

**CANDIDATE: JUDGE NC ERASMUS**

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

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

1.1 The candidate holds the following degrees:

1.1.1 B Iuris (1983); and

1.1.2 LLB (1989).

1.2 The candidate is appropriately qualified.

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

2.1 The candidate has had a long and distinguished career as a public prosecutor, district and regional magistrate, advocate, and judge. His career spans 30 years, and has included serving as an Acting Judge of Appeal on the Supreme Court of Appeal (from 1 June 2012 to 31 May 2013) and as Acting Judge President of the Free State High Court (from 1 January to 30 April 2014).

2.2 The candidate has demonstrated a commitment to human rights and constitutionalism in the substance of many of his judgments, and by his association with bodies such as NICRO, the South African Judicial Education Institute, and National Association of Democratic Lawyers (NADEL). This record indicates that he is a fit and proper person for judicial appointment.

2.3 No adverse comments have been received.

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 (Coloured) 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 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 43 reported judgments. It seems that certain of the reported judgments listed in the candidate's application are judgments of another Judge Erasmus.

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4.2 Of the candidate's listed 43 reported judgments, 26 are from the High Court and 17 are from the SCA.

4.2.1 Of the 26 High Court judgments, at least 16 were authored by the candidate. Of these 16 judgments, 13 were single-judge decisions, one was a full court appeal, and two were appeals from the lower courts. We have been unable to establish the authorship of the remaining ten judgments (which are split equally between appeals from the lower courts and full court appeals).

4.2.2 Of the 17 SCA decisions, only three were authored by the candidate. Of these three, two were full court appeals. Of the remaining 14 decisions, 13 were full court appeals.

4.3 The candidate therefore only appears to have authored 19 reported judgments in a judicial career of over 14 years. That said, the reported judgments (and the unreported decisions included in the application) reflect competence in a wide range of areas of the law. Put differently, the candidate's reported judicial record indicates a strong knowledge of the law, including constitutional law.

4.4 The candidate lists the following seven judgments as being his most significant:

4.4.1 *NDPP v Prophet* 2003 (6) SA 154 (C);

4.4.2 *George and Others v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC);

- 4.4.3            *Stander and Others v Schwulst and Others* 2008 (1) SA 81 (C);
- 4.4.4            *Beja and Others v Premier of the Western Cape and Others* [2011] 3 All SA 401 (WCC);
- 4.4.5            *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA);
- 4.4.6            *Saldanha Bay Municipality v Britannia Beach Estate (Pty) Ltd* [2012] ZASCA 206; and
- 4.4.7            *Mugridge v S* 2013 (2) SACR 111 (SCA).
- 4.5            *Prophet* considered an application by the NDPP for civil forfeiture in respect of a property alleged to have been used in drug-related offences. At issue was whether the property in question fell within the definition of an “instrumentality of the offence”. Having considered both local and foreign case law, as well as the facts in some detail, the candidate ordered that forfeiture be granted. The decision was upheld on appeal.
- 4.6            In *George*, the candidate had to consider whether a matter brought under the Equality Act to the Equality Court should be referred to an alternative forum (the High Court), as argued by the respondent. The applicants had launched two applications that arose out of substantially the same facts but were based on different causes of action – one in the Equality Court and the other in the High Court. The matter was not referred to an alternative forum. The decision was upheld on appeal.
- 4.7            In *Stander*, trustees sought an order indemnifying themselves

in respect of an application that sought their removal on grounds such as dishonesty and bad faith. Claiming that they should have been cited in the main application in their representative capacities, the trustees sought a declarator that their defence be funded by the trust estate. The court held that it could not make such an order before the main application was decided.

4.8 In *Beja*, the applicants sought – as their main relief – the enclosure of toilets built in a part of Khayelitsha by the City of Cape Town. Claiming that certain members of the relevant community had entered into an agreement regarding the building of unenclosed toilets, the City also brought a counter-application seeking certain declaratory relief. The court found the provision of unenclosed toilets to be unconstitutional and the purported agreement to be unlawful, and ordered that the toilets be enclosed. In addition, the counter-application was dismissed.

4.9 *Hano Trading* concerned two sets of issues: the filing of further affidavits in terms of Rule 6(5)(e) of the Uniform Rules of Court, and a court's discretion in this regard; and the steps a party to a contract is required to take before invoking a cancellation clause. The candidate listed the judgment based on the first set of issues. The SCA upheld the High Court's finding to disallow the filing of further affidavits because it would cause severe prejudice to the other party, and because no reason had been placed before the High Court to justify the filing of further affidavits.

- 4.10 *Saldanha Bay* considered the enforceability of conditions in respect of “capital contributions” imposed in terms of a local government land use planning ordinance, as well as the relevant tariffs in this regard. The appeal followed a High Court order declaring the tariff for the calculation of certain contribution levies to be invalid. In its judgment, the SCA held that the payment of contributions was an enforceable condition of each approval under the ordinance, and that the amount payable is determined with reference to a tariff. The appeal was upheld.
- 4.11 In *Mugridge*, the SCA considered an appeal against a conviction on several charges relating to the rape of the appellant’s adopted minor daughter, as well as the sentence in respect of the rape conviction. The main defence in the High Court had been that the complainant had consented to the acts in question. Following a careful examination of the evidence, as well as the law on consent, the SCA held that “real consent was absent”. The SCA also held that there was no reason to interfere with the sentence imposed by the trial court.
- 4.12 Collectively, these seven decisions indicate the candidate’s ability to deal with a wide range of complex issues of law and fact. The decisions appear to be well-reasoned, carefully constructed and comprehensive. In particular, the SCA decisions demonstrate a clear understanding of the role of an appellate court. In short, the judgments demonstrate the candidate’s understanding of the law – including constitutional law – and its application to the facts.

4.13 The candidate has only listed two publications in the field of law: first, a contribution to a booklet on juvenile justice published by the Community Law Centre at the University of the Western Cape in 1989; and second, a contribution to a criminal justice handbook published by the UN Office on Drugs and Crime. Given the paucity of publications and their limited focus, the candidate's writings do not provide much indication of his knowledge of the law.

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

5.1 The candidate has demonstrated a strong commitment to the values of the Constitution. This is evident not only from many of his judgments, but also from a consideration of his extra-curial work on juvenile justice and the reintegration of offenders. His interest and expertise in the criminal justice system, from a rights-based perspective, appears to have arisen from the years he worked as a prosecutor and magistrate in the lower courts.

5.2 He has also been a member of the National Association of Democratic Lawyers ("NADEL") since 1989, serving as a board member of its Human Rights and Advocacy Project. His nomination is supported by NADEL in the Western Cape.

5.3 The candidate has also been involved in numerous community-based bodies, such as Child Welfare Cape Town, a school governing body, and the National Sea Rescue Institute. He appears to be strongly rooted in – and have a clear understanding of the needs of – his local community.

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

6.1 Three of the candidate's judgments have been overturned on appeal. Of these, the candidate has identified two.

6.1.1 In *S v Lubaxa* 2001 (4) SA 1251 (SCA), the appeal against convictions on three charges – two of murder and a third on robbery – were upheld. The SCA held that the candidate's reasoning for finding the appellant guilty of murder and robbery was "manifestly unsound". At issue was whether the trial court should have granted the appellant a discharge at the close of the prosecution's case in terms of section 174 of the Criminal Procedure Act 51 of 1977. The appeal against the conviction on a fourth charge (theft) was dismissed.

6.1.2 In *Basson v Niemann* [2012] ZASCA 203, the appeal was upheld, resulting in the plaintiff's claims being dismissed on the basis of a special plea of prescription. The SCA disagreed with the candidate's findings of fact, holding that the plaintiffs had acquired knowledge of all facts material to their claim more than three years before serving the summons.

6.1.3 In *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* 2011 (4) SA 551 (SCA), the appeal against a decision regarding the adequacy of the reasons for a tax assessment was upheld. The order of the court below, compelling the Commissioner to furnish the respondent with adequate

reasons for certain tax assessments, was substituted by an order that the matter was to be struck from the roll.

6.1.4 The SCA found that the composition of the tax court was flawed (in terms of the relevant provision of the Income Tax Act 58 of 1962), resulting in its order not being a valid decision. This was because the determination of the adequacy of the reasons furnished by the Commissioner involves both questions of law and fact, meaning the matter in the tax court should not have been heard by a judge sitting alone. In addition, the SCA noted that the tax court had failed to set out its own reasoning as to why the Commissioner had not provided adequate reasons.

6.2 A fourth judgment, *Carter v Haworth* [2009] ZASCA 19, is important to consider. In its decision in this matter, the SCA struck the appeal from the roll on the basis that the judgment of the court below was not appealable. Central to this finding was the fact that the candidate's judgment had not included an order.

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

7.1 The candidate has had extensive professional experience as a prosecutor, magistrate, advocate and High Court judge. He has also served as an acting judge of appeal on the SCA for a full year, from 1 June 2012 to 31 May 2013.

7.2 His reported judgments, both in the High Court and the SCA – cover a wide range of areas of the law.

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

8.1 The candidate is fluent in English and Afrikaans. His proficiency in other languages is unknown.

8.2 Given the nature of many of his extra-curial activities, including the delivery of speeches at conferences, his membership and chairing of a range of organisations, and his role as a legal educator, his communication skills are likely to be excellent.

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

9.1 The candidate has no judgments outstanding.

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

10.1 The candidate's judgments do not raise any concerns regarding his ability to be fair and impartial.

10.2 No adverse comments have been received.

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

11.1 The candidate's judgments do not raise any concerns regarding his ability to act independently.

11.2 No adverse comments have been received.

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

12.1 The candidate has presided over numerous proceedings as a magistrate in the district and regional courts, and as a judge, over a period spanning many years.

12.2 No adverse comments have been received.

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

13.1 The candidate's successful occupation of positions requiring administrative work indicates that he is a skilled and efficient administrator. In particular, he gained valuable management experience as a prosecutor and magistrate in the lower courts.

13.2 The candidate is currently acting in the position of Judge President of the Free State High Court. On the Chief Justice's request, he has been the convenor of the National Operations Committee of the National Efficiency Enhancement Committee since October 2012.

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

14.1 The candidate's integrity was questioned by the current Premier of the Western Cape following the High Court's decision in *City of Cape Town v Premier of the Western Cape and Others* 2008 (6) SA 345 (C). In particular, the Premier – at the time the Mayor of Cape Town – threatened to lodge a complaint of judicial misconduct regarding the role played by the candidate as Chairperson of the commission of enquiry, the establishment of which was subsequently set aside.

14.2 It is important to note that the High Court did not make any adverse findings against the candidate in that case. In this regard, it held as follows:

*“I wish to make it absolutely clear that I do not suggest that Erasmus J was in any way a party to such conduct,*

*but what this starkly illustrates is the care which must be exercised by any judge, in deciding whether or not to accept an appointment to chair a commission, at the behest of a representative of the executive.” (At paragraph 177.2.)*

14.3 The concerns raised suggest that the candidate may well have been expected to identify this judgment in answering question 19 of the questionnaire. That question asks whether the candidate is aware of “*any other relevant material which [he or she] should bring to the attention of the [Judicial Service] Commission*”.

14.4 No adverse comments were received.

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

15.1 There is nothing to suggest that the candidate lacks the appropriate judicial temperament.

15.2 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 For the reasons set out in paragraph 5 above, it is clear that the candidate is deeply committed to human rights, and has vast experience with regard to the values and needs of the community.

16.2 Throughout his professional life, the candidate has demonstrated a commitment to human rights, with a particular

focus on the rights and needs of marginalised communities.

**17. The candidate's potential**

17.1 If appointed, the candidate would strengthen the SCA with his unique blend of judicial experience in the lower and superior courts, as well as his interest and experience in criminal law and the criminal justice system. That said, his reported judgments indicate an ability to consider and deal with diverse areas of law.

17.2 During his acting appointments in the SCA, the candidate sat in some 17 reported cases, writing judgments in three.

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

18.1 The candidate's appointment would indicate that a diversity of experience is an important consideration in relation to judicial appointment to the SCA.

18.2 It would also indicate that extra-curial experience is valued. In this regard, the candidate's active participation in a range of activities – such as judicial training and community-based organisations – serves him well.

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

### **Reported decisions**

*NDPP v Prophet* 2003 (6) SA 154 (C)

*George and Others v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC)

*Stander and Others v Schwulst and Others* 2008 (1) SA 81 (C)

*Beja and Others v Premier of the Western Cape and Others* [2011] 3 All SA 401 (WCC)

*Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA)

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*S v Lubaxa* 2001 (4) SA 1251 (SCA)

*Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* 2011 (4) SA 551 (SCA)

### **Unreported decisions**

*Carter v Haworth* [2009] ZASCA 19

*Basson v Niemann* [2012] ZASCA 203

*Saldanha Bay Municipality v Britannia Beach Estate (Pty) Ltd* [2012] ZASCA 206

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**Judgments upheld on appeal**

*NDPP v Prophet* 2003 (6) SA 154 (C)

*George and Others v Minister of Environmental Affairs and Tourism* 2005  
(6) SA 297 (EqC)

**Judgments overturned on appeal**

*S v Lubaxa* 2001 (4) SA 1251 (SCA)

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CC t/a Global Investment* 2011 (4) SA 551 (SCA)

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