

CANDIDATE: JUDGE KGB SWAIN

COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL

1. The candidate's appropriate qualifications

1.1. The candidate has the following degrees and qualifications:

1.1.1. B.Sc. (Natal) 1972;

1.1.2. LL.B (Natal) 1975;

1.1.3. LL.M (Cantab) 1977; and

1.1.4. Certificate in Constitutional Litigation (Natal) 1996.

1.2. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

2.1. There is nothing in the application or judgments considered that would suggest that the candidate is not a fit and proper person.

2.2. The candidate is a judge of the High Court and is currently acting on the Competition Appeal Court and the Supreme Court of Appeal. A review of his judgments and other information in the public domain provides no indication that he is unfit for the position applied for.

2.3. To the best of the reviewers' knowledge, no complaints of any type have been lodged with the JSC in respect of this candidate.

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 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 appears to have extensive experience both at the Bar and on the Bench.
- 4.2. Prior to his elevation to the Bench, the candidate was a practising Advocate, and member and leader of the Society of

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Advocates of KZN over a period of 26 years, having taken Silk in March 1993.

4.3. He has been a judge of the KZN High Court since 2003, was appointed to act on the Competition Appeal Court for the period 2012 to 2014, and has been acting as a Justice of the Supreme Court of Appeal without interruption since 15 October 2012.

4.4. We have considered the judgments penned by the candidate. The judgments display a sound knowledge of the law. The applicant appears to have expertise of broad remit, having delivered judgments on complex issues in employment law, constitutional law, company law and tax law. Moreover, as is set out in the candidate's application, and considered below, the judgments penned by the candidate have an excellent record of being upheld on appeal.

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

5.1. The candidate's judgments indicate that he is committed to the values enshrined in the Constitution. The judgments reviewed that have been authored by the candidate (*S v Khan* 2010 (2) SACR 476 (KZP) and *Ngcobo NO and Another v Food and Allied Workers' Union* [2012] 10 BLLR 1035 (KZD) being two examples), exhibit a judicial appreciation of the required commitment to constitutional ideals.

5.2. Central to the determination of the two aforesaid judgments, was an awareness of the rights of dismissed individual workers as against their unions and of suspects (potential

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“*accused persons*” under section 35 of the Constitution) as against the officers in the police. The candidate’s pragmatism and sensitivity to the more marginalised in society is consonant both with the judicial injunction under section 39 of the Constitution, specifically, and generally with the value system which the Constitution enshrines.

5.3. The candidate moreover displays an excellent grasp for the modalities of constitutional interpretation. The reviewers consider this trait of particular benefit to the judicial system as a whole, and in particular the Supreme Court of Appeal, a court steeped in common law traditions, but which can be anticipated to deal with an increasing number of constitutional matters.

6. Whether any judgments have been overturned on appeal

6.1. 16 of the candidate’s numerous judgments have been taken on appeal. The candidate states that only 6 of these appeals were successful (2 before the full bench of the KZN High Court and 4 before the Supreme Court of Appeal).

6.2. However, the reviewers note that the Constitutional Court recently overturned a costs order granted by a panel of the Competition Appeal Court (CAC) in the matter of *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others* 2014 (3) BCLR 251 (CC). The candidate authored the judgment of the CAC (Davis JP and Mailula J concurring) which ordered the appellants’ costs in both the appeal and the proceedings before the Tribunal to be

borne by the Competition Commission. The same panel granted leave to appeal, noting that there was uncertainty as to the extent of the power of the CAC to award costs against the Competition Commission. In the result, the Constitutional Court clarified the extent of the powers of the CAC in respect of costs, ultimately holding that the CAC's discretion had been wrongly exercised. The costs award was accordingly set aside.

6.3. Of the six appeals which were successful, the reviewers have only been able to source four. We address these four judgments below:

6.3.1. In *Director of Public Prosecutions, KZN v P* 2006 (3) SA 515 (SCA), an appeal in respect of sentence alone, the SCA overturned the sentence of correctional supervision imposed by the candidate in respect of *P*, a girl who at twelve years of age had paid, and offered herself sexually to, two men in return for their killing of her grandmother. The SCA held that the Constitution did not forbid incarceration of children in certain circumstances, and noted that it was not inconceivable that some courts may be confronted with cases which required detention. The SCA partially upheld the appeal, concluding that correctional supervision on its own was not severe enough. A sentence of seven years' imprisonment, entirely suspended on condition of *P*'s compliance with a rigorous regime of correctional supervision was more appropriate. In reaching its conclusion the SCA stated

that although the candidate had given “*due and careful, if not anxious, consideration to the matter*” he had been “*taken in by the evidence*” of an expert witness who “*without any factual basis, came to the conclusion that the accused's childhood had shaped her to commit the crimes in question*”.

6.3.2. In *Sewpersad and Another v Dookie* 2009 (6) SA 611 (SCA), the SCA overturned the candidate’s decision that subsequent conduct of the party seeking to declare a contract of sale of land invalid had revived the agreement of sale. Applying the proper test, the SCA held that there was no basis, regard being had to the affidavits filed by the parties, for a finding that there was consensus between the parties that the agreement be revived.

6.3.3. In *National Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), the SCA overturned the candidate's decision that a pension fund was not entitled, in terms of Regulation 1 of the Regulations governing the operation of the Superannuation Fund, to direct the municipality to pay an adjusted contribution to the aforesaid Fund based on an increase in the member's pensionable emoluments. The point of difference between the SCA and the candidate was the interpretation of “pensionable emoluments” under the Regulations.

6.3.4. In *Lykes Lines Ltd., LLC v Vereeniging Meat Packers (Pty) Ltd* [2013] ZASCA 18 (20 March 2013), the SCA,

having granted special leave to appeal, dismissed an appeal against a judgment of the Full Court, which had in turn reversed a decision of the candidate. The issue in dispute was whether the evidence led by the appellant was sufficient to establish that the respondent bore the risk of the loss of a container. The SCA found that “*on the evidence the internal arrangement appears to be no more than inter-corporate mutual dealings not in themselves creating legal liability but resulting rather in no more than a non-binding agreement often described as a ‘gentlemen’s agreement’*”.

6.4. Outside of those indicated by the candidate in his application, and the recent judgment of the Constitutional Court in *Pioneer Hi-Bred* discussed above, the reviewers’ have not found any further judgments of the candidate that were subject to successful appeal.

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

7.1. The candidate’s experience, save for a brief two-year stint as a part-time lecturer at the then University of Natal (Pietermaritzburg) is exclusively in his capacity as advocate and judge. Having said that, the candidate’s practical experience is substantial, spanning 26 years as counsel and more than a further 10 years on the Bench. The candidate has some 80 reported judgments to his name (of which he was the principal or sole author), which is a considerable achievement.

8. The candidate's linguistic and communication skills

- 8.1. From the candidate's judgments, it is clear that he has excellent linguistic skills in English. The reviewers note that the candidate uses plain language in his judgments, making them easily understandable.
- 8.2. His proficiency in other languages is unknown to the reviewers.
- 8.3. No adverse comments have been raised about the candidate's communication skills.

9. The candidate's ability to produce judgments promptly

- 9.1. The candidate displays an exceptional ability to produce clear, reasoned judgments on complex legal issues within a short space of time.
- 9.2. The candidate's application indicates that he has no reserved judgments. The reviewers regard this as an important point in the candidate's favour as the interests of justice are best served by the prompt and efficient delivery of judgments.

10. The candidate's fairness and impartiality

- 10.1. No adverse comments have been received.
- 10.2. In particular, we note that the candidate appreciates the judicial role under the Constitution. In *City of Cape Town v Premier, Western Cape and Others* 2008 (6) SA 345 (C), the candidate, writing for a full court, held that it was unconstitutional and invalid for a sitting judge to chair a

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political commission of inquiry and simultaneously to hold prosecutorial powers. The decision was not appealed against.

11. The candidate's independent mindedness

11.1. No adverse comments have been received. The reviewers refer to the comments set out at paragraph 10 above.

12. The candidate's ability to conduct court proceedings

12.1. No adverse comments have been received.

12.2. The reviewers have received a letter from a senior member of the Johannesburg Bar who has appeared before the candidate on three occasions recently in the Supreme Court of Appeal.

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12.3. The sentiments expressed generally in the letter are summarised in a single paragraph which reads as follows:

“In the three appeals I refer to above Judge Swain demonstrated his obvious experience and ability to deal competently, capably and decisively with diverse commercial and intellectual property matters. He also demonstrated an admirable judicial presence which he executed in a manner befitting of a permanent member of the Supreme Court of Appeal.”

13. The candidate's administrative ability

13.1. No adverse comments have been received.

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13.2. We refer to paragraph 9 above.

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

14.1. No adverse comments received.

15. The candidate's judicial temperament

15.1. No adverse comments have been received.

15.2. A further paragraph from the letter referred to in paragraph 12 reads as follows:

“I point out ... that I do not recall Judge Swain asking a single irrelevant question in any of the appeals. I was acutely aware in each appeal that he listened carefully to every response to every question put by any member of the various benches and that even when other members of the court were obviously irritated or dissatisfied with submissions by counsel or questions put by their colleagues on the bench, Judge Swain remained composed, patient and always polite.”

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

16.1. The application itself does not disclose any extra-curial basis from which the reviewers' can comment upon this issue.

16.2. The reviewers refer to their comments at paragraph 5 above relating to the candidate's commitment to the values of the Constitution, as expressed in his judgments.

17. The candidate's potential

- 17.1. In our view, the candidate is uniquely qualified for permanent elevation to the Supreme Court of Appeal, regard being had to his experience which includes lengthy terms served in two appellate courts. We note that the candidate has 7 years left on the Bench and we are strongly of the view that those years would be best served in the Supreme Court of Appeal. His obvious skills will be a valuable addition to that Court.
- 17.2. The reviewers are of the firm view that the candidate is a very strong contender for appointment. He has a wealth of experience, both as an advocate and as a judge, in the full breadth of the law. In our view, he has had an exemplary career as a judge thus far, evidenced by the vast number of his judgments which grace the law reports. We have no doubt that the candidate will, if elevated to the Supreme Court of Appeal, continue to make a powerful contribution to the development of South African jurisprudence.
- 17.3. The candidate certainly appears to be held in high regard by his peers on the bench of the Supreme Court of Appeal. In *Casey v Firstrand Bank* [2013] ZASCA 131, Willis JA, dissenting on a point relating to the date upon which an exchange rate should be calculated, referred to “*the fine judgment of Swain AJA*” with which he mainly agreed. Navsa ADP, disagreeing with Willis JA, considered the candidate’s order on the point as being the product of “*sound reasoning*”.

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

18.1. Although the appointment of the candidate would not enhance diversity on the Supreme Court of Appeal, as set out above, in the view of the reviewers, the candidate is possessed of a broad array of skills and is likely to make a substantive and valuable contribution to the jurisprudence of the Court. The appointment of a white man with a demonstrable commitment to the South African constitutional project would moreover reinforce the notion that white, male candidates of merit are considered and appointed to the Bench.

18.2. The candidate's elevation would also, in our view, send out the message that it is a person's diligent and unwavering commitment to the rule of law and our constitutional values which finds its recognition in judicial appointment.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

P Trimborn Agency v Grace Trucking CC 2006 (1) SA 427 (N)

AOL v Minister of Home Affairs and Others 2006 (2) SA 65 (N)

Standard Bank of South Africa Ltd v Supa Quick Auto Centre 2006 (4) SA 65 (N)

Van Aardt and Another v Weehuizen and Others 2006 (4) SA 401 (N)

Sea Lake Investments (Pty) Ltd t/a Sea Lake Industries v Msunduzi Municipality and Another [2006] 1 ALL SA 656 (N)

Meyer v Director of Public Prosecutions, KZN [2006] 4 ALL SA 598 (N)

Unilever Plc. v Africa Sun Oil Refineries 2006 BIPLR 180 (D)

Colgate Palmolive (Pty Ltd v Commissioner, South African Revenue Service 2007 (1) SA 35 (N)

Absa Bank Ltd v Bisnath NO and Others 2007 (2) SA 583 (D)

Strut Ahead Natal (Pty) Ltd v Burns 2007 (4) SA 600 (D)

South African Eagle Insurance Co Ltd v Naidoo and Another [2007] 4 ALL SA 840 (N)

S v Makhaye 2007 (1) SACR 369 (N)

Sewperdash and Another v Dookie 2008 (2) SA 526 (D)

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Jackpersad NO and Others v Mitha and Others 2008 (4) SA 522 (D)

Hughes v John Dory Trucking (Pty) Ltd and Others 2008 (5) SA 300 (N)

City of Cape Town v Premier, Western Cape and Others 2008 (6) SA 345 (C)

Gourlay v Canoa KZN (Pty) Ltd t/a Canon Office Automation [2008] 2 ALL SA 194 (N)

Dasarth v Hulett Aluminium (Pty) Ltd 2008 BIPLR 382 (D)

Khan v Ansur No and Others 2009 (3) SA 258 (D)

Reebib Rentals (Pty) Ltd v Lets Trade 1163 CC 2009 (3) SA 396 (D)

Accolla v Pillay t/a Newlands Sports Bar Liquor Store 2010 (3) SA 514 (KZP)

Naidoo NO and Others v Naidoo and Another 2010 (5) SA 514 (KZP)

Standard Bank of South Africa Ltd v Maharaj t/a Sanrow Transport 2010 (5) SA 518 (KZP)

Moosa and Others NNO v Hassam and Others NNO 2010 (2) SA 410 (KZP)

Proflour (Pty) Ltd and Another v Grindrod Trading (Pty) Ltd t/a Atlas Trading and Shipping and Another [2010] 2 ALL SA 510 (KZD)

S v Dube and Others 2010 (1) SACR 65 (KZP)

S v Khan 2010 (1) SACR 476 (KZP)

Ex Parte Sibisi 2011 (1) 192 (KZP)

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Naicker v Moodley 2011 (2) SA 502 (KZD)

Future Rustic Construction (Pty) Ltd v Spillers Waterfront (Pty) Ltd and Another 2011 (5) SA 506 (KZD)

Pansolutions Holdings Ltd v P&G General Dealers & Repairers CC 2011 (5) SA 608 (KZD)

S v Mthembu 2011 (1) SACR 272 (KZP)

Mondi South Africa Ltd v Martens and Another 2012 (2) SA 469 (KZP)

Firststrand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd 2012 (4) SA 266 (KZD)

Liberty Group Ltd v Singh and Another 2012 (5) SA 526 (KZD)

MS v KS 2012 (6) SA 482 (KZP)

Ngcobo NO and Another v Food and Allied Workers' Union [2012] 10 BLLR 1035 (KZD)

Pioneer Hi-bred International Inc. and Another v Competition Commission and Another (113/CAC/NOV11) [2012] ZACAC 3 (28 May 2012)

Nortje v Fakie 2013 (1) SA 577 (KZP)

Banda and Another v Van der Spuy and Another 2013 (4) SA 77 (SCA)

Communicare and Others v Khan and Another 2013 (4) SA 482 (SCA)

BDE Construction v Basfour 3581 (Pty) Ltd 2013 (5) SA 160 (KZP)

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MEC for Environmental Affairs and Development Planning v Clairison's
CC 2013 (6) SA 235 (SCA)

Glenrand MIB Financial Services (Pty) Ltd and Others v Van den Heever
No and Others [2013] 1 ALL SA 511 (SCA)

Computicket (Pty) Ltd v Competition Commission of South Africa [2013]
1 CLR 26 (CAC)

S v Sewnarain 2013 (1) SACR 543 (KZP)

S v Maselani and Another 2013 (2) SACR 172 (SCA)

Unreported decisions

Vukukhanye Personnel Services v EThekwini Municipality [2010] JOL
26516 (KZD)

Bruyns v Makakatana Bay Lodge CC and Another; Makakatana Bay
Lodge CC v Bruyns and Another [2010] JOL 27057 (KZP)

CShell 271 (Pty) Ltd v Oudtshoorn Municipality [2013] ZASCA 62 (24
May 2013)

Fegen and Another v Mphakathi [2013] ZASCA 100 (9 September 2013)

Axal Properties 2 CC v Kotze [2013] 110 (16 September 2013)

Casey and Another v Firstrand Bank Ltd [2013] ZASCA 131 (26
September 2013)

MEC for Finance and Economic Development, KZN v Masifundisane
Training College CC [2013] ZASCA 138 (27 September 2013)

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Public Investment Corporation Ltd v Bodigelo [2013] ZASCA 156 (22 November 2013)

Cowan v Hathorn No and Others [2013] ZASCA 159 (25 November 2013)

Lykes Lines Ltd., LLC v Vereeniging Meat Packers (Pty) Ltd [2009] ZAKZDHC 18 (30 October 2009)

BBS Empangeni v Phoenix Industrial Park (Pty) Ltd and Another [2011] ZAKZDHC 48 (30 October 2000)

Putini v Edumbe Municipality [2012] ZAKZDHC 26 (15 May 2012)

Muddiman v Registrar of Deeds, KZN and Others [2012] ZAKZDHC 27 (18 May 2012)

Gamede and Others v S [2009] ZAKZPHC 63 (23 September 2010)

National Joint Municipal Pension Fund v Endumeni Municipality [2010] ZAKPHC 63 (23 September 2010)

Mncwane v S [2010] ZAKZPHC 97 (23 September 2010)

Mngomezulu and Others v Premier, KZN and Others [2011] ZAKZPHC 52 (17 November 2011)

McAlister v Wavelengths 1188 CC and Another [2012] ZAKZPHC 31 (29 May 2012)

S v Mazibuko and Another [2012] ZAKZPHC 32 (31 May 2012)

Thuthabantu Properties CC v Summit Warehousing (Pty) Ltd [2012] ZAKZPHC 33 (4 June 2012)

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Gracie v Cundill [2012] ZAKZPHC 34 (8 June 2012)

S v Pillay [2012] ZAKZPHC 40 (26 June 2012)

S v Peerbhai and Another [2012] ZAKZPHC 58 (17 September 2012)

S v Van Biljoen [2012] ZAKZPHC 60 (17 September 2012)

S v Mundhree [2012] ZAKZPHC 65 (28 September 2012)

Moodley v Ebrahim [2012] ZAKZPHC 67 (10 October 2012)

Lazarus v Road Accident Fund [2012] ZAKZPHC 17 (17 March 2012)

McGregor v Asmal and Another [2012] ZAKZPHC 20 (3 April 2012)

Judgments upheld on appeal

Road Accident Fund v Smith [2006] ZASCA 172 (28 September 2006)

Howick District Land Owners' Association v Umgeni Municipality and Others [2007] 1 ALL SA 139 (SCA)

African Sun Oil Refineries (Pty) Ltd v Unilever Plc. 2007 BIPLR 127
NPD

Mdlongwa v S [2010] ZASCA 81 (31 May 2010)

Gamede and Another v S [2010] ZASCA 122 (30 September 2010)

BBS Empangeni CC v Phoenix Industrial Park (Pty) Ltd [2012] ZASCA
33 (29 March 2012)

S v Mthembu 2012 (1) SACR 517 (SCA)

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Sewnarain v S [2013] ZASCA 27 (25 August 2013)

Food and Allied Workers' Union v Ngcobo 2013 (5) SA 378 (SCA)

CNS Agents and Distributors v Nova Risk Partners AR 254/06

Judgments overturned on appeal

Director of Public Prosecutions, KZN v P 2006 (3) SA 515 (SCA)

Sewpersad and Another v Dookie 2009 (6) SA 611 (SCA)

National Joint Municipal Pension Fund v Endumeni Municipality 2012
(4) SA 593 (SCA)

Lykes Lines Ltd., LLC v Vereeniging Meat Packers (Pty) Ltd [2013]
ZASCA 18 (20 March 2013)

*Competition Commission of South Africa v Pioneer Hi-Bred International
Inc and Others* 2014 (3) BCLR 251 (CC)