

CANDIDATE: JUDGE JR MURPHY

**COURT FOR WHICH CANDIDATE APPLIES: LABOUR
APPEAL COURT**

1. The candidate's appropriate qualifications

1.1. The candidate has the following qualifications:

1.1.1. B.A. (Law and African Politics) 1976;

1.1.2. LLB 1980 to 1981; and

1.1.3. Post graduate diploma in Tax Law 1993.

1.2. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

2.1. There is nothing apparent from the applicant's application form or in his judgments that would suggest that the candidate is not a fit and proper person.

2.2. The candidate has had a successful legal career as an attorney, legal academic and judge and has shown a dedication and commitment to the law in fields, which would suggest that he is a fit and proper person for judicial appointment.

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. Women are poorly represented on the Labour Appeal Court ("LAC") and presently only one judge on the bench of eight

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judges is a woman. The candidate's appointment would not improve this position.

3.3. The candidate's appointment would not ordinarily help to reflect the racial composition of the South African judiciary. However, given the present demographics of the LAC, his appointment would help reflect such composition.

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

4.1. The candidate has over 30 years of legal experience:

4.1.1. The candidate was a candidate attorney and then admitted as an attorney between the years 1984 to 1987. It is unclear in exactly which year the candidate was admitted as an attorney.

4.1.2. The candidate has been a law lecturer early on in his career and a senior lecturer and assistant professor at a later stage.

4.1.3. The candidate has a wealth of knowledge in pension law, labour law, property law and administrative law.

4.1.4. The candidate was the pension funds adjudicator between the years 1997 and 2003.

4.1.5. The candidate was a presiding judge in the United Nations: Kosovo in 2003.

4.1.6. The candidate was an acting Judge in the Labour Court from 2004 to 2005.

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- 4.1.7. The candidate is currently a Judge in the North Gauteng High Court and has been since 2006.
- 4.1.8. The candidate has been an acting Judge of the Labour Appeal court for four terms, since July 2011.
- 4.2. In addition to the areas of law mentioned above, the candidate adjudicates matters concerning commercial law, company law, contract law, insolvency law, the law of delict, trust law, the law of succession, family law and matters concerning local government, tenders and refugee cases.
- 4.3. In terms of academic writing the candidate has done the following:
 - 4.3.1. co-authored books, manuals and commentaries dealing with labour law, free and fair elections, the bill of rights, the establishment of the land claims court and farm workers respectively;
 - 4.3.2. contributed chapters to various books dealing with the same subject matter above; and
 - 4.3.3. written articles and notes on the same subject matter above as well as pension law, a constitutional review of taxation, among other things.
- 4.4. We have considered the judgments listed by the candidate in his application form and the further reported judgments handed down by the candidate. The candidate has written the following judgments which deal with constitutional or administrative law issues:

4.4.1. *SAPU v National Commissioner of the SA Police* (2005) 26 ILJ 2403 (LC) was decided amidst much uncertainty and debate in judicial circles about the boundaries between administrative action and employment law, when the state acts as employer. The candidate held that a distinction should be drawn between the conduct of an employer acting as employer, and its conduct when engaging in administrative action, such as issuing tenders. The candidate held that the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) does not apply to the former. This finding and the candidate’s reasoning was held to be persuasive by the full bench of the Constitutional Court in *Gcaba v Minister Of Safety And Security & Others* 2010 (1) SA 238 (CC), which definitively settled the issue some years later.

4.4.2. Aside from the above matter, the candidate also demonstrated his ability to rule on contentious constitutional issues, amidst controversy and dissenting judgments on the topic, and to be vindicated later by the Constitutional Court, in a judgment related to the application of section 197 of the Labour Relations Act, which deals with transfers of a business as a going concern. In *COSAWU v Zikhethale Trade (Pty) Ltd* (2005) 26 ILJ 1056 (LC), the candidate held that section 197 applied to so-called second generation outsourcing agreements. While this judgment was reversed on appeal (on a technical point of non-joinder), the candidate’s reasoning and conclusions, and the application of

European law to the proper interpretation of section 197 (which is derived from the European TUPE regulations) in the context of the constitutional right to fair labour practices, were endorsed and followed by the Constitutional Court in *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others* 2012 (1) SA 321 (CC).

4.4.3. *Kievits Kroon Country Estate (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* (2012) 33 ILJ 2812 (LAC) concerned the constitutionally sensitive and difficult issues of belief in traditional medicine and the implications on the employment relationship, that arose when an employee took unauthorised leave to attend a sangoma training course. The candidate concurred in a decision of the LAC that served to protect and give effect to the right to freedom of belief and conscience. This decision, which drew from Constitutional Court authority, was later endorsed by the Supreme Court of Appeal.

4.4.4. *Department of Correctional Services and Another v Police & Prisons Civil Rights Union and Others* (2011) 32 ILJ 2629 (LAC) dealt with the constitutionally sensitive right of freedom of belief, in the context of the employment relationship. The employer had instructed all male (but not female) staff with dreadlocks to cut them off. The affected employees were all adherents of the Rastafarian religion which mandated dreadlocks. The candidate was the author of the decision, in which the

LAC held, in a carefully written and comprehensive judgment, that the dismissal of the affected employees was automatically unfair, and amounted to unfair discrimination on the grounds of race, gender and religion. This decision was endorsed on appeal.

4.4.5. *Total Computer Services (Pty) Ltd v Potchefstroom Local Municipality* 2008 (4) SA 346 (T) concerned the review of a decision to award a municipal tender under PAJA. The candidate ordered that the tender be reviewed and set aside, that the awarding of the tender was unlawful and unfair, and that the municipality reconsider competing tenders with due regard to section 217 of the Constitution.

4.4.6. In *Centre for Child Law and Others v MEC for Education, Gauteng and Others* 2008 (1) SA 223 (T), the candidate considered the poor physical conditions at hostels where children in state custody were housed. There was also a lack of access control and proper psychological support and therapeutic services at the school concerned. The candidate, in applying section 28 of the Constitution, found that the Constitution contained no internal limitation subjecting children's rights to the availability of resources and legislative measures for their progressive realisation, unlike other socio-economic rights contained in sections 26 and 27 of the Constitution. The candidate ordered the respondents to issue each child with a sleeping bag and to put in place proper access control and psychological support

structures.

4.4.7. In *Freedom under law v National Director of public Prosecutions and Others* 2014 (1) SA 254 (GNP), the candidate heard an application to set aside the decision by the NDPP to discontinue criminal and disciplinary proceedings against Lieutenant-General Richard Mdluli (Head of Crime Investigation, SAPS) as unlawful. The judgment deals with complex constitutional and administrative law issues. The court granted the review application. The decision is currently on appeal, and as such we refrain from comment on the correctness of the decision, save to state that it deals with difficult and important issues of legality, the rule of law, and other constitutional concepts, in a detailed and rational manner.

4.5. Some noteworthy Labour Court and High Court judgments by the candidate include:

4.5.1. *Changing Tides v Grobler* [2012] 3 ALL SA 513 (GNP) which dealt with various provisions under the National Credit Act 34 of 2005, and clarified the rights as between credit providers and consumers under the Act. In particular, the judgment looked at and examined sections 86 and 130(4)(c) of the Act, which deal with the debt review process and a debt re-arrangement by a Court. The judgment took cognisance of SCA cases and attempted to develop the law.

4.5.2. In *Malan v Bulbring NO & Others* [2004] 10 BLLR 1010

(LC), the candidate dealt with the application of the Extension of Security Tenure Act 62 of 1997 (“ESTA”) in the labour context. The judgment held that the application of ESTA did not deprive the CCMA of jurisdiction to arbitrate a dispute concerning the dismissal of a farmworker for breaching the rules relating to accommodation on the farm.

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

5.1. The candidate’s findings in the cases set out above and legal writings demonstrate a firm commitment to the values of the Constitution, and a method of interpreting and applying constitutional values to difficult cases that is consonant with that of the Constitutional Court.

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

6.1. The following judgment was overturned on appeal:

6.1.1. In *Janse van Rensburg v Myburgh* 2007 (6) SA 287 (T), the SCA found that the applicant had incorrectly upheld the plea of *res judicata* and had misapplied the “*once and for all rule*”. The SCA held that it was for the party relying on the application of the rule to plead such reliance and lay a foundation in fact which would enable the opposing parties to deal with such reliance.

6.2. The following judgments were upheld on appeal:

6.2.1. Although the candidate’s judgment in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and*

Tourism and Others 2006 (5) SA 512 (T) was overturned by the Supreme Court of Appeal (2007 (5) SA 438 (SCA)), it was reversed by the Constitutional Court (2008 (2) SA 319 (CC)).

6.2.2. In *Herholdt v Nedbank Ltd* (2012) 33 ILJ 1789 (LAC), the candidate was the author of the decision of the LAC, which dealt with the appropriate test for the review of arbitration awards. In the course of the judgment, the court made certain remarks about the efficacy of the review process in the Labour Courts, and expressed the view that an appeal process may have been more suitable to achieve the legislative aim of expeditious dispute resolution in labour matters. The LAC decision was upheld on appeal to the SCA, but the SCA differed on the appropriate review test. The SCA held that the LAC's findings on the review test were *obiter*. The current Judge President of the Labour Court and LAC, Waglay JP, expressed disagreement with the LAC decision in *Herholdt*, in a subsequent decision in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC). The controversy over the extent of the review test has been on-going since the promulgation of the LRA, is a contentious field, and the comments of the candidate in *Herholdt* were endorsed by the then Judge President, Mlambo JP, who concurred in the judgment. In our view, this decision reflects normal judicial disagreement in the course of the development of new jurisprudence, and

does not reflect negatively on the candidate in any way.

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

7.1. The candidate has had extensive professional experience as an attorney, legal academic, High Court Judge and acting Judge of the Labour Court and LAC, as cited above.

7.2. Although the candidate has a wide range of experience in various areas of law, he is a seasoned labour law practitioner and, in particular, his acting positions in the Labour Court and LAC support his suitability for appointment to the LAC.

8. The candidate's linguistic and communication skills

8.1. The candidate is fluent in both English and Afrikaans. He has demonstrated great proficiency in both languages and his communication skills are, on the whole, reputedly very good.

8.2. The candidate's judgments also show a comparative ease with language and an ability to use it as an effective communication tool.

9. The candidate's ability to produce judgments promptly

9.1. The candidate seemingly only has three judgments, which have been reserved and are currently outstanding. Two of those judgments were only reserved in January 2014.

9.2. The third outstanding judgment has been reserved for a slightly longer period of time from October 2013. This would, however, include the December recess.

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9.3. It would appear that the candidate is generally able to produce judgments quite promptly, and there is not normally a lengthy delay between the hearing of the matter and the delivery of judgment.

10. The candidate's fairness and impartiality

10.1. The candidate has a reputation for fairness and impartiality.

11. The candidate's independent mindedness

11.1. As both a judge and an academic, the candidate has demonstrated a high degree of independent mindedness, particularly in the fields of pension law, labour law and administrative law. The candidate is not unduly deferent to the state, or any other interest group, and his decisions indicate that he applies independent judgment regardless of prevailing political or commercial pressures. The recent decision in *Freedom Under Law*, discussed above, provides a good example of independent judicial conduct.

12. The candidate's ability to conduct court proceedings

12.1. The candidate has presided over numerous proceedings as a judge of the High Court, as an acting judge of the Labour Court and as an acting judge of appeal in the LAC.

12.2. The candidate generally has a good reputation and has shown at both a High Court and appellate level, an ability to conduct court proceedings in a fair and efficient manner.

13. The candidate's administrative ability

- 13.1. The candidate has occupied various administrative roles in his long and distinguished career, and it appears that he has done so with great aplomb.
- 13.2. It would also appear that the candidate is a skilled and efficient administrator across various disciplines and in various capacities both locally and internationally. This is for instance apparent in his work with the United Nations and in the various administrative roles that he occupied in South Africa as the pension funds adjudicator; senior commissioner of the CCMA; editor in chief of the Butterworth's Pension Law Reports; Head of Department of Public Law at the Law Faculty of the University of the Western Cape and Director of the Community Law Centre at the University of the Western Cape (amongst others).
- 13.3. The candidate's successful occupation of positions requiring administrative work at both an academic and practical level, will stand him in good stead and make him a welcome addition to an appellate Court. It should also be noted that some of the administrative positions occupied by the candidate were in the service of the community at large.

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

- 14.1. The candidate has a good reputation for having and maintaining high standards of honesty and integrity.

15. The candidate's judicial temperament

- 15.1. The candidate has a reputation for fairness and impartiality.
- 15.2. In the *Freedom Under Law* matter, it was reported in the media that certain altercations took place between the candidate and Mokhari SC of this Bar, which led to Mokhari SC filing a complaint against the candidate with the JSC. As this is (as far as we are aware) an on-going matter, and save to note that the candidate properly disclosed this complaint in his application form, we cannot comment further. The JSC will be alive to this issue and ought to canvass it with the candidate during the course of his interview.
- 15.3. Personal experience of appearances before the candidate, and informal enquiries amongst senior colleagues, indicate that the candidate normally displays excellent judicial temperament. He is generally well-prepared, keen to debate points with counsel, and intensely interested in the issues at play, and in the underlying constitutional values.

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

- 16.1. The candidate's *curriculum vitae* indicates a commitment to public service. His judgments show a keen sensitivity to protect vulnerable persons against infringement of constitutional rights, and to uphold the values of the Constitution and the rule of law.
- 16.2. The candidate's *curriculum vitae* and judicial record indicate a firm commitment to human rights.

17. The candidate's potential

17.1. In our view, the candidate displays potential to excel as a permanent judge of the LAC, and at appellate court level generally.

17.2. The candidate has the qualifications, experience, judicial demeanour and potential to attain and succeed at the highest levels of the judiciary, and in our view will be an asset to the LAC Bench.

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

18.1. The candidate is a white man, and on the face of it, his appointment will not promote transformation on the bench. This may send a negative signal to the community at large, not in respect of this particular candidate or his ability, but in respect of the comparatively disproportionate number of white male judges across all courts. Nonetheless, given the relatively small number of white men on the LAC, this should not be held against him in this appointment.

18.2. The candidate is an experienced and highly capable judge, with a firm track record of academic and judicial rigour, independent mindedness, and a strong commitment to promoting constitutional values and the rule of law.

18.3. The appointment of this candidate would send a positive message to the community at large.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Khanyile v CCMA & Others [2005] 2 BLLR 138 (LC)

SAPU v National Commissioner (2005) 26 ILJ 348 (LC)

Total Computer Services (Pty) Ltd v Potchefstroom Local Municipality
2008 (4) SA 346 (T)

Centre for Child Law and Others v MEC for Education, Gauteng and Others 2008 (1) SA 223 (T)

Freedom under law v National Director of public Prosecutions and Others 2014 (1) SA 254 (GNP)

Malan v Bulbring NO & Others [2004] 10 BLLR 1010 (LC)

Changing Tides v Grobler [2012] 3 ALL SA 513 (GNP)

Unreported decisions

See the candidate's *curriculum vitae* for a full list of unreported decisions and online judgments.

Judgments upheld on appeal

Herholdt v Nedbank [2013] 9 BLLR 857 (LAC)

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Department of Correctional Services v Popcru [2012] 2 BLLR 110
(LAC)

*Kievits Kroon Country Estate (Pty) Ltd v Commission for Conciliation,
Mediation & Arbitration & Others* (2012) 33 ILJ 2812 (LAC):

Judgments overturned on appeal

Janse van Rensburg v Myburgh 2007 (6) SA 287 (T)