

**CANDIDATE: JUDGE DH ZONDI**

**COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL**

**1. The candidate's appropriate qualifications**

1.1. The candidate has the following degrees:

1.1.1. B. Iuris (1982);

1.1.2. LLB (1984) (labour law); and

1.1.3. LLM (1988).

1.2. The candidate is appropriately qualified.

**2. Whether the candidate is a fit and proper person**

2.1. The candidate has disclosed in his application that he was fined R500 by the Law Society in 1990 for his failure to file a Rule 79 certificate timeously. He provides the explanation that the incident occurred in his first year of practice for his own account, and that he was not aware that the certificate would be required of him at that time.

2.2. The fine appears to have been imposed for a technical oversight on the candidate's part. This has not prevented him from being regarded as a fit and proper person for judicial appointment in the past, as he is a sitting judge of both the High Court and the Competition Appeal Court.

*CANDIDATE: JUDGE DH ZONDI*

- 2.3. In the circumstances, the historic fine is not an obstacle to the candidate being considered to be a fit and proper person for appointment to the SCA.
- 2.4. On the contrary, his permanent appointment as a judge of the High Court in 2007 is consistent with him being fit and proper.
3. **Whether the candidate's appointment would help to reflect the racial and gender composition of South Africa**
  - 3.1. The candidate is a black (African) man.
  - 3.2. Currently, the Supreme Court of Appeal comprises twenty members, consisting of five black women, nine black men, two white women and four white men. Fifteen members are men (four are white and eleven black) and seven are women (two white and five black).
  - 3.3. All the shortlisted candidates for the Supreme Court of Appeal for the present JSC sitting are men. This may well be a reflection of the fact that women are relatively poorly represented on the benches of the various High Courts.
  - 3.4. Whilst the appointment of a male candidate – which is unavoidable in the present round of appointments – will not advance the cause of gender representation, the reviewers do not, in the light of the current racial composition of the Supreme Court of Appeal, consider the candidate's race to be material.

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

4.1. The candidate has 3 law degrees (a B Juris; a LL B; and a LL M).

4.2. His judicial record indicates the following:

4.2.1. He is a sitting judge of the High Court, the Competition Appeal Court and he has sat on the Labour Appeal Court ("LAC") and the Supreme Court of Appeal (in an acting capacity). Therefore, his judicial working knowledge of the law covers a wide spectrum.

4.2.2. This is confirmed on a consideration of his judgments. Of those highlighted by the candidate as indicating his contribution to the law they cover the following fields: property law (*Markom v Menqa and Others* (2008) JOL 22400 (C); *United Reform Church, De Doorns v President of the RSA* 2013 (5) SA 205 (WCC)); competition law (*Minister of Economic Development v Competition Tribunal and Others* 2012 (1) CPLR 6); constitutional law (*Brümmer v Minister of Social Development and Others* [2009] 2 All SA 583 (WCC); *Markom* (above); *United Reform Church, De Doorns* (above)); labour law (*National Commissioner of the South African Police v Meyers* 2012 (33) ILJ 1417 (LAC)); criminal law (*S v Matshivha* 2014 (1) SACR 29 (SCA); *S v Calvin Uithaler* unreported Case No: A4902013 (SCA)) and administrative law (*City of*

CANDIDATE: JUDGE DH ZONDI

*Tshwane v Marius Blom and Others* 2014 (1) SA 341 (SCA).

4.2.3. His judgments generally indicate a competent grasp of the legal issues involved, although none of the judgments considered dealt with particularly seminal issues.

4.2.4. The candidate's judgments include appropriate references to, and the application of, constitutional principles. One disappointment is that the candidate does not appear to take the opportunities presented in cases to canvass constitutional issues in a more in-depth manner. For example, in the *United Reform Church, De Doorns* judgment (above) the candidate was presented with the opportunity to explore in much more detail the question of what amounts to an arbitrary deprivation of property under section 25 of the Constitution. However, his judgment devotes only three relatively brief paragraphs to this issue.

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

5.1. There is nothing to indicate that the candidate is not committed to the values of the Constitution.

5.2. In *Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA), the candidate had to decide whether the invalidity of section 66(1)(a) of the Magistrates' Court Act operated retrospectively, and if so, what the impact this had on sales in execution. The section was declared invalid by the Constitutional Court in *Jaftha v Schoeman and Others; Van*

CANDIDATE: JUDGE DH ZONDI

*Rooyen v Stottz* for being overbroad and for being in violation of section 26(1) of the Constitution.

5.3. The candidate held that if the provisions of section 70 of the Magistrates' Court Act could render a sale in execution unimpeachable, this would defeat the whole purpose of the Constitutional Court's ruling in the *Jaftha* case. This view was lauded and confirmed by the Appellate Division.

5.4. Although this decision illustrates the candidate's commitment to upholding the values of the Constitution, it is one of only a few examples of where the candidate expressly dealt with constitutional issues.

5.5. The candidate taught constitutional law at Portland State University, Oregon, in 1989 and 1995, as a visiting lecturer.

## 6. **Whether any judgments have been overturned on appeal**

6.1. In his application, the candidate refers to five judgments in which he has been overturned on appeal. We have reviewed the appeal judgments. These do not leave an impression of either extraordinary ability or inability on the part of the candidate. They are dealt with in chronological order:

6.1.1. In *Midi Television (Pty) Limited t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA), the SCA judgment shows that this was a difficult matter involving the balancing of freedoms of expression and of the press and media, against the interests of the administration of justice. The court *a quo*'s judgment

was overturned on the basis that the DPP did not have a clear right to the interdict sought by it in the court *a quo*. The court *a quo*'s judgment, and an opinion from counsel who appeared in this matter, confirm that the issue on which the SCA overturned the candidate was a highly debatable moot point in both courts, so no discredit to the candidate.

6.1.2. In a Full Bench appeal in *Capespan (Pty) Ltd v Any Name 451 (Pty) Ltd* 2008 (4) SA 510 (CPD), Thring J wrote a judgment overturning the candidate on the basis that, in dealing with a *pactum de non cedendo*, he had not correctly applied the law regarding the difference between a potentially cedable right preceding the *pactum*, and a right flowing from the *pactum* which is inherently not cedable. In *Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd* 1968 (3) SA 166 (A), the AD stated the principle that where the stipulation against cession is part and parcel of the agreement creating the right, the right is limited by the stipulation. This has not been a moot point since 1968. For these reasons, the candidate's judgment in this matter appears to be premised on a basic and avoidable judicial error.

6.1.3. *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) involved two difficult administrative and constitutional issues: whether the applicant was entitled to condonation for approaching the High Court outside of the thirty-day period for obtaining

records in terms of section 78(2) of the Promotion of Access to Information Act 2 of 2000, and whether section 78(2) was inherently unconstitutional (the candidate found that it was). The Constitutional Court upheld his finding of unconstitutionality, but overturned his finding that Brümmer was not entitled to condonation. This reversal on one of two difficult issues does not discredit to the candidate's application.

6.1.4. In *Spearhead Property Holdings Ltd v E&D Motors (Pty) Ltd* 2010 (2) SA 1 (SCA), the appeal related to whether an option to purchase a leased property was binding on the lessor's successor-in-title by virtue of the "*huur gaat voor koop*" rule. The SCA gave a split decision, three judges concurring with Hurt AJA in reversing the candidate's decision, and Maya J dissenting and upholding the candidate's decision on a somewhat strained basis. Hurt AJA stated that: "*I consider that the learned Judge overstated the law as it currently stands with regard to the consequences of the huurgaat voor koop principle*". Hurt AJA's judgment constitutes a lengthy analysis, and there is a dissenting judgment. The SCA judgment discloses no obvious blunders by the candidate.

6.1.5. *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (3) BCLR 333 (CC) concerned an appeal from a judgment of the LAC. The Constitutional Court found that neither the Labour Court nor the LAC ought

to have addressed the merits of the matter, but should have dismissed the appeal on the sole basis that the MEC had failed to seek condonation for delay in instituting the review application under the Promotion of Administrative Justice Act, 3 of 2000.

6.2. Overall, these five judgments disclose one major judicial error by the candidate, in the Cape full bench judgment dealing with *pacta de non cedendo*.

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

7.1. The candidate did his articles with Mendelsohn & De Villiers from 1984 to 1986, and was admitted as an attorney of the High Court (Transvaal Provincial Division) in 1986.

7.2. During 1986, the candidate worked as a professional assistant at Hattenbach & Abraham, but left the firm to work in private practice in Johannesburg from 1987 to 2007.

7.3. From 1997 to 2006 the candidate acted as a senior part-time commissioner of the CCMA.

7.4. In October 2004 the candidate was appointed to the CCMA panel of trainers, and in June 2004 to the SSSBC panel of trainers.

7.5. During the fourth term of 2004, as well as from June 2005 to April 2007 the candidate was appointed as an acting judge in the Western Cape High Court.

*CANDIDATE: JUDGE DH ZONDI*

- 7.6. From May 2007 to date, the candidate has been a judge in the Western Cape High Court.
- 7.7. From January 2009 to 2011, and from April 2011 to date, the candidate has been serving as an acting judge in the Competition Appeal Court.
- 7.8. During the third term of 2010, the fourth term of 2011 and the third and fourth terms of 2012, the candidate was an acting judge in the Labour Appeal court.
- 7.9. From April to November 2013, the candidate was an acting judge in the Supreme Court of Appeal.

**8. The candidate's linguistic and communication skills**

- 8.1. There are no indications from the candidate's judgments that he has any linguistic or communication difficulties.
- 8.2. His grasp of the English language (which, presumably, is not the candidate's mother tongue) is good, and from some of his judgments it appears that he also has a grasp of Afrikaans.

**9. The candidate's ability to produce judgments promptly**

- 9.1. In his application form, the candidate notes that the following judgments are still outstanding:
  - 9.1.1. *Fezile Simanga v SATAWU*, case number 952/08. Judgment was reserved on 4 February 2014.

*CANDIDATE: JUDGE DH ZONDI*

9.1.2. *Tresso Trading 490 (Pty) Ltd t/a Nexxus Corporation*, case number 13638/2013. Judgment was reserved on 6 February 2014.

9.2. We have not been made aware of any cases in which the candidate took an undue amount of time in delivering a judgment.

## 10. **The candidate's fairness and impartiality**

10.1. The candidate's judgments indicate that he approaches disputes with a sense of fairness. This quality appears, for example, in *United Reform Church, De Doorns 2013 (5) SA 205 (WCC)*. In this case, the candidate recognised the unequal bargaining position of the Church in agreeing to a clause in a lease with the Department of Local Government, Housing and Agriculture: Administration House of Representative, which effectively deprived the church of its land after 20 years.

10.2. The candidate also cites in his application his philosophy that he should approach cases in such manner as to uphold the public's trust in the adequacy and efficacy of the judicial process.

## 11. **The candidate's independent mindedness**

11.1. There is nothing to suggest that the candidate is not independently minded.

11.2. In *Myers v National Commissioner of the South African Police and Others 2013 345 ILJ 1729 (SCA)*, the candidate

delivered a minority judgment which was subsequently upheld. The case revolved around the question of whether a member of the South African Police Service was guilty of misconduct, and if so, whether his dismissal was fair in the circumstances.

- 11.3. The majority of the LAC held that the dismissal was fair. The candidate in a minority judgment held that although the candidate was guilty of misconduct, the sanction was too harsh in the circumstances, and held that the commander should have been reinstated in his previous position. The case was taken on appeal to the SCA, where the court agreed with the approach adopted by the candidate.

## **12. The candidate's ability to conduct court proceedings**

- 12.1. The candidate has acted as a judge since 2004, and was appointed permanently in 2007. His 10 years of judicial service indicate that he has substantial experience in conducting court proceedings.
- 12.2. There is nothing adverse in his application to give any indication to the contrary.

## **13. The candidate's administrative ability**

- 13.1. The candidate worked in private practice for a period of 20 years. In addition, the candidate combined his position as judge in the Western Cape High Court with various other acting positions the LAC, the Competition Appeal Court and the Supreme Court of Appeal.

*CANDIDATE: JUDGE DH ZONDI*

13.2. The above suggests that the candidate has excellent administrative abilities, bearing in mind the fact that at present he has only two judgments outstanding.

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

14.1. One of the candidate's nominators, the Honourable Justice Ndita, says that "*his integrity is ... untainted*".

14.2. The candidate disclosed the fine he received years ago from the Law Society.

14.3. There is nothing to indicate any instances of, or propensity towards unethical behaviour or a lack of integrity. No adverse comments have been received to this effect.

**15. The candidate's judicial temperament**

15.1. No adverse comments have been received.

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

16.1. The candidate has been a member of the Black Lawyers' Association, which nominated him for a position on the SCA.

16.2. He is a Trustee of Parmed medical scheme, and was previously a member of the school governing body of Princess High School in Roodepoort.

16.3. His application gives no other details of his commitment to human rights and the values and needs of the community.

**17. The candidate's potential**

17.1. If appointed, the candidate would bring to the Supreme Court of Appeal judicial experience in more than one field of law, and more specifically important expertise in labour law.

17.2. The candidate has only been acting as a permanent High Court judge for a period of seven years. The candidate has potential to develop further as a High Court judge before an appointment to the SCA.

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

18.1. The candidate is an African man and his appointment would be in line with the need for racial transformation of the courts.

18.2. The candidate has risen to judicial office from a firm foundation of legal scholarship (with three legal degrees), and practice as an attorney. In addition, he acted as a judge for a number of years before being appointed to a permanent position. The public has an interest in judicial appointments to the higher courts that marry the need for transformation with a proven track record of competence and ability.

18.3. His appointment would not meet the need to transform the gender imbalance that persists in our courts, and particularly our higher courts. He does not demonstrate such remarkable ability as a judge to warrant his appointment over that of an equally competent woman candidate.

CANDIDATE: JUDGE DH ZONDI

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

### **Reported decisions**

*Brümmer v Minister of Social Development and Others* 2009 2 All SA 583 WCC

*Woodways CC v Vallie* 2010 (6) SA 136 (WCC)

*Treatment Action Campaign v Rath and Others* 2008 (4) All SA 360 (C)

*Minister for Economic Development and Others v Competition Tribunal and Others; SACCAWU v Walmart Stores and Another* [2012] 1 CPLR 6 (CAC) (co-authored the judgment)

*National Commissioner of the South African Police v Myers* (2012) 33 ILJ 1417 (LAC)

*Uniting Reformed Church, De Doorns v President of the Republic of South Africa and Others* 2013 (5) SA 205 (WCC)

*S v Matshivha* 2014 (1) SACR 29 SCA

*City of Tshwane v Marius Blom and GC Germishuizen Inc and Another* 2014 (1) SA 341 (SCA)

### **Unreported decisions**

*Markom v Menqa* 2008 JOL 22400 (C)

*S v Calvin Uithaler* unreported Case No: A4902013 (SCA)

CANDIDATE: JUDGE DH ZONDI

### **Judgments upheld on appeal**

*Meter NO and Others v Geo Parkes & Son* 2006 (SCA) 161 30  
November 2006

*Aventura Ltd v Jackson NO* 2007 (5) SA 497 (SCA)

*Shoprite Checkers (Pty) Ltd v Commissioner for South African Revenue  
Services and Others* 2008 BIP 369 (C)

*Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA)  
(partially)

*Helibase (Pty) Ltd v Commissioner for Civil Aviation and Others*  
(5185/06) 2009 ZAWCHC 136 (13 February 2009)

*Thabana Li Meli (Pty) Ltd v Thabani Wines* (A552/2008) 2009  
ZAWCHC 142 (28 August 2009)

*John van Leendert BV v Klein Karoo International Trading* (A381/2010)  
2011 ZAWCHC 235 (25 May 2011)

*Myers v National Commissioner of the South African Police and Others*  
2013 345 ILJ 1729 (SCA)

### **Judgments overturned on appeal**

*Medi Television (Pty) Limited t/a E-Tv v Director of Public Prosecutions*  
(Western Cape) 2007 (5) SA 540 (SCA).

*CANDIDATE: JUDGE DH ZONDI*

*Capespan (Pty) Ltd v Any Name 451 (Pty) Limited 2008 (4) SA 510  
(CPD)*

*Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd 1968 (3)  
SA 166 (A)*

*Brümmer v Minister for Social Development and Others*

*Spearhead Property Holdings Ltd v E&D Motors (Pty) Ltd*

*Khumalo and Another v MEC for Education (Constitutional Court case  
10/13)*