

APPLICANT: AUBREY PHAGO LEDWABA

COURT FOR WHICH CANDIDATE APPLIES:

CONSTITUTIONAL COURT AND SUPREME COURT OF APPEAL

1. The candidate's appropriate qualifications:

1.1. B Proc, University of Limpopo

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

2.1. The candidate has been a judge from 2005 and Deputy Judge President of the Gauteng Division from 2013. He has also served as acting justice of appeal in the SCA and as acting justice in the Constitutional Court. The candidate is therefore suitable for elevation.

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

3.1. The candidate will help to reflect the racial composition of South Africa.

3.2. The candidate will not help to reflect gender representation on the bench.

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

4.1. On the strength of the candidate's reported and unreported judgments over a wide range of subjects, he has demonstrated a good knowledge of the law, including constitutional law.

4.2. In *Moyo and Another v Minister of Police and Others; Sonti and Another v Minister of Police and Others* 2020 (1) SACR 373 (CC): judgment in the Constitutional Court on constitutional invalidity of two sections of the Intimidation Act, 72 of 1982. The judgment also dealt with other issues in criminal appeals generally.

5. **The candidate's commitment to the values of the constitution:**

5.1. The candidate has demonstrated a life-time commitment to constitutional values. This is confirmed by the testimonials of other professionals, including NADEL.

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

6.1. Judgments of the candidate have been overturned on appeal in the following instances:

6.1.1. *RAS NO and Others v Van Der Meulen and Another* [2010] ZASCA 163: the appeal related to the question of whether the respondent (applicant in the court *a quo*) had a sufficient interest in the subject of the proceedings to entitle her to seek relief, and whether it was competent for the court *a quo* to direct the Master of the High Court to investigate the administration of a trust. The court *a quo* had refused leave to appeal;

6.1.2. *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10: the subject matter of the appeal was the procedure to be followed in the enactment of legislation and the consequences of an erroneous process;

- 6.1.3. *Nedbank Ltd and Another v Procprops 60 (Pty) Ltd* [2013] ZASCA 153: the appeal in this case turned upon the interpretation of a guarantee. The court *a quo* had granted leave to appeal; and
- 6.1.4. *Knoop and Another NNO v Gupta* [2021] 1 All SA 17 (SCA) and [2021] 1 All SA 726 (SCA): these cases dealt with the removal of business rescue practitioners in terms of s 139(2) of the Companies Act and the execution of that order pending appeal. The court *a quo* granted leave to appeal against its decision; the execution order was an automatic appeal.
- 6.2. There is no suggestion in any of these appeal decisions of any impropriety or misdirection by the candidate.
- 6.3. In the *Knoop* appeal, the SCA found the court's execution order a 'nullity'. The SCA's orders in both *Knoop* matters are the subject of a pending application for leave to appeal to the Constitutional Court.
- 6.4. The appeals referred to in 6.1.1 to 6.1.3 above turned solely on a different interpretation of the facts and legal issues before the Court.

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

- 7.1. State Prosecutor, 1983-1984
- 7.2. Articles: 1984-1986
- 7.3. Attorney of the High Court in Gauteng: 1986-2005
- 7.4. Member, Council of the Law Society of the Northern Province: 1999-2005

- 7.5. Commissioner, Small Claims Court: 2003-2005
- 7.6. Member, Magistrates' Commission: 2003-2005. Chair: from April 2019
- 7.7. Judge of the High Court of South Africa (Gauteng Division): 2005 to date
- 7.8. Deputy Judge President: 2013 to date
- 7.9. Member, International Association of Refugee Law Judges: 2009 to present
- 7.10. Vice Chairperson, National Council for Correctional Services: 2010-2013
- 7.11. Member, Judicial Case Flow Management Committee: 2013 to date
- 7.12. Member, ADR Advisory Committee, SA Law Reform Commission: 2018 to date
- 7.13. Acting Justice, Constitutional Court: February to May 2019
- 7.14. Acting Judge of Appeal, SCA: December 2019 to date of application

8. The candidate's linguistic and communication skills:

- 8.1. Clear and concise judgments in English.
- 8.2. Communicates well in other official languages, including black African languages.
- 8.3. Chaired Court Interpreters Capacitation Committee established by the Chief Justice: 2014-2016

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

9.1. The candidate efficiently produces judgments, generally within one month of hearing a matter.

10. The candidate's fairness and impartiality:

10.1. As presiding officer, the candidate is regarded as fair and impartial.

10.2. The candidate takes an active role in proceedings, even in very difficult politically-loaded matters, and criminal proceedings. The candidate is well-prepared in the matters in which he appears as a rule. As a DJP, he has also been required to issue fair and impartial directives to the parties before him, to ensure justice is served, and served timeously.

11. The candidate's independent mindedness:

11.1. Especially apparent in the politically charged matters in which he had to preside over a specially constituted full bench, he has exercised his independence.

11.2. Whether 'politic or impolitic', he intends to have justice and constitutional values served.

11.3. The candidate is open to persuasion, and willing to be moved by good law and good facts.

11.4. In *Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Ltd and Others* 2020 (3) SA 1 (CC), the candidate wrote the minority judgment holding that the legislative decision of privileging majority unions in the consultation process in section 189 of the Labour Relations Act is unconstitutional.

11.5. In *Hatting v Furman and Others NNO [2020] ZASCA 123 (5 October 2020)*: Ledwaba AJA wrote a dissenting judgment on the enforceability of a buy and sell agreement. He concluded that leave to appeal be granted as well as the upholding of the appeal. Two separate judgments, the first written by Ponnann JA with Mbatha JA concurring, parted ways with the conclusions of Ledwaba in dismissing the application for leave to appeal with costs for lacking prospects of success. In a further judgment written by Van der Merwe JA and supported by Molemela JA and Mbatha JJA, these Justices further determined that the application for leave to appeal fell to be dismissed with costs for separate reasons to that held in the judgment of Ponnann JA. The importance of this decision is that it deals with the legal approach to simulated transactions.

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

12.1. Firm and efficient, with judicial humility.

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

13.1. One of this candidate's strongest points is his improvements to judicial case flow management in Gauteng, and advice to other divisions as well.

13.2. The candidate has served Gauteng well as DJP, which requires some of the best judicial administrative skills in South Africa.

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

14.1. The candidate has an impeccable reputation for integrity and ethical behaviour.

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

- 15.1. The candidate is a good listener;
- 15.2. an active participant, eliciting responses to incisive judicial questions, without overwhelming the parties in stating their respective cases; and
- 15.3. possesses a good presence in court, exercised with judicial humility.

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

- 16.1. The candidate exhibits a life-long commitment to human rights.
- 16.2. Personal experience of the values of the community includes service roles, including non-judicial roles in the following:
 - 16.2.1. Mamelodi Education Forum
 - 16.2.2. Tshegofatsong Special School, supporting learners with disabilities
 - 16.2.3. Training legal practitioners and judges, including the South African Judicial Education Institute, especially attorneys and counsel from previously disadvantaged backgrounds
 - 16.2.4. Board Member, Mamelodi Hospital: 2004-1005
 - 16.2.5. Judges and the Media Pillars of Democracy: 2008
 - 16.2.6. Advocacy Training, BLA: 2010, GCB: 2010, 2011

17. The candidate's potential:

- 17.1. Good potential for elevation.

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

18.1. The most senior judge in Gauteng appointed to a higher court.

18.2. Judicial excellence is rewarded by elevation to an appellate court.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions:

Moyo and Another v Minister of Police and Others; Sonti and Another v Minister of Police and Others 2020 (1) SACR 373 (CC).

Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Ltd and Others 2020 (3) SA 1 (CC).

Staufen Investments (Pty) Ltd v Minister of Public Works, Eskom Holdings SOC Ltd and Registrar of Deeds, Cape Town 2020 (4) SA 78 (SCA)

Modise and another v Tladi Holdings (Pty) Ltd [2020] 4 All SA SA 670 (SCA)

Doorewaard and another v S [2021] 1 All SA 311 (SCA). This was a criminal appeal concerning the conviction of the appellants on five counts including murder, kidnapping and the pointing of a firearm. The appellants had been convicted by the North West Division of the High Court. The appellants were alleged to have committed a particularly gruesome crime with racial undertones. Ledwaba AJA set aside the convictions having determined that the main witness for the State lacked credibility. His judgment criticised the many failings of the police in the manner in which evidence was garnered. Ledwaba AJA's judgment was supported by Ponnann JA in the setting aside of the conviction and sentence. A separate judgment was written by Molemela JA, who dissented concerning the setting aside of the sentence, being of the opinion that the conviction on the charge of murder be replaced with a conviction of culpable homicide. The judgment of Ledwaba AJA shows a good command of the factual analysis and a straightforward application of the law.

Van Meyeren v Cloete 2021 (1) SA 50 (SCA)

Compcare Wellness Medical Scheme v Registrar of Medical Schemes and others
2021 (1) SA 15 (SCA)

Makhoka v S 2019 (2) SACR 198 (CC)

Spilhaus Property Holdings (Pty) Ltd and others v MTN and Another 2019 (4)
SA 406 (CC)

Nandutu and others v Minister of Home Affairs and Others 2019 (5) SA 325 (CC)

*National Union of Metalworkers of South Africa obo Nganezi and others v
Dunlop Mixing and Technical Services (Pty) Ltd and Others* 2019 (5) SA
354 (CC)

S v S and Another 2019 (6) SA 1 (CC)

Democratic Alliance v Acting NDPP and Others 2016 (2) SACR 1 (GP); [2016]
3 All SA 78; 2016 (8) BCLR 1077 (GP), confirmed on appeal.

*Furniture Bedding and Upholstery Industry Bargaining Council Greater
Northern Region v Acraft Investments (Pty) Ltd* (2008) 29 ILJ 939 (T)

Singh v Minister of Justice and Constitutional Development and others 2013 (3)
SA 66 (EqC)

*Southern African Litigation Centre v Minister of Justice and Constitutional
Development and others* 2015 (5) SA 1 (GP)

Patel v National Director of Public Prosecutions and others 2018 (2) SACR 420
(KZD)

*Economic Freedom Fighters and another v Minister of Justice and Constitutional
Development and another; Economic Freedom Fighters and another v*

Minister of Justice and Constitutional Development and another 2019 (2)
SACR 297 (GP)

Gupta v Knoop and Another NNO 2020 (4) SA 218 (GP)

Unreported Decisions:

A general comment regarding unreported judgments by the candidate: given the length of time the candidate has served on the bench, the candidate has not written a large number of judgments. His administrative role as DJP is partially to blame. However, where he has written judgments, they are usually difficult appeals or politically-charged matters.

Nxele v S [2020] ZASCA 6 (12 March 2020). This case is indicative of the role the candidate has taken as the DJP in the Gauteng Division: he has often presided over criminal appeals, and other full bench appeals and special allocations where the full court sits as a court of first instance.

Municipality of Mhlontlo v TDH Tsolo Junction (1086/2019) [2021] ZASCA 3 (7 January 2021): The appeal pertained to the crisp issue of whether or not there had been non-fulfilment of a suspensive condition in a contract, so as to establish that the contract did not come into effect. In a short judgment, DJP Ledwaba dismissed an appeal against the finding of the court a quo, upholding the contention that the non-fulfilment of the suspensive condition meant there was no contract to be enforced.

Mulaudzi v Mudau and Others [2020] ZASCA 148 (18 November 2020): wrote the judgment of the unanimous court on the proper application of section 15 of the Matrimonial Property Act on the question of deemed consent.

Ngothula v S [2020] ZAGPPHC 690 (1 October 2020): DJP Ledwaba confirms sentence of rape imposed by the Magistrate Court.

Central Developments Tshwane (Pty) Limited and Another v Body Corporate, Twee Riviere Aftree Oord [2020] ZASCA 107 (21 September 2020): Ledwaba AJ jointly wrote the judgment with Wallis JA for the unanimous court. The judgment is important in that it clarifies the authority of a body corporate to sue in its own name, absent special resolution by its members.

Sindane v Minister of Police [2020] ZAGPPHC 672 (23 October 2020): Judgment dealt with the principles of arrest for the purpose of securing an accused's presence before court. DJP Ledwaba's judgment reiterates the position that an arresting officer must exercise a discretion in the face of jurisdictional facts justifying an arrest.

Steyn v S [2020] ZAGPPHC 654 (16 September 2020): DJP Ledwaba set aside a sentence imposed for drunken driving upon a failure of the sentencing magistrate to call for evidence from a probation officer or a correctional services official.

Myeza and Others v S [2020] ZAGPPHC 653 (16 September 2020): DJP Ledwaba varied certain criminal convictions.

Judgments upheld on appeal:

Democratic Alliance v Acting NDPP and Others 2016 (2) SACR 1 (GP)

Kubyana v Standard Bank of South Africa Ltd [2014] ZACC 1

Grove v The RAF [2011] ZASCA 55

Judgments overturned on appeal:

RAS NO and Others v Van Der Meulen and Another [2010] ZASCA 163

Tongoane and Others v National Minister for Agriculture and Land Affairs and Others [2010] ZACC 10

Nedbank Ltd and Another v Procprops 60 (Pty) Ltd [2013] ZASCA 153

Knoop and Another NNO v Gupta [2020] ZASCA 149