- 4.1. At the time of the interviews, the candidate will be approximately 50 years and 9 months old and will have completed a period of approximately 11 years and 8 months of active service.
- 4.2. If appointed, the candidate would be eligible to complete a period of approximately 19 years and 2 months' active service as Judge President.

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

- 5.1. The candidate's *curriculum vitae* indicated that she formerly held membership of the Black Lawyers Association and the South African Women Lawyers Association.
- 5.2. She was a faculty member of the BLA's Legal Education Centre and provided trial advocacy training to law students and legal practitioners.

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

- 6.1. A review of the candidate's judgments shows her knowledge in various areas of law, including constitutional law.
- 6.2. The candidate has, however, attracted criticism from the Constitutional Court for failure to observe a founding value of the Constitution.
 - 6.2.1. This appears in the judgment of *Barnard Labuschagne Inc v Commissioner, South African Revenue Service and Another* 2022 (5) SA 1 (CC) at paragraphs [29] to [30]. The judgment states:

“Since all the relevant authorities were drawn to the High Court's attention, it is unacceptable that it did not discuss them and either follow them or explain why it thought they were distinguishable. In the light of the authorities to which the High Court was referred, it is difficult to fathom the court's statement, when refusing leave to appeal, that there were no conflicting judgments on rescindability. ... Observance of the rules of precedent is not a display of politeness to courts of higher authority; it is a component of the rule of law, which is a founding value of the Constitution.”

- 6.2.2. The judgment further states at paragraph [31]:

“The High Court's cursory dismissal of the alternative constitutional challenge is also unsatisfactory. Having wrongly found that a tax judgment is not rescindable, the High Court was required to revisit the constitutional challenge assessed in Metcash, bearing in mind that the rescindability of tax judgments was an integral part of this court's reasons for dismissing the constitutional challenge. However, nothing more need be said about this, since the High Court's finding on rescindability was wrong.”

- 6.2.3. The Constitutional Court overturned the candidate’s judgment in *Labuschagne Inc v South African Revenue Services & Minister of Finance* 2020 JDR 1167 (WCC).

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

- 7.1. The candidate has disclosed that six judgments have been taken on appeal. The reviewers found a further two judgments. On appeal, four judgments have been upheld, one partly upheld and partly overturned, and three judgments have been overturned. It is possible that some appeals remain to be decided, but these were not traced.

- 7.2. The judgments of the candidate upheld on appeal are:

- 7.2.1. *City of Cape Town v Khaya Projects (Pty) Ltd & Others* (21166/12) [2014] ZAWCHC 167; 2015(1) SA 421 (WCC); [2015] 1 All SA 81 (WCC) (11 November 2014). The judgment was upheld in *City of Cape Town v Khaya Projects (Pty) Ltd and Others* 2016 (5) SA 579 (SCA), save that the SCA set aside the order directing the appellant to pay the costs of the *amicus curiae*.
- 7.2.2. *In Ma-Afrika Hotels (Pty) Ltd & Another v Santam Limited* (6499/2020) ZAWCHC 160; [2021] 1 All SA 195 (WCC) (17 November 2020); 2020 JDR 2375 (WCC) the candidate, sitting on a full bench, co-wrote the judgment with Goliath J (Cloete J writing a separate concurring judgment). This full bench judgment was upheld in *Santam Limited v Ma-Afrika Hotels (Pty) Ltd* 2021 JDR 2421 (SCA).
- 7.2.3. *Lifman & Others v Commissioner for the South African Revenue Services & Others* (5961/15) [2015] ZAWCHC 218; [2016] 1 All SA 225 (WCC) (17 June 2015) in which the candidate refused the applicants’ application for an interim

interdict with costs, including the costs of three counsel. The candidate listed this in her application as one of her judgments that were unsuccessfully appealed against, but the reviewer has been unable to locate the appeal judgment.

7.2.4. *In Becker v Minister of Mineral Resources and Energy and Others* [2023] 2 All SA 73 (WCC) the candidate refused a subsequent application for leave to appeal to the SCA. The reviewer was advised by counsel in the matter that the SCA granted leave to appeal and to cross-appeal, and then refused both the appeal and cross-appeal, with minimal reference to the candidate's judgment.

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

7.3.1. *Truworths Limited v Pepkor Retail (Pty) Ltd* 2016 JDR 2201 (WCC), in *Pepkor Retail (Pty) Ltd v Truworths Ltd* (900/2015) [2016] ZASCA 146 (30 September 2016).

7.3.2. *Investec Bank Limited v Stratford & Another* (10394/2012) [2013] ZAWCHC 207 (14 August 2013) – upheld partly by the Constitutional Court in *Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC).

7.3.3. The candidate's majority judgment for the full bench, overturned in *Bischoff NO obo Denzil John Reyners v Passenger Rail Agency of SA* (727/2022) [2023] ZASCA 160 (28 November 2023).

7.3.4. *Labuschagne Inc v South African Revenue Services & Minister of Finance* 2020 JDR 1167 (WCC) was overturned in *Barnard Labuschagne Inc v Commissioner, South African Revenue Service and Another* 2022 (5) SA 1 (CC), referred to in paragraphs 5.2 to 5.2.4 above.

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

8.1. The candidate's professional experience extends over 24 years and broadly falls into three stages: the first stage was her practice as an attorney from October 2000 to March 2011 (both with the state attorney and in private practice), the second stage was as an acting judge for eight successive court terms in the Western Cape High Court from April 2011 to February 2013, and the third stage has been her permanent appointment as a judge in the Western Cape High Court from February 2013 to date, with a term as an acting judge in the Supreme Court of Appeal from June to September 2024.

9. The candidate's linguistic and communication skills

- 9.1. The candidate's judgments are written in English.
- 9.2. Nothing in the judgments and other writings considered by the reviewers indicates that the candidate's linguistic and communication skills are inadequate.

10. The candidate's ability to produce judgments promptly

- 10.1. The candidate indicated that one judgment was outstanding at the time of completing the questionnaire.
- 10.2. As far as could be ascertained at the time of completing this review, that judgment was no longer outstanding as it was not marked up on the WCHC list of reserved judgments as at 22 August 2024.
- 10.3. Of the 15 judgments of the candidate considered by the reviewers, none were handed down more than three months after the hearing, where the dates of the hearing and judgment were known.

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

- 11.1. The reviewers received no adverse comments from colleagues relating to the candidate's ability to conduct court proceedings fairly, efficiently, and effectively.

12. The candidate's independent-mindedness

- 12.1. The reviewers received no adverse comments from colleagues relating to the candidate's independent-mindedness.

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

The candidate was a director of her own law firm for a two-year period from March 2011 to February 2013 and presumably had to discharge administrative functions in that capacity. However, she was an acting judge in the Western Cape High Court during every court term commencing from April 2011 to February 2013, so her attention to administrative duties in her practice would necessarily have been curtailed while on the bench.

- 13.1. The candidate's *curriculum vitae* indicates that she had served on various committees and boards, which would indicate that she has adequate administrative abilities.

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

- 14.1. The candidate's appointment would send the message that there is a commitment to the transformation of leadership within the division.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported judgments

1. *Kekkel en Kraai Suid Afrika (Pty) Ltd v Bes-Buhr Trading CC and others* [2023] 4 All SA 439 (WCC) (full bench judgment authored by the candidate)
2. *Becker v Minister of Mineral Resources and Energy and Others* [2023] 2 All SA 73 (WCC) – the candidate refused a subsequent application for leave to appeal to the SCA. The reviewer was advised by counsel in the matter that the SCA granted leave to appeal and to cross-appeal, and then refused both the appeal and cross-appeal.
3. *Olivier NO v MEC for Health, Western Cape and Another* 2023 (2) SA 551 (WCC)
4. *Smit v The Master of the High Court, Western Cape and Others* [2022] 4 All SA 146 (WCC)
5. *Ma-Afrika Hotels (Pty) Ltd & Another v Santam Limited* [2021] 1 All SA 195 (WCC) the candidate, sitting on a full bench, co-wrote the judgment with Goliath J
6. *Lifman & Others v Commissioner for the South African Revenue Services & Others* [2016] 1 All SA 225 (WCC)
7. *City of Cape Town v Khaya Projects (Pty) Ltd & Others* 2015(1) SA 421 (WCC); [2015] 1 All SA 81 (WCC)

Unreported judgments

8. *McMurray and others v Heat Pump International (Pty) Ltd* 2023 JDR 1865 (WCC)
9. *Machard v Minister of Defence and Military Veterans and Others* 2022 JDR 1498 (WCC)
10. *Goosen-Joubert v Women4Women NPC* (16325/2021) [2022] ZAWCHC 82 (16 May 2022)
11. *Serné NO. v Mzamomhle Educare* 2021 JDR 2352 (WCC) (two judges)
12. *Congress of Traditional Leaders of South Africa v Speaker of the National Assembly and Others* (2474/16) [2016] ZAWCHC 206; [2017] 2 All SA 463 (WCC) (23 November 2016)
13. *Truworths Limited v Pepkor Retail (Pty) Ltd* 2016 JDR 2201 (WCC)
14. *Investec Bank Limited v Stratford & Another* (10394/2012) [2013] ZAWCHC 207 (14 August 2013)
15. *Labuschagne Inc v South African Revenue Services Minister of Finance* 2020 JDR 1167 (WCC)

Judgments upheld on appeal

16. *Ma-Afrika Hotels (Pty) Ltd & Another v Santam Limited* [2021] 1 All SA 195 (WCC)
17. *Lifman & Others v Commissioner for the South African Revenue Services & Others* [2016] 1 All SA 225 (WCC) - the reviewers have been unable to locate the appeal judgment
18. *City of Cape Town v Khaya Projects (Pty) Ltd and Others* 2015 (1) SA 421 (WCC)
19. *Investec Bank Limited v Stratford & Another* (10394/2012) [2013] ZAWCHC 207 (14 August 2013) – upheld partly by the Constitutional Court in *Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC)

Judgments dismissed on appeal

20. The candidate's majority judgment for the full bench, overturned in *Bischoff NO obo Denzil John Reyners v Passenger Rail Agency of SA* (727/2022) [2023] ZASCA 160 (28 November 2023)
21. *Labuschagne Inc v South African Revenue Services Minister of Finance* 2020 JDR 1167 (WCC)
22. *Truworths Limited v Pepkor Retail (Pty) Ltd* 2016 JDR 2201 (WCC)
23. *Investec Bank Limited v Stratford & Another* (10394/2012) [2013] ZAWCHC 207 (14 August 2013) – upheld partly by the Constitutional Court in *Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC)