

JSC INTERVIEW ROUND: OCTOBER 2024

VACANCY: JUDGE SUPREME COURT OF APPEAL

JUDGE PETRUS ARNOLUS KOEN

1. The candidate's tertiary qualifications, professional admissions, honours, and permanent judicial appointments:

1.1. The candidate holds the following qualifications:

1.1.1. Bachelor of Commerce (BCom), The University of Natal, Pietermaritzburg (now the University of KwaZulu-Natal) – 1980

1.1.2. Bachelor of Laws (LLB) (Cum Laude), The University of Natal, Pietermaritzburg (now the University of KwaZulu-Natal) – 1982

1.1.3. Diploma in Arbitration – 1986, The Association of Arbitrators of South Africa.

1.2. The candidate's professional admissions:

1.2.1. admitted as an attorney, notary public and conveyancer – 30 March 1987

1.2.2. the candidate practised as an advocate and was a member of the Society of Advocates KwaZulu-Natal, in Pietermaritzburg – July 1988 to 31 October 2006

1.2.3. the candidate was conferred the status of Senior Counsel on 13 November 1997.

1.3. The candidate was appointed as a judge of the High Court, KwaZulu-Natal, on 1 November 2006.

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.

2.2. The candidate has disclosed that an in-person litigant, Mr Ramnarain Manilal, lodged a complaint against him with the Judicial Service Commission, which dismissed the complaint summarily. The complainant appealed the decision. The tribunal that considered the appeal, comprising Goliath DJP (with Nkabinde ADCJ, and Molemela (then) JP), unanimously dismissed the appeal.

3. Whether the candidate's appointment would help to achieve an appropriate racial and gender composition on the bench:

3.1. There are currently 23 permanent judges on the Supreme Court of Appeal bench, comprising:

3.1.1. 10 black women (8 African, 1 Coloured, 1 Indian)

3.1.2. 7 black men (4 African, 2 Coloured, 1 Indian)

3.1.3. 3 white women, and

3.1.4. 3 white men.

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

4. The maximum time period the candidate could serve if appointed:

4.1. At the time of the interviews, the candidate will be approximately 65 years old and will have completed a period of approximately 17 years and 11 months of active service.

4.2. If appointed, the candidate would be eligible to complete a period of approximately 4 years and 11 months' active service as a judge of the Supreme Court of Appeal.

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

5.1. Throughout his professional career, the candidate has dedicated his time to training legal practitioners, advocates, Magistrates, and aspirant judges. The candidate is still involved in pupil advocate training and presides at the annual final motion and appeal moot court hearings arranged by the Pietermaritzburg Bar at the conclusion of the pupil advocates' vocational training. The candidate has also presided over final moot court hearings for law students at the University of KwaZulu-Natal, in both Durban and Pietermaritzburg.

5.2. The candidate has served in leadership positions in the legal profession as the Chairperson and Vice Chairperson of the Society of Advocates of KwaZulu-Natal in the period 2003 – 2005.

5.3. The candidate has been a member of the editorial board of the South African Criminal Justice Journal since 2019.

5.4. This commitment to legal training reflects a commitment to the rule of law and to

ensuring that an efficient legal service is promoted by new entrants to the profession and those seeking advancement.

5.5. The candidate served as a council member of the Community Chest, Pietermaritzburg from 2014 to 2018. The Community Chest assists vulnerable communities in the greater Pietermaritzburg area. On 20 September 2018, the candidate formally recognised by this organisation for his services.

5.6. The candidate has played an important part in giving time, effort, and resources to vulnerable persons and generally to advance the interests of others.

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

6.1. From his *curriculum vitae*, the candidate has extensive legal experience in various legal fields, having practised as an advocate for approximately 18 years, 9 of which as senior counsel.

6.2. The candidate has served as a permanent judge of the High Court for a period of almost 18 years.

6.3. The candidate has extensive experience and diverse knowledge and understanding of various areas of the law.

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

7.1. The judgments of the candidate upheld on appeal:

7.1.1. *Shoprite Checkers (Pty) Ltd v Everfresh Market Virginia (Pty) Ltd (previously known as Wild Brek 166 (Pty) Ltd)* 2010 JDR 0818 (KZP). Leave to appeal was refused by SCA. Thereafter the applicant was unsuccessful before the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC);

7.1.2. *Kwa Sani Municipality v Underberg/ Himeville Community Watch Association* 2013 JDR 2506 (KZP). The appeal was dismissed, and judgment confirmed on appeal in *Kwa Sani Municipality v Underberg/ Himeville Community Watch Association and Another* [2015] 2 All SA 657 (SCA);

7.1.3. *Gainsford v Argent Industrial Limited* (unreported PMB judgment). The candidate's judgment was confirmed by the full court in *Argent Industrial*

Limited v Gainsford NO and Others [2018] ZAKZPHC 37; [2018] JOL 40406 (KZP).

7.1.4. *Malani v Natalia Financial Brokers CC* 2016 JDR 1039 (KZP). The order was confirmed on appeal in *Malani v Natalia Financial Brokers CC* [2016] ZASCA 84; and

7.1.5. *Magudu Game Company (Pty) Ltd v Mathenjwa NO and others* [2008] 2 All SA 338 (N), was confirmed on appeal in *Mathenjwa NO and others v Magudu Game Company (Pty) Ltd* [2009] 4 All SA 15 (SCA), 2010 (2) SA (SCA). The candidate's judgment is discussed by A Muir in 'Of fences, game and property – Some unresolved issues of wild animals in South Africa' 2016 Stell LR 136, Prof W Freedman 'A critical analysis of the escape rule (2019) TSAR 374; and AJ van der Walt 'Normative pluralism and anarchy' (2008) 1 CCR 77.

7.2. Judgments overturned on appeal

7.2.1. *Mahlangu and another v Minister of Police* 2020 (2) SACR 136 (SCA); [2020] 2 All SA 656 (SCA). The candidate's majority judgment was overturned in *Mahlangu and another v Minister of Police* 2021 (2) SACR 595 (CC); 2021 (7) BCLR 698 (CC).

The appeal centred on whether the Minister should be held vicariously liable for damages flowing from the appellants' detention for the entire period (that is from the time of their unlawful arrest to the time of their release). Specifically, whether the candidate was correct in holding that the failure by appellants to apply for bail after the unlawful arrest and detention relieved the Minister of the onus to prove the lawfulness of their detention for the entire period.

The Constitutional Court found that the approach adopted by the Supreme Court of Appeal, in shifting the onus onto the applicants, constituted an error in law.

The Constitutional Court further found that the SCA erred in refusing to award the appellants damages for the full period of detention from the date of their arrest to the date of their release.

7.2.2. *Mthimkulu v S* 2013 (2) SACR 89 (SCA) in which the candidate's order in *S v Mthimkulu* was altered on appeal.

The appellant appealed to the SCA against the order, with leave of the court *a*

quo. The principal issue for determination on appeal was whether s 276B(2) of the Criminal Procedure Act 51 of 1977 (the Act) compels a court that sentences a person to imprisonment, following a conviction for two or more offences where the sentences of imprisonment are ordered to run concurrently, to fix a non-parole period in respect of the effective period of imprisonment. A subsidiary issue was whether the appellant had a right to be heard before the court *a quo* invoked s 276B(2) of the Act.

The appellant was convicted in the KwaZulu-Natal division on one count of murder, possession of a fully automatic firearm without a licence to possess such firearm and possession of five rounds of live ammunition without the required licence. He was sentenced to 20 years' imprisonment on the murder count and five years' imprisonment for unlawful possession of a prohibited firearm and ammunition.

The court *a quo* directed that the term of five years' imprisonment in respect of the latter two counts run concurrently with the 20 years' imprisonment imposed in respect of the murder count, and then proceeded to fix a non-parole period of 13 years.

The SCA dealt with the interpretation of the relevant provision. Leach JA found that the court *a quo* erred and that its judgment on the non-parole period should be set aside.

7.2.3. *Craig NO v Minister of Safety and Security* (unreported PMB Judgment). Order altered on appeal in *Minister of Safety and Security and others v Craig and others* [2010] 1 All SA 126 (SCA); 2011 (1) SACR 469 (SCA).

The plaintiff instituted action both in her personal capacity and as legal guardian of her three minor daughters, claiming delictual damages for loss of support following death in detention of her spouse. The plaintiff asserted that police at the Hammarsdale police station were under a legal duty to ensure the well-being of an arrested person, such as the deceased, and that they had negligently breached that duty in relation to him. According to the plaintiff, the police were negligent in that they had detained the deceased without ensuring that he had immediate medical attention.

The appeal turned on whether the assessment of the evidence by the court below was correct.

At para 64 of the judgment the court found that:

“the court below was manifestly wrong in accepting the evidence of Dr Thompson. He made the verbal report relied on by the court below to Captain van Zandten after the deceased’s death was reported in the media and was common knowledge in Camperdown, and after it must have become known to him at least that there was a concern about culpability.”

The SCA upheld the appeal with costs and the order of the court *a quo* was set aside and substituted.

7.2.4. *S v Coetzee* 2008 JDR 0803 (N) (with Gorven J, now JA concurring). A sentence altered on appeal in *Coetzee v S* 2010 (1) SACR 176 (SCA); [2010] 2 All SA 1 (SCA).

The appellant was convicted in the Regional Court on four counts of indecent assault and two counts of *crimen injuria*. He was sentenced to an effective term of four years' imprisonment. An appeal against conviction and sentence was dismissed by the Pietermaritzburg High Court (Koen J, Gorven AJ concurring). The appeal was against the sentence only.

The SCA found that all the counts should be taken as one for purposes of sentence. Accordingly, a sentence of four years' imprisonment in terms of s 276(1)(i) of the Act was appropriate.

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

8.1. The candidate has considerable professional experience in the legal field, as an attorney and advocate.

8.2. The candidate has served as a judge of the High Court for a further period of almost 18 years.

8.3. The candidate was appointed as an Acting Judge of Appeal of the Supreme Court of Appeal for eight stints during the following periods:

8.3.1. 1 December 2014 to mid-February 2015

8.3.2. 1 October 2019 to 30 November 2019

- 8.3.3. 1 December 2019 to 31 March 2020
- 8.3.4. 1 April 2020 to 31 May 2020
- 8.3.5. 1 October 2023 to 30 November 2023
- 8.3.6. 1 February 2024 to 23 February 2024
- 8.3.7. 1 April 2024 to 31 May 2024
- 8.3.8. 1 June to 30 September 2024.
- 8.4. The well-considered judgments of the candidate reflect his extensive professional legal experience.
- 8.5. The candidate has cited the following matters as involving extensive facts and lengthy records:
 - 8.5.1. *Price Waterhouse Coopers Inc and Others v The National Potato Cooperative and Another* (451/12) [2015] ZASCA 2; [2015] 2 All SA 403(SCA) (4 March 2015), in which the record exceeded 84 000 pages (p 20 of the candidate's application).
 - 8.5.2. *Shange and Others v S* [2017] 3 All SA 289 (KZP); [2016] ZAKZPHC 115, which involved an extended trial relating to two cash in transit robberies involving 26 accused and 31 charges. In this matter the record exceeded 10 000 pages.
 - 8.5.3. The candidate's recent acting appointment at the SCA from 1 February 2024 in the appeal for *SAP SE v Systems Application Consultants (Pty) Ltd t/s Securinfo and Another*, comprised of 63 volumes and approximately 12 000 pages.

9. The candidate's linguistic and communication skills:

- 9.1. The candidate has good linguistic and communication skills. The candidate is able to crystallise and distil issues in dispute. The candidate's judgments follow logical reasoning, and the relevant legal principles are applied to the facts of the matter.

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

- 10.1. The candidate has disclosed in his application that he had one outstanding judgment (*S v Mhlongo*) which would be handed down by 15 July 2024. The reviewers were not able to locate the judgment.

10.2. The candidate is not known to delay judgments.

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

11.1. A letter from TSI Mthembu SC, dated 30 May 2024, nominating the candidate for appointment to the SCA describes the candidate as follows: "*I found him to be a man of excellent character and integrity*", and further that "*he is courteous to counsel and members of the public appearing before him in court. He has, by virtue of the number of reported judgments, contributed immensely to the law*" (p 2 of the candidate's application).

11.2. Comments to the reviewers variously described the candidate as cordial and respectful. The candidate has been praised for his patience and his assistance to counsel and to unrepresented parties. The candidate is efficient and is able to identify the issues quickly so as to direct parties to the evidence and the legal principles applicable. This trait has led to the candidate's ability to optimise court time and to guide the parties to address the pertinent issues.

11.3. The review team notes that, in the course of the candidate's recent interview for appointment to the SCA in May 2024, two commissioners questioned the candidate's decision to raise the question of his own recusal in a criminal matter (*S v Zuma and Another* 2023 (1) SACR 621 (KZP)) which he had presided over for a period of 2 years.

12. The candidate's independent mindedness:

12.1. The candidate's considerable legal experience, independent, and open-minded approach to his work is demonstrated in his judgments. There have not been any reports of executive-mindedness, bias, nor prejudice to particular persons or parties.

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

13.1. The candidate has held positions of leadership, within and outside of the legal profession. Under his leadership, the PMB Bar was well managed and well resourced.

13.2. The candidate is known as a judge who prepares diligently for hearings before him and delivers prompt judgments.

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

- 14.1. The candidate's appointment as would send a positive message to the community at large for the following reasons:
- 14.2. The candidate is a senior judge with considerable experience and expertise in diverse areas of the law. This experience would assist the SCA in shoring up the expertise lost due to the recent retirements.
- 14.3. The candidate engages courteously with legal practitioners and members of the public. He is respected by members of the Bar for his legal acumen and for being approachable and engaging.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported judgments

- 1 *Maharaj's Coach and Bus Hire CC v Dealership Middelburg Man (Pty) Ltd and Others* [2022] ZAKZPHC
- 2 *Staufen Investments (Pty) Ltd v The Minister of Public Works, ESKOM Holdings SOC Ltd & The Registrar of Deeds, Cape Town* (200/2019) [2020] ZASCA 18; [2020] 2 All SA 738 (SCA); 2020 (4) SA 78 (SCA) (20 March 2020)
- 3 *Intech Instruments v Transnet Ltd* 2018 JDR 0506 (KZD) [2017] ZAKZDHC 49, upheld on appeal in *Intech Instruments v Transnet Limited t/a South African Port Operations* (1165/18) [2019] ZASCA 79; [2019] 3 All SA 357 (SCA)
- 4 *Africa Cash and Carry (Pty) Limited v The Commissioner for the South African Revenue Service* (783/18) [2019] ZASCA 148; [2020] 1 All SA 1 (SCA); 2020 (2) SA 19 (SCA) 21
- 5 *University of KwaZulu-Natal v Independent Newspapers (Pty) Ltd and Others* [2018] JOL 40414 (KZD); 2018 JDR 1623 (KZD)
- 6 *Media 24 (Pty) Ltd and Others v Department of Public Works and Others* [2016] 3 All SA 870 (KZP); [2016] ZAKZPHC 52; 2016 JDR 1148 (KZP)
- 7 *Kwa Sani Municipality v Underberg/ Himeville Community Watch Association* 2013 JDR 2506 (KZP); [2013] ZAKZPHC 60. Appeal was dismissed and judgment confirmed on appeal in *Kwa Sani Municipality v Underberg/ Himeville Community Watch Association and Another* [2015] 2 All SA 657 (SCA); [2015] ZASCA 24
- 8 *Cape Bar Council v Judicial Service Commission and Another (Centre for Constitution Rights and Another as Amici Curiae)* [2012] 2 All SA 143 WC; 2012 (4) BCLP 406 (WCC)
- 9 *Shoprite Checkers (Pty) Ltd v Everfresh Market Virginia (Pty) Ltd (previously known as Wild Brek 166 (Pty) Ltd)* [2010] JOL 25835 (KZP); 2010 JDR 0818 (KZP); [2010] ZAKZPHC 34. Leave to appeal was refused by SCA. Thereafter the applicant was unsuccessful before the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC); [2011] ZACC 30; 2012 (3) BCLR 219 (CC)

Unreported judgments

- 10 *Bonifacio & another v LombardINSurance Co Limited* [2024] ZASCA 86 (4 June 2024)
- 11 *Rabinowitz v Levy and Others* (Case no. 1276/2022) [2024] ZASCA 8 (26 January 2024)

- 12 *BG Bojosintane & Associates v Sheriff and Another* (1072/22) [2023] ZASCA 174 (8 December 2023)
- 13 *City of Cape Town v Nqulelwa Mtyido* (Case no. 1272/2022) [2023] ZASCA 163 (1 December 2023)

Judgments upheld on appeal

- 14 *Intech Instruments v Transnet Ltd* 2018 JDR 0506 (KZD) [2017] ZAKZDHC 49, upheld on appeal in *Intech Instruments v Transnet Limited t/a South African Port Operations* (1165/18) [2019] ZASCA 79; [2019] 3 All SA 357 (SCA)
- 15 *Moor and another v Tongaat-Hullet Pension Fund and other* [2017] JOL 37333 (KZD); 2017 JDR 0138 (KZD); [2016] ZAKZDHC 55. Appeal was dismissed by the SCA in *Moor and another v Tongaat-Hullet Pension Fund and Others* [2018] ZASCA 83; [2018] 3 All SA 326 (SCA)
- 16 *Transnet Ltd v Newlyn Investments (Pty) Ltd* (unreported PMB judgment) Confirmed on appeal in *Transnet Ltd v Newlyn Investments (Pty) Ltd* 2011 (5) SA 543 (SCA) [2011] ZASCA 44
- 17 *Robertson v Hangar* (unreported PMB judgment dated 19 January 2015). Confirmed on appeal in *Hangar v Robertson* (211/2015) [2016] ZASCA 102 (10 June 2016)
- 18 *Clearing Agents, Receivers & Shippers v The Members of the Executive Council: Transport, KwaZulu-Natal, and Minister of Transport and Commissioner for the South African Revenue Service* (unreported Durban Judgment). Appeal was dismissed with costs in *Clearing Agents, Receivers & Shippers v The Members of the Executive Council: Transport, KwaZulu-Natal, and Others* [2007] ZASCA 35 (RSA); [2008] 1 All SA 1 (SCA)
- 19 *Gainsford v Argent Industrial Limited* (unreported PMB judgment). Confirmed on appeal to the full court in *Argent Industrial Limited v Gainsford NO and Others* [2018] ZAKZPHC 37; [2018] JOL 40406 (KZP)
- 20 *Malani v Natalia Financial Brokers CC* 2016 JDR 1039 (KZP). Order confirmed on appeal in *Malani v Natalia Financial Brokers CC* [2016] ZASCA 84; Referred to by D Millard 'Insurance Law' 2016 Annual Survey 517
- 21 *Kwa Sani Municipality v Underberg/ Himeville Community Watch Association* 2013 JDR 2506 (KZP); [2013] ZAKZPHC 60. Appeal was dismissed and judgment confirmed on appeal in *Kwa Sani Municipality v Underberg/ Himeville Community Watch Association and Another* [2015] 2 All SA 657 (SCA); [2015] ZASCA 24

- 22 *Magudu Game Company (Pty) Ltd v Mathenjwa NO and Others* [2008] 2 All SA 338 (N). Confirmed on appeal on *Mathenjwa NO and others v Magudu Game Company (Pty) Ltd* [2009] 4 All SA 15 (SCA); 2010 (2) SA 26 (SCA); [2008] ZAKZHC 3
- 23 *Shoprite Checkers (Pty) Ltd v Everfresh Market Virginia (Pty) Ltd (previously known as Wild Brek 166 (Pty) Ltd)* [2010] JOL 25835 (KZP); 2010 JDR 0818 (KZP); [2010] ZAKZPHC 34. Leave to appeal was refused by SCA. Thereafter the applicant was unsuccessful before the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC); [2011] ZACC 30; 2012 (3) BCLR 219 (CC)

Judgments overturned on appeal

- 24 *Mahlangu and another v Minister of Police* [2020] ZASCA 44; 2020 (2) SACR 136 (SCA); [2020] 2 All SA 656 (SCA); [2020] JOL 47140 (SCA). The candidate's majority judgment was overturned in *Mahlangu and another v Minister of Police* [2021] ZACC 10; 2021 (2) SACR 595 (CC); 2021 (7) BCLR 698 (CC)
- 25 *Tutton v S*, with Tshabalala JP and Govindsamy AJ concurring (unreported). The appeal was upheld in *Tutton v S* (294/18) [2019] ZASCA 3 (20 February 2019)
- 26 *Airports Company South Africa Limited v Masiphuze Trading (Pty) Ltd* 2018 JDR 08169 (KZD); 2018 ZAKZDHC 19, overturned in *Airports Company South Africa Limited v Masiphuze Trading (Pty) Ltd* [2019] ZASCA 150
- 27 *Valuline CC and others v Minister of Labour and others* [2013] 6 BLLR 614 (KZP); [2013] ZAKZPHC 9 (KZP); 2013 (4) SA (KZP); 2013 (5) BCLR 589 (KZP); (2013) 34 ILJ 1404
- 28 *Jerrier v Outsurance Insurance Company Ltd* 2013 JDR 0562 (KZP); [2013] ZAKZPHC. Overturned on appeal to the KZN full court in *Jerrier v Outsurance Insurance Company Ltd* [2015] 3 all SA 701 (KZP); 2015 (5) SA 433 (KZP)
- 29 *S v Mthimkulu* (unreported PMB Judgment) order changed on appeal in *Mthimkulu v S* [2013] ZASCA 53; 2013 (2) SACR 89 (SCA)
- 30 *Rampar Trading (Pty) Ltd v Puma AG Rudolph Dassler Sport* (unreported DBN Judgment). The order was substituted on appeal in *Puma AG Rudolph Dassler Sport v Rampar Trading (Pty) Ltd and Others* [2010] ZASCA 140; 2011 (2) SA 463 (SCA); [2011] 2 All SA 290 (SCA)
- 31 *Singh and Another v Ebrahim* [2010] 3 All SA 249 (D). The order was amended on appeal in *Singh and Another v Ebrahim* [2010] ZASCA 145

- 32 *Craig NO v Minister of Safety and Security* (unreported PMB Judgment). Order altered on appeal in *Minister of Safety and Security and others v Craig and others* [2009] ZASCA 97; [2010] 1 All SA 126 (SCA); 2011 91) SACR 469 (SCA)
- 33 *S v Coetzee* 2008 JDR 0803 (N); [2008] ZAKZHC 40, (with Gorven J, now JA concurring). A sentence altered on appeal in *Coetzee v S* [2009] ZASCA 134; 2010 (1) SACR 176 (SCA); [2010 2 All SA 1 (SCA)