

CANDIDATE: JUDGE D VAN ZYL

COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL

1. The candidate's appropriate qualifications

1.1. The candidate has obtained the following degrees:

1.1.1. BA;

1.1.2. LLB; and

1.1.3. LLM (Stellenbosch).

1.2. The candidate has obtained the following non-degree qualifications:

1.2.1. Post-graduate certificate in Tax Law (Unisa).

1.3. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

2.1. There is nothing in the candidate's application or judgments to suggest that the candidate is not a fit and proper person.

3. Whether the candidate's appointment would help to reflect the racial and gender composition of South Africa

3.1. The candidate is a white man.

3.2. Currently, the Supreme Court of Appeal comprises of twenty-

one permanent Judges. Five are black women, ten are black men, one is a white woman, and five are white men. It is apparent, therefore, that while strides have been taken to address racial representivity, gender representivity still lags behind.

3.3. Given the current composition of the bench, the appointment of a white man will not advance the transformation of the judiciary from a race or gender perspective.

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

4.1. The candidate practised as a state prosecutor for six years; he then held a position as a Senior Lecturer for one year at the University of the Transkei; he then practised as an advocate for nine years at the Transkei Bar before being appointed to the Eastern Cape Division of the High Court.

4.2. As a Judge for 18 years, the candidate has served in the Eastern Cape, as an Acting Judge of the Labour Court, the Labour Appeal Court and the Supreme Court of Appeal. The candidate has also served as an Acting Judge President of his Division, and currently serves as the Acting Deputy Judge President of that Division.

4.3. The candidate has 32 reported judgments (11 of which are reported in the SA law reports, the others in the SACR, BCLR, BLLR, All SA, and ILJ).

4.4. *Sithonga v Minister of Safety and Security* 2008 (1) SACR 376

(TK): Referred to by the Supreme Court of Appeal in *Ivanov v North West Gambling Board* 2012 (6) SA 67 (SCA), although the Supreme Court of Appeal noted in footnote 16 that a passage in the candidate's judgment at 391A-B was wrong).

- 4.5. *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (Ck): This case dealt with rescission of judgments and compromises. The judgment is well-reasoned and provides a comprehensive account of the relevant authorities. It was confirmed on appeal in *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2010 (4) SA 122 (SCA). The judgment was described as "comprehensive and well-researched" in *National Pride Trading 452 v Media 24* 2010 (6) SA 587 (ECP).
- 4.6. *Gugu v Zongwana* [2014] 1 All SA 203 (ECM): This case dealt with successive sales of a residential property. The candidate's judgment is well-researched and provides a comprehensive account of the relevant authorities.
- 4.7. *National Educare Forum v Commissioner, SARS* 2002 (3) SA 111: This case dealt with a complex issue of VAT liability. The candidate produced a thorough, comprehensive judgment on the relevant legal principles.
- 4.8. *Fetsha v Member of the Executive Council responsible for Education (Eastern Cape)* (2006) 3 ALL SA 542 (Ck): The candidate considered the right to fair administrative action, in the exercise of public power. As a result of the reduction of the plaintiff's salary by the respondent, the plaintiff claimed

damages representing the difference between the amount which he allegedly should have received and that which he actually received during the relevant period. The candidate rightly found that the exercise of public power must comply with the Constitution and the principle of legality. The candidate found that, having regard to the nature of the power exercised by the employer in the present case, substantial fairness to the plaintiff was achieved before his salary was reduced.

4.9. *S v Sasha* 1996 (2) SACR 73 (Tk): The candidate was required to consider whether the accused was married, and if so, the nature of such marriage with reference to the Transkei Marriage Act and customary law applicable to the offence of incest. After consideration of the law, the candidate found that the accused could not be convicted of incest since the Transkei Marriage Act did not preclude him from marrying the person he married.

4.10. *Mgijimi v Eastern Cape Appropriate Technology Unit* (2002) 1 ILJ 291 (Tk): In this case the candidate was required to rule upon the jurisdiction of the High Court in labour matters. The candidate engaged in a thorough analysis of relevant constitutional principles, but ultimately dismissed the applicant's argument that the High Court has jurisdiction because the matter raised a constitutional issue.

4.11. The candidate delivered the following three judgments while he was an Acting Justice of the Supreme Court of Appeal:

4.11.1. *Esofranki Pipelines (Pty) Ltd v Mopani District*

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Municipality [2014] 2 All SA 493 (SCA): This case dealt with a review of a tender. In his judgment, the candidate engages a court's remedial discretion to set aside administrative action which has been declared unlawful. He identifies several flaws in the reasoning of the court *a quo*. The candidate's judgment is thorough, well-reasoned, and displays a good grasp of the relevant administrative and constitutional principles.

4.11.2. *Ellerine Brothers v McCarthy* 2014 (4) SA 22 (SCA): This case dealt with the effect of insolvency on uncompleted contracts. The judgment is succinct and well-reasoned, and was delivered less than 2 weeks after the hearing.

4.11.3. *Vhembe District Municipality v Stewarts & Lloyds Trading (Booyens) (Pty) Ltd* [2014] 3 All SA 675 (SCA): This was an appeal against the dismissal of an application to rescind a default judgment. The candidate effectively canvassed provincial authorities dealing with the interpretation of "debt" in the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 to reach a well-reasoned conclusion.

4.12. The candidate appears to be a technically sound Judge. His judgments are generally comprehensive and very well researched. He appears to have an excellent knowledge of private law.

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

5.1. There is nothing in the judgments of the candidate or in any publicly available information which suggests that the candidate is not committed to the values of the Constitution. The candidate has, in his position as a Judge of the High Court, discharged his functions in a responsible and efficient manner.

6. Whether any judgments have been overturned on appeal

6.1. The candidate states that two judgments have been overturned on appeal. They are:

6.1.1. *Jakins v Baxter* [2013] ZASCA 190: This case dealt with the interpretation of an ante-nuptial contract and its effect on a benefit payable under a life insurance policy. Upon the death of the deceased, Old Mutual paid the policy benefit to the deceased's estate. The deceased's widow sought declaratory relief that she and not the estate, was entitled to the benefit. The court of first instance found in the widow's favour, but a full court (including the candidate) reversed that order. The Supreme Court of Appeal upheld the appeal and overturned the full court, without commenting upon the candidate's judgment.

6.1.2. *Minister of Safety and Security v Hlomza* [2014] 51: In February 2005 the respondent's husband, a policeman, shot her and then killed himself. The respondent sustained injuries, and sued the Minister for damages sustained as a result of her injuries, as well as for loss of support. The claim for personal injury having been conceded, the issue

on appeal was whether the plaintiff had proved her claim for loss of support. No evidence had been led at trial and the question to be determined was one relating to the onus to be discharged by the plaintiff in those circumstances. The court *a quo* found that the plaintiff bore an onus and that, in the absence of evidence, the onus had not been discharged. The candidate, writing for the Full Bench, found that the admitted facts created a *prima facie* case that placed an evidential burden on the defendant (the Minister of Safety and Security). The SCA disagreed. The SCA agreed with the trial Judge, that the plaintiff retained the onus and, in failing to lead evidence in support of her case, failed to discharge the burden upon her. In the circumstances, the SCA confirmed that absolution should be granted. While the SCA was critical of the assumptions and inferences relied on by the Full Court, there is nothing in this judgment that would militate against the appointment of the candidate.

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

- 7.1. As appears from the candidate's CV, he has experience as a prosecutor, as a legal academic, as an advocate and has approximately 18 years' experience on the bench. His judgments reflect a wide experience of matters faced by Judges and his judgments show a keen and diligent intent to deal properly and thoroughly with each matter before him. The judgments reviewed reveal experience in civil matters, criminal

matters and matters involving administrative action.

8. The candidate's linguistic and communication skills

8.1. The judgments written by the candidate appear lucid, considered and reasoned. No problem is foreseen with the candidate's linguistic or communication skills.

9. The candidate's ability to produce judgments promptly

9.1. From the information available, it appears that the candidate produces his judgments with admirable promptness. The majority of the appeal judgments written by the candidate on the Eastern Cape Full Bench appear to have been delivered with days or weeks of the hearing. The judgments written by the candidate while acting in the Supreme Court of Appeal were likewise delivered promptly.

10. The candidate's fairness and impartiality

10.1. There is nothing in any of the material reviewed to suggest that the candidate could be criticised for unfairness or for bias.

11. The candidate's independent mindedness

11.1. As appears from the judgments reviewed, the candidate does apply his independent mind to each of the questions before him. The candidate has, on many occasions, overturned judgments on appeal. On a conspectus of the judgments written by the candidate, his decisions are well motivated and demonstrate an independent evaluation of the matter before him.

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12. The candidate's ability to conduct court proceedings

12.1. With 18 years of experience on the bench and in hearing appeals, the candidate has the ability to conduct court proceedings, particularly proceedings in an appeal court.

13. The candidate's administrative ability

13.1. The candidate has been appointed as the Acting Judge President and the Acting Deputy Judge President in the Eastern Cape Division. The candidate appears to have the necessary administrative ability.

14. The candidate's reputation for integrity and ethical behaviour

14.1. Nothing in the material suggests any adverse criticism of the candidate's reputation.

15. The candidate's judicial temperament

15.1. The information reviewed supports the conclusion that the candidate has the appropriate judicial temperament.

16. The candidate's commitment to human rights, and experience with regard to the values and needs of the community

16.1. There is nothing in the judgments of the candidate or in any publicly available information which suggests that the candidate is not committed to the advancement of human rights. The candidate has, in his position as a Judge of the High Court, discharged his functions in a responsible and efficient manner. Further, the candidate has been involved in cases which affect the broader community, including issues of

customary law.

17. The candidate's potential

17.1. The extent to which the candidate researches the legal and factual material in each matter and the manner in which he engages with precedent and sets out the legal reasoning in support of his judgments supports a conclusion that the candidate has potential to make a valuable contribution in the Supreme Court of Appeal.

18. The message that the candidate's appointment would send to the community at large

18.1. It is important that the Appellate Courts include members from different parts of South Africa. The High Court at Mtata is a relatively small court which deals with a number of issues that may not be as prominent as matters heard in some of the larger courts.

18.2. The message will be sent to the legal community that consistent, ethical and diligent performance in the smaller jurisdictions is recognised and appreciated and that it is not necessary for a Judge to have sat in the larger divisions of the High Court to be considered for elevation to the Appellate Courts.

18.3. The SCA, despite no longer being the apex court in all matters other than constitutional matters, continues to shape the law as the *de facto* last court of appeal in many matters. The candidate's impressive list of reported judgements, several of

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which are of substantial legal significance, commends him as a jurist who would make a significant contribution to the development on the SCA bench, if appointed.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

In addition to those referred to above

Reported decisions

S v Sasha 1996 (2) SACR 73 (Tk)

Cekesha and others v Premier, Eatsern Cape 1998 (4) SA 935 (Tk)

Conjwa and others v Postmasters General, Trankei (1998) 7 BLLR 718 (Tk)

Vulindlela Furniture Manufactures (Pty) Ltd v MEC, Department of Education and Culture, Eastern Cape 1998 (4) SA 908 (Tk)

S v Yanta 2000 (1) SACR 237 (Tk)

National Educare Forum v Commissioner, SARS 2002 (3) SA 111 (TkHC)

Mgijimi v Eastern Cape Appropriate Technology Unit (2002) 1 ILJ 291 (Tk)

Fetsha v Member of the Executive Council Responsible for Education (Eastern Cape) (2006) 3 ALL SA 542 (Ck)

Janda v FNB (2006) 12 BLLR 1156 (LC)

S v Ndiki 2008 (2) SACR 252 (CK)

MEC for Economic Affairs, Environment and Tourism v Kruisenga 2008 (6) SA 264 (Ck)

Ex-TRTC United Workers Front v Premier, Eastern Cape Province 2010 (2) SA 114 (ECB)

SA Taxi Securitisation (Pty) Ltd v Lennard 2012 (2) SA 456 (ECG)

Road Accident Fund v Krawa 2012 (2) SA 346 (ECG)

S v Philander 2012 (1) SACR 582 (ECG)

S v Van Rooyen 2012 (2) SACR 141 (ECG)

S v Masiza 2013 (1) SACR) 121 (ECG)

Hlomza v Minister of Safety and Security and Another 2013 (1) SACR 591 (ECM)

Ex Parte PJLG and Another; In re: PJLG and Another [2013] 4 All SA 41 (ECG)

Gugu and Another v Zongwana and Others [2014] 1 All SA 203 (ECM)

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Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and others [2014] 2 All SA 493 (SCA)

Ellerines Brothers v McCarthy 2014 (4) SA 22 (SCA)

Vhembe District Municipality v Stewarts & Lloyds Trading (Booyens) (Pty) Ltd and Another [2014] 3 All SA 675 (SCA)

Ex-TRTC United Workers Front v Premier, Eastern Cape Province 2010 (2) SA 114 (ECB)

MEC for Economic Affairs, Environment and Tourism v Kruisenga and another 2008 (6) SA 264 (Ck)

Cekeshe and Others v Premier Eastern Cape and Others 1998 (4) SA 935 (Tk)

S v Tandwa and Others 2008 (1) SACR 613 (SCA)

Unreported decisions

Minister of Safety & Security v Hlomza [2014] ZASCA 51

Steenkamp NO v Provincial Tender Board Eastern Cape [2006] JOL 16488 (Ck)

Jakins v Baxter and another [2013] ZASCA 190

Mnyaka v Minister of Safety and Security 2013 JDR 0006 (ECM)

Nelson Mandela Bay Metropolitan Municipality v Swartkops Seesout (Pty) Ltd; Swartkops Seesout (Pty) Ltd v Nelson Mandela Bay Metropolitan Municipality 2009 JDR 0685 (ECP)

Wesbank A Division of FirstRand Bank Ltd and Another (EL 1450/2011, ECD 2485/2011) [2012] ZAECCELLC 1 (24 February 2012)

Grasslands Agriculture (Pty) Ltd v Parmalat SA (Pty) Ltd 2011 JDR 0694 (ECG)

Makana Municipality v Ruck 2012 JDR 0170 (ECG); [2013] JOL 29803 (ECG)

Mlungisi Papu and others v The State (Case No. CA&R 25/2014)

De Lange v S [2011] JOL 26673 (ECG)

Du Preez v S [2010] JOL 23998 (E)

Judgments upheld on appeal

MEC for Economic Affairs, Environment and Tourism v Kruisenga and

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another 2008 (6) SA 264 (Ck)

Cekeshe and Others v Premier Eastern Cape and Others 1998 (4) SA 935 (Tk)

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