

JSC INTERVIEW ROUND: OCTOBER 2024

VACANCY: JUDGE OF THE SUPREME COURT OF APPEAL

JUSTICE ELIZABETH DOROTHY BAARTMAN

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. Iuris (1986), University of the Western Cape

1.1.2. LLB (1994), University of the Western Cape.

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

1.2.1. Prosecutor, 1986 to 1991, Department of Justice

1.2.2. Senior State Advocate, 2003 to September 2008.

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

1.3.1. Magistrate, April 1991 to August 2001, Wynberg Magistrates' Court

1.3.2. Judge of the High Court (Western Cape Provincial Division), 2009 to date

1.3.3. Acting Judge of the Supreme Court of Appeal, May 2015 to April 2016, December 2023 to date.

2. The candidate's integrity and ethics

2.1. No circumstances are known to the reviewers 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. The 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 Coloured woman.

4. The maximum period the candidate could serve if appointed

4.1. At the time of the interviews, the candidate will have completed a period of approximately 15 years and 1 month of active service.

4.2. The candidate has not supplied her date of birth. If appointed, the candidate would be eligible to serve as a judge of the Supreme Court of Appeal until the age of 70.

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

5.1. The candidate's judgments demonstrate a commitment to constitutional values and a sound understanding of constitutional principles.

5.2. The candidate's judgment in *Scalabrini Centre of Cape Town and Another v The Minister of Home Affairs and Others* (Case 5441/2020 Western Cape High Court dated 30 November 2020) is a case in point. The applicants brought a two-part application in the High Court. In Part A, they sought an interdict restraining the respondents from implementing various provisions of the Refugees Act 130 of 1998 pending final determination of the relief sought in Part B of the notice of motion, where the applicants sought a declaratory order that the impugned subsections are inconsistent with the Constitution and invalid. The premise of the challenge was that the impugned sub-sections permit the return of asylum seekers to the countries from which they fled, where they may face torture or death, simply because they are late in renewing a visa and therefore constitute a limitation of the rights to dignity, life, and the rights of children, which is not justified under section 36 of the Constitution.

5.3. The Court granted interim relief pending a constitutional challenge which was ultimately successful, with the Constitutional Court having confirmed the High Court's declaration of constitutional invalidity for purposes of Part B in *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* 2024 (3) SA 330 (CC).

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

6.1. The candidate has been a High Court judge since 2009 and has covered a wide variety of areas of law that include criminal law, commercial law, as well as constitutional law.

- 6.2. The judgments considered illustrated that the candidate's understanding of legal and constitutional principles is competent.

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

- 7.1. The candidate has disclosed that 13 judgments have been taken on appeal, and the reviewers found a further 5 judgments of the candidate that have been taken on appeal. On appeal, 8 judgments have been upheld and, importantly, 10 judgments have been overturned.
- 7.2. The candidate lists the judgment of *Scalabrini Centre Cape Town and Another v The Minister of Home Affairs and Others Case 5441/2020* (delivered 30 November 2020) as one that was upheld on appeal. It is noted that the candidate's judgment granted interim relief. The subsequent judgment of the High Court granting final relief was appealed to the Constitutional Court. The reviewers have been unable to find a judgment on appeal of the candidate's judgment granting interim relief. The candidate notes, at para 16.1 of the questionnaire, that she refused leave to appeal in this matter. It is unclear whether leave was subsequently granted, or if the judgment was indeed upheld on appeal.
- 7.3. The candidate lists the judgment of *Pepkor Speciality (Proprietary) Limited and Another v Abraham Johannes Van Huyssteen and Others* (Case No. 16806/2018 (judgment delivered 4 March 2019) as one that was upheld on appeal. This is a matter in which the candidate granted leave to appeal, but the SCA struck the matter from the roll. The SCA held that the candidate ought not to have granted leave to appeal, let alone to the SCA.
- 7.4. The candidate lists the judgment of *Lambertus von Wielligh Bester N. 0. and Others v Gertruida Johanna Horn and Others* as one that was upheld on appeal. The reviewers have not been able to find a judgment on appeal. The candidate notes that the SCA refused an application for special leave. It therefore appears that there was no appeal heard on this judgment.
- 7.5. *Coboza v MEC for Health, Western Cape*. In this matter, the candidate upheld a special plea of prescription in a medical negligence matter. In *The MEC for Health, Western Cape v Coboza 2020 JDR 2720* (SCA), the SCA dismissed an appeal against the candidate's decision. However, the basis on which the SCA dismissed the appeal is that the special plea ought never to have been determined. The SCA noted that the

candidate erred in requiring knowledge of negligence as a prerequisite for the running of prescription to commence. It held that prescription had been raised “in the air”, without reference to the relevant primary facts upon which the respondent's claim was founded. Because these facts were not pleaded, the SCA held that it could obviously not be determined when the respondent knew the primary facts or should reasonably have known them. In the result, the SCA held, the determination of the plea of prescription was an exercise in futility. The SCA held that the court *a quo* should have dismissed the special plea on this ground, and it is on this basis that the appeal failed.

7.6. The judgments of the candidate upheld on appeal are:

7.6.1. The candidate lists the judgment of *Shirley Searl v Mossel Bay Municipality and Others* (9573/09) as one that was upheld on appeal. The reviewers were unable to find this judgment or any judgment on appeal with these parties.

7.6.2. The candidate lists the judgment of *The Commissioner of South African Revenue Services v Fastmould Specialist CC* (A642/2010) as one that was upheld on appeal. The reviewers were unable to find any judgment on appeal in respect of this matter.

7.6.3. The candidate lists the judgment of *City of Cape Town v Andile Lily and Others* (3945/2001) as one that was upheld on appeal. The reviewers were unable to find this judgment or any judgment on appeal with these parties.

7.6.4. The candidate lists the judgment of *KWV South African (Proprietary) Limited v Johannes Matthys Annandale and Others* SCA Case NO 516/2017 WCC Case NO 4765/2016 as one that was upheld on appeal. The reviewers were unable to find this judgment or any judgment on appeal with these parties.

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

7.7.1. *Public Protector v Speaker of the National Assembly* unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, Case No 2107/21 (28 July 2021). The candidate penned the judgment of the full court, which held that it was not desirable to appoint a judge to the independent panel mandated to consider whether there is prima facie evidence for the removal of a Chapter 9 institution office-bearer. The High Court also held that the limitation of legal representation in rule 129AD(3) of the Rules, was irrational and consequently severed the proviso limiting legal representation. On appeal, the

Constitutional Court upheld the appeal in part, setting aside the order severing the part of the rule relating to the appointment of a judge to the panel. The appeal against the order relating to full legal representation was dismissed.

7.7.2. *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* (Case no 219/2021) [2022] ZASCA 24 (9 March 2022) concerned an application for production of documents under uniform rule 35(12). The candidate, sitting as the court *a quo*, had dismissed the application, on the basis that the documents requested were irrelevant, and one document on the basis that it was privileged as it was commissioned in circumstances where litigation was contemplated. The SCA held that the candidate had erred in assessing relevance on the basis of whether Caxton would derive benefit from their production, as documents are relevant also where a party requires them for the purposes of assessing its position. The SCA also found that litigation privilege did not apply.

7.7.3. *Claire Joanne Helman v The Kingsbury Foetal Assessment Centre (Pty) Ltd* 4872/2013 concerned a claim for damages by a boy with Down's syndrome. The damages were alleged to flow from the Centre's failure to warn his pregnant mother that there was a high risk of him being born with the syndrome. He alleged that, had his mother been informed of the risk, she would have terminated the pregnancy. The Centre excepted to the claim as not disclosing a cause of action, and the candidate upheld the exception and dismissed it. The Constitutional Court overturned that decision on appeal, on the basis that, though the common law at present does not recognise a child's delictual claim for damages arising from a negligent prenatal misdiagnosis in relation to congenital medical conditions or disabilities, the common law might be developed to recognise the child's claim. The Constitutional Court noted that, in upholding the exception, the candidate had also ordered the dismissal of the claim. The Constitutional Court held that this was unwarranted. The upholding of an exception does not inevitably carry with it the dismissal of the action. Instead, the Constitutional Court held, leave to amend the particulars of claim should have been granted.

7.7.4. *Imperial Marine Company v The Motor Vessel "Filippo Lembo" "Deiulemar Compagnia Di Navigazione Spa* AC8/2009 and AC 20/90 concerned the arrest

of ships as security under the Admiralty Jurisdiction Regulation Act. The order made by the candidate was upheld in part and overturned in part.

- 7.7.5. *Prince Mangosuthu Gatsha Buthelezi, MP and Another v Minister of Home Affairs and Another* (22071/2011) [2012] ZAWCHC 3 concerned a PAJA review of the respondents' alleged failure to take a decision in respect of a visa application by the Dalai Lama. The candidate dismissed the application with costs on the grounds that there was no live controversy. The SCA overturned this decision, holding that whether the authorities had acted lawfully was and remained a live issue. The SCA declared that the respondent had unreasonably delayed the decision whether to grant or withhold the visa and in doing so acted unlawfully.
- 7.7.6. *Jacobus Du Plessis Both NO. and Others v Members of the Executive Council for Education, Western Cape* Case N.O. 24611/2011. The reviewers were unable to find this judgment or any judgment on appeal with these parties.
- 7.7.7. *City of Cape Town Metropolitan Municipality v Nu-Way Housing Developments (Pty) Ltd* 2021 JDR 0388 (SCA). Nu-Way sued the appellant for the recovery of R2 109 009.00, being an electricity development contribution that Nu-Way had paid the city, allegedly under protest. Nu-Way based its claim on the *condictio indebiti*, alternatively in contract. The candidate, in the court *a quo*, upheld the claim on both bases. The SCA overturned this decision, holding that the court *a quo* had erred in its conclusion on the central issue.
- 7.7.8. *Municipality of Mossel Bay v Evangelical Lutheran Church* concerned an application by the municipality to retransfer certain immovable property to it from the respondent church, on the basis of non-compliance by the church with certain restrictive conditions. The candidate had dismissed the application. In *Municipality of Mossel Bay v Evangelical Lutheran Church* 2013 JDR 1053 (SCA), the SCA was critical of the candidate's judgment, holding that the candidate misconstrued the restrictive conditions, which were clear and unambiguous, "completely ignoring" the first part of the condition. The SCA also held that the alternative bases of dismissal that the candidate relied on were "self-evidently irrelevant considerations". The SCA concluded that "the court below erred in veering off-course in respect of these two aspects and its

conclusions do not provide a legally tenable alternative basis for its dismissal of the application.” This judgment was not referenced by the candidate in her application.

7.7.9. *Stay at South Point Properties (Pty) Ltd v Mqulwana and others* 2023 JDR 2330 (SCA) concerned an eviction application. The candidate had dismissed an application to evict the respondents from a student residence, on the basis that the applicant had not brought the application in terms of the provisions of the Prevention of Illegal Occupation Act (PIE). The issue on appeal was whether the provision of student accommodation by CPUT to its students constitutes a “home”, so as to render PIE of application. The SCA held that student accommodation is not a “home”, but a residence of limited duration. Therefore, the appeal was upheld. This judgment was not referenced by the candidate in her application.

7.7.10. *Grootkraal Community* concerned an application to evict a school from a farm, and a counter-claim by the community members for the registration of a public servitude over the farm, based on the doctrine of vetustas. The candidate dismissed the counterclaim for registration of a public servitude. In *Grootkraal Community and Others v Botha NO and Others* 2019 (2) SA 128 (SCA), the SCA overturned the candidate’s decision. The SCA held that the requirements for a public servitude were proved and directed the Registrar to register such a servitude. This judgment was not referenced by the candidate in her application.

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

8.1. The candidate was a Magistrate for a decade and has been a High Court judge for fifteen years. The candidate has particular experience in criminal law, as a prosecutor.

8.2. The candidate has had two acting appointments in the SCA: from May 2015 to April 2016 and December 2023 to date.

8.3. The candidate’s judgments indicate that she has experience in a wide range of areas of the law.

8.4. The most significant of the candidate’s judgments, written while acting at the SCA and as identified by the candidate in her application, are:

- 8.4.1. *Nel & Others v Cilliers* (197/2023) [2024/ Z4SCA 57 (19 April 2024)]. The candidate ruled that a pretrial admission is binding and does not have to be accepted before a litigant is held to the admission/concession. The candidate held that the pretrial procedure is important as it identifies the issues for trial and obviates the need to lead unnecessary evidence on issues not in dispute. The procedure is important and its effect binding on litigants.

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 not adequate.

10. The candidate's ability to produce judgments promptly

- 10.1. The candidate indicated that only one judgment was outstanding at the time of completing the questionnaire, being the matter of *IRD Global Limited v The Global Fund to Fight Aids, Tuberculosis and Malaria*, which was reserved on 22 May 2024 during the candidate's acting term in the Supreme Court of Appeal.
- 10.2. The judgment was delivered on 4 July 2024.
- 10.3. There are no indicators which suggest that the candidate is unable to deliver judgments promptly.

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)

- 13.1. There are no facts which suggest that the candidate lacks the necessary administrative skills to serve with distinction on the Supreme Court of Appeal.

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

- 14.1. The candidate's judgments are clearly written. She is well respected, and the wider public would receive her positively as she is a competent judge with a demonstrated record of commitment to public service.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported judgments

1. *Khoin and others v Jenkins and Others and a related matter* [2023] 1 All SA 110 (WCC)
2. *Joint Owners, Erf 5216 Hartenbos v Minister for Local Government Affairs and Development Planning, Western Cape and Another* 2011(1) SA 128(WCC)
3. *Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (Pty) and Another* 2012 (6) SA 110 (WCC)

Unreported judgments

4. *Nel & Others v Cilliers* (197/2023) [2024] Z4SCA 57 (19 April 2024)
5. *Booyesen v Major and Another* (5043/2001) [2001] ZAWCHCH 273 (31 August 2021)
6. *Ramaando Morathi Ramokgopa v Siphela Lenah Nxumalo* 2022 JDR 3601 (WCC)
7. *Scalabrini Centre Cape Town and Another v The Minister of Home Affairs and Others* Case 5441/2020 Delivered 30 November 2020

Judgments upheld on appeal

8. *Pepkor Speciality (Proprietary) Limited and Another v Abraham Johannes Van Huyssteen and Others* Case No. 16806/2018 Judgment delivered 4 March 2019) (SCA struck the matter from the roll)
9. *Coboza v MEC for Health, Western Cape. (SCA decision on appeal - The MEC for Health, Western Cape v Coboza* 2020 JDR 2720 (SCA))

Judgments set aside on appeal

10. *Speaker of the National Assembly v Public Protector and Others; Democratic Alliance v Public Protector and Others* (CCT 257/21; CCT 259/21) [2022] ZACC 1 (judgment on appeal from candidate's decision as court *a quo*)
11. *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* (Case no 219/2021) [2022] ZASCA 24 (9 March 2022)
12. *H v Fetal Assessment Centre* (CCT 74/14) [2014] ZACC 34 (judgment on appeal from candidate's decision as court *a quo*)
13. *Imperial Marine Company v Motor Vessel Pasquale della Gatta and Another; Imperial Marine Company v Motor Vessel Filippo Lembo and Another* (638/2010) [2011] ZASCA 131 (judgment on appeal from candidate's decision as court *a quo*)
14. *Buthelezi and Another v Minister of Home Affairs and Others* (242/12) [2012] ZASCA

- 174 (judgment on appeal from candidate's decision as court *a quo*)
15. *City of Cape Town Metropolitan Municipality v Nu-Way Housing Developments (Pty) Ltd* 2021 JDR 0388 (SCA) (SCA decision upholding appeal against the candidate's decision as the court *a quo*)
 16. *Municipality of Mossel Bay v Evangelical Lutheran Church* 2013 JDR 1053 (SCA) (SCA decision upholding appeal against the candidate's decision as the court *a quo*)
 17. *Stay at South Point Properties (Pty) Ltd v Mqulwana and others* 2023 JDR 2330 (SCA) (SCA decision upholding appeal against the candidate's decision as the court *a quo*)
 18. *Grootkraal Community and Others v Botha NO and Others* 2019 (2) SA 128 (SCA) (SCA decision upholding appeal against the candidate's decision as the court *a quo*)