

CANDIDATE: **ADV TAKALANI SAMUEL MADIMA SC**

COURT FOR WHICH APPLICANT APPLIES: **GAUTENG DIVISION**

1. The candidate's appropriate qualifications

1.1 The candidate holds the following qualifications:

1.1.1 Bachelor of Law (B.Iuris), University of the North (1985);

1.1.2 Master of Laws (LL.M), University of Essex (1988);

1.1.3 Doctor of Philosophy (Law), University of Essex (1993);

1.1.4 Master of Business Administration, University of Cape Town (2002);

1.1.5 Diploma in Human Rights Law, and

1.1.6 AFSA Diploma in Mediation and Arbitration, University of Pretoria.

1.2 The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

2.1 The candidate was admitted as an advocate in terms of the Recognition of Foreign Legal Qualifications and Practice Act, no. 114 of 1993 on 3 August 1994.

2.2 The candidate received his letters patent as senior counsel on 1 April 2011.

2.3 The candidate practices as a member of both the Johannesburg and Cape Bars.

2.4 There is no reason not to conclude that the candidate is a fit and proper person.

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. The appointment of the candidate would advance transformation from a race perspective but not from a gender perspective.

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

4.1 The candidate has 3 degrees and 2 diplomas in the field of the law (see 1.1 above).

- 4.2 The candidate has published or presented a number of papers in the Labour Law field during the period 1992 – 1994.
- 4.3 The candidate appears on average once every month in the High Court and describes that approximately 10% of his practice consists of constitutional law, 20% administrative law, 40% medical negligence law and 20% refugee law.
- 4.4 In the candidate's CV, he states that his interests are in Commercial Law, Administrative and Constitutional Law, Refugee Law, Land Law, African Customary Law, Employment Law, Competition Law, Contract Law and Medical Negligence Law.
- 4.5 The candidate has delivered judgments in various fields of the law, such as administrative law, contract law, competition law, criminal law, delictual law including Road Accident Fund cases, gambling law, insolvency law, the law of minors, property law and the law relating to civil practice.
- 4.6 Although none of the cases dealt directly with constitutional law points, the candidate, where relevant, referred to the Constitution, was aware of the rights enshrined in the Constitution and the need to emphasise that such rights are protected, save for the cases highlighted in the following section.

4.7 The candidate has specialised knowledge of the competition law having been a member of the Competition Tribunal for about 5 years (2009 – 2014) and having written or concurred in about 20 judgments as listed by the candidate.

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

5.1 The candidate obtained a Diploma in Human Rights Law.

5.2 The candidate presented a paper on the SA Constitution to the International Bar Association, Cape Town in 2008.

5.3 There is no reason to doubt the candidate's commitment to the values of the Constitution. However the comments in the paragraphs below are worth considering.

5.4 Save for what is set out immediately below, none of the judgments reviewed expressly raised constitutional issues. However, in the matter of *Chiloane v Chiloane*, an application for eviction under the PIE Act, the candidate decided the matter on the basis that the applicant showed proof of ownership over the property by way of a Deed of Transfer. The respondents alleged that the home was a family home and they did not know how it came to be transferred into the applicant's name. As the respondents did not meaningfully challenge the Deed of Transfer, the

candidate found that the applicant was entitled to its order. No constitutional provisions were referred to or applied, nor did the candidate consider whether the eviction would be just and equitable, taking into account all the relevant circumstances including the rights and needs of the elderly, children, disabled persons and households headed by women. Nor was there a consideration of what date would be just and equitable for the eviction taking into account the number of years that the respondent had lived at the property.

5.5 The candidate followed a similar approach in another PIE eviction matter, namely, *Machaka and another v Rubidge and Another*, in which only the questions of ownership and formal legality of occupation were considered.

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

6.1 The candidate has indicated that none of his judgments have been overturned on appeal and, save for what is stated hereinafter, we have been unable to locate any.

6.2 In the matter of *Absa Bank Ltd v De Villiers and another* the candidate sat as a member of the full court in hearing an application for the review of a decision of the Magistrates' Court. The full court dismissed the application. On appeal to

the SCA, the judgment of the full court was upheld but for different reasons (as it was held that the full court erred in not considering and finding that the Magistrates Court decision was not susceptible for review).

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

- 7.1 The candidate has acted as a judge in the High Court for a total period of approximately 45 weeks (10 months) during the years 2008 – 2017. He is acting again in Johannesburg at present.
- 7.2 The candidate was a part-time member of the Competition Tribunal during the years 2009 – 2014 (5 years) and accordingly has specialised knowledge of the competition law.
- 7.3 The candidate has practised as an advocate since 1 June 2004 (13 years), with a standing as senior counsel of 6 years, and has extensive experience in trial advocacy.
- 7.4 The candidate acted as chairman of a number of disciplinary hearings in the period 2008 – 2017.

- 7.5 The candidate was chairman of the Western Cape Gambling and Racing Board for two terms during the period February 2008 – January 2014.
- 7.6 The candidate is an Adjunct Professor of Law in the Commercial Department of the University of Cape Town since 2008.
- 7.7 The candidate worked in various legal capacities as Legal Assistant at the Legal Aid Bureau (1984 – 1985), Senior Researcher – Labour Law at Centre of Applied Legal Studies, Wits University (1992 – 1993), pupil at the Johannesburg Bar (1996), Senior Lecturer at UNISA (1996 – 1997), Litigation Officer at the Black Lawyers Association (1996 – 1997) and as Head of Legal Services / General Counsel at Transnet Limited (July 1997 – 2004).
- 7.8 The candidate has extensive experience in trial advocacy programmes initiated by the BLA-LEC where he has taught university students and candidate attorneys.
- 7.9 Further, the candidate was a researcher at CALS where his research was focused on labour policy and he also intermittently taught Labour Law B with Judge President Davis. He also advised trade unions on various legal issues

and presented labour seminars at CALS and at the annual labour law conference.

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

8.1 According to the candidate's CV, the candidate has complete command of the French, Afrikaans and English languages. The candidate is also able to speak, read and write Lu-Venda, Sepedi, Setswana and Sesotho. Further, the candidate is able to speak and read Xitsonga and speak isiXhosa and isiZulu. The candidate's ability to communicate in the above languages places him in an advantageous position to communicate with litigants.

8.2 From a reading of the candidate's judgments his linguistic skills appear to be good. His judgments are well-structured, clear and decisive. The language that the candidate uses is simple and effective. The candidate displays logic and reasoning that is clear and succinct. The use of numbered and short paragraphs in all the judgments made them easy to follow.

8.3 It could be said that the judgments handed down by the candidate as an acting judge and as a member of the Competition Tribunal indicate a propensity towards terseness. If they are terse, this does not detract from the

judgments being legally sound and may be a sound adherence to the principle of judicial economy.

9. The candidate's ability to produce judgments promptly

9.1 Generally judgments were handed down within one to three months.

9.2 However, a few cases (from February 2015) came to our attention where the judgment was delivered more than 3 months after the hearing:

9.2.1 In *Krohn v RAF* the waiting period was about 8 months (9 February 2015 – 6 October 2015);

9.2.2 In *Numbi Training* the waiting period was about 8 months (12 February 2015 – 6 October 2015);

9.2.3 In *Metsoamere v RAF* the waiting period was about 12 months (11 February 2015 – 9 February 2016).

9.3 From the candidate's questionnaire it appears that no judgments are outstanding.

10. The candidate's fairness and impartiality

- 10.1 There is nothing to suggest that the candidate is not fair and impartial to litigating parties that appear before him.
- 10.2 The decision in *Family Advocate, Cape Town* in which the candidate was required to adjudicate upon the unlawful removal or retention of a child, he did so in a fair and equitable manner with due regard to the fact that the parties were still married and that the case concerned their child.

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

- 11.1 The candidate was decisive in giving his judgments. Most of the cases were run of the mill and did not have complex and difficult factual or legal issues.
- 11.2 In a number of the reviewed judgments, the candidate displayed a fair amount of independent mindedness and did not limit his enquiries and discussions to those points advanced by counsel. In other cases he drew inferences and conclusions arising out of a lack of evidence presented by a party.

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

- 12.1 The candidate has already acted in the High Court for a total period of about 10 months and sat as a part-time member of

the Competition Tribunal for 5 years, in addition to his experience as counsel.

12.2 One member has reported on his appearance before Madima AJ. The member's personal experience was that the candidate came to grips with the issues quickly and gave the parties a fair hearing. He conducted his court properly and the experience was professional and cordial.

12.3 In at least two of the reviewed judgments the candidate makes a point of thanking counsel for their contributions to the court in their heads of argument and in that way displays a courtesy and respect for counsel which is admirable.

12.4 There is nothing to indicate that the candidate is not able to conduct court proceedings ably and with ease.

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

13.1 In his experience as Head of Legal Services / General Counsel for Transnet Ltd over 7 years the candidate was in charge of up to 22 in-house lawyers.

13.2 In the candidate's CV, he notes that he regards himself as very strong on Corporate Governance and Compliance.

13.3 As counsel practising in both Johannesburg and Cape Town the candidate would have developed the necessary administrative skills that should ensure an effective discharge of his administrative responsibilities as a judge in the High Court.

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

14.1 No adverse comments have been received.

14.2 The candidate's application is supported by letters of good standing given by the Cape Bar Council and Johannesburg Society of Advocates, and letters of support from his group leaders (eminent silks) at Cape Town and Johannesburg respectively.

14.3 According to the candidate's answers in his questionnaire, he has never been convicted of any offence involving dishonesty, violence or any other disreputable, dishonourable conduct and has never been found guilty by any legal professional body of any unprofessional or disgraceful conduct.

15. The candidate's judicial temperament

15.1 There is no reason to believe that the candidate does not have the required judicial temperament.

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

16.1 It is apparent from the candidate's CV he commenced his career with an awareness of and interest in human rights issues. It is apparent from the publications which he has listed in his CV that he made contributions towards a magazine known as Black Enterprise dealing with issues such as sexual harassment, HIV, affirmative action, labour issues including domestic workers and the need for affirmative action.

16.2 The candidate is involved in the activities of the BNEI-SENA Educational Trust and the Lemba Heritage Foundation. He secured a R 3 million donation for the improvement of facilities at the Tshifudi Primary School in Limpopo. The candidate sponsors cash prizes for university students and financially supported the university studies of at least two students.

16.3 The only rider is the comment in paragraph 5 above, where the candidate overlooked an opportunity to consider a human rights issue.

17. The candidate's potential

17.1 The candidate has already made his mark in the corporate and professional worlds as well as in academia.

17.2 The letters of support given by his group leaders speak of the candidate's intellect, industry and life experience, as well as the fact that he is an independent thinker and articulate.

17.3 There is no reason not to believe that the candidate will further grow as a human being and lawyer if he is to be elevated to the bench.

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

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

18.2 The candidate is a black silk and there have been few black silks who have been elevated to the bench.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Note: The candidate lists 32 cases in the High Court and 20 cases in the Competition Tribunal in which judgment was given by him. Due to the extremely short time period available to the members of the reviewing committee (2 weeks), not all of the cases referred to by the candidate could be located and reviewed. In addition to the cases listed by the candidate we found 8 additional cases and reviewed them. In the cases listed by the candidate, there are duplications in three instances and in some of the cases the candidate concurred in a judgment written by another member of the court or tribunal.

Reported decisions

19. *Family Advocate, Cape Town and Another v EM* 2009 (5) SA 420 (C) [Also cited on the candidate's list of cases as *Murphy v Family Advocate, Cape Town* [2009] 5 SA 420 (C)] – this appears to be the only reported judgment written by the candidate.

19.1 This was an application in terms of The Hague Convention on the civil aspects of international child abduction (1980) (“the Convention”) as incorporated into South African law by The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 (“the Act”). The respondent, who was the biological mother, and who had wrongfully retained the child in South Africa, resisted

the child's return to England on the grounds that the child's father had consented to or acquiesced in the child's retention (art 13(a)). She alleged that a letter to the father that had been written to give the child's grandmother consent to accompany the child to South Africa after the child and her grandmother had visited the father in England constituted consent or acquiescence.

- 19.2 The candidate found that the requirements for an applicant who wishes to secure the return of a child in terms of the Act are that the child must have been habitually residing in the requesting state immediately before the removal or retention and that the removal or retention was wrongful in that it constituted a breach of custody rights by operation of law of the requesting state. Further the candidate found that the father (the second applicant) had not consented to the removal of the child to South Africa and that the delay in bringing the application was not prejudicial to his rights. The candidate found that the burden to prove that the wrong parent acquiesced rests upon the party who resists the child's return. Therefore this burden of proof must be discharged on a balance of probabilities. The application was granted.
- 19.3 The candidate considered and applied South African case law, foreign case law as well as South African legislation.

This demonstrates a sufficient knowledge of the law that was applicable in the circumstances.

- 19.4 The candidate showed a commitment to the rights of the parents and the effect of the removal of the child from the UK on those rights.
- 19.5 The candidate did not confine himself to the submissions made by counsel on behalf of the parties but applied his mind to the facts independently of those submissions.
- 19.6 The candidate made no order as to costs as he was mindful that the parties were still married and the costs order would be akin to a costs order against oneself. This indicates that the judge was at all times fair and impartial.
- 19.7 The candidate subsequently dismissed an application for leave to appeal – 2009 JDR 0101 (C).
- 19.8 This case is cited with approval in the textbook *Child Law in South Africa* edited by Trynie Boezaart.
- 19.9 This judgment was referred to by the Supreme Court of Appeal in *KG v CB AND OTHERS* 2012 (4) SA 136 (SCA), but not in *CENTRAL AUTHORITY v TK* 2015 (5) SA 408

(GJ), both cases dealing with international abduction and the Hague Convention.

20. *Absa Bank Ltd v De Villiers and another* [2010] 2 ALL SA 99 (SCA). [The citation for the Cape High Court judgment is 2009 (5) SA 40 (C)] – the candidate concurred in the Full Court judgment of the Cape Provincial Division.
21. *National Union of Metalworkers of SA & Others v The Benicon Group* (1997) 18 ILJ 123 (LAC) – the candidate sat as an assessor with Cameron J (as he then was).

Unreported decisions

High Court judgments reviewed as listed in the candidate's CV

1. *Banks v Joseph NO* 2009 JDR 0034 (C) [Also cited on the candidate's list of cases as *P Banks v QS Josephs N.O. & E Wagner N.O.* Case No 4746/08]
2. *Engen Petroleum Ltd v Kunshani Motors (Pty) Ltd* 2009 JDR 0035 (C), [2009] JOL 23930
3. *Khanyile v Minister of Police*, Case No. 33478/11
4. *Chiloane v Chiloane* 2013 JDR 1479 (GSJ)
5. *Maleka v Rubidge* Case No 2012/31313 [correct citation is *Machaka and another v Rubidge and Another* 2013 JDR 2246 (GSJ)]

6. *Khoza v Motsepe* 2013 JDR 1478 (GSJ)
7. *Cowley v Cowley* Case No 32126/2015 [published as *C v C* [2016] ZAGPPHC 273 (29/4/2016)]
8. *Nkosi v The State* 2017 JDR 0792 (GP) [also published as *Nkosi & Another v S* [2017] ZAGPPHC 308 (2 May 2017)]
9. *Metsoamere v RAF* 2016 JDR 0288 (GP) [also published as *Metsoamere v Road Accident Fund* [2016] ZAGPPHC 53 (9 February 2016)]
10. *Smit v Smit* Case No 11443/2016
11. *Steloy Castings (Pty) Ltd and others v B&K Castings (Pty) Ltd* Case No 49326/2015 (***Included in the candidate's application at page 92**)
12. *Vukani Gaming Gauteng (Pty) Ltd and two Others v KKK Properties CC* 2016 JDR 1163
13. *Webbstock v Law Society of the Northern Provinces* 2016 JDR 1282 (GP) [also published at [2016] ZAGPPHC 545 (20 June 2016)] (***Included in the candidate's application at page 71**)
14. *Kopano Copier Company (Pty) Ltd t/a Nashua Kopano v Gibson and Another* 2013 JDR 1994 (GSJ), [2016] JOL 37440 GSJ, [2013] ZAGPJHC 233 (31 July 2013) (***Included in the candidate's application at page 53**)
15. *Jerry Rafatlema v The State* Case No A627/2015 (***Included in the candidate's application at page 123**)

High Court judgments reviewed not listed in the candidate's CV

16. *Bayview Fishing (Pty) Ltd v De Tora Enterprises (Pty) Ltd* 2009 JDR 0048 (C)
17. *Motsiri v Sheriff of the High Court* 2013 JDR 1477 (GSJ)
18. *Comford v Munzhedzi* 2013 JDR 2247 (GSJ)
19. *Krohn v RAF* 2015 JDR 2147 (GP)
20. *Nedbank Ltd v Mogami* 2015 JDR 1589 (GJ)
21. *Numbi Training and Research Consultants v The Soweto Retired Professional Society and Two Others*, Case No. 69609/2010 [published at [2015] ZAGPPHC 1040 (6 October 2015)]
22. *Rachwall v Road Accident Fund* 2016 JDR 1164 (GP)
23. *S v Ndubane* 2017 JDR 0641 (GP)

Competition Tribunal judgments reviewed as listed in the candidate's CV

24. *Monsanto South Africa (Pty) Ltd and Another v Bowman Gilfillan and two Others*
25. *Competition Commission v Geomatic Quarry Sales (Pty) Ltd t/a Quarry Company and three Others* Case No. 76/CR/NOV09
26. *The New Reclamation Group (Pty) Ltd v Gerhardus Johannes Jacobs* Case No. 21/CR/March 11 (***Included in the candidate's application at page 107**)

27. *Bidvest Group Ltd v Academy Brushware (Pty) Ltd*, Case No. 017632 CT 2013
28. *Growthpoint Properties v Absec Properties*, Case No. 018002 CT 2014
29. *Cape Gate (Pty) Ltd v Arcelormittal (Pty) Ltd*, Case No. 018259 CT 2014
30. *Competition Commission v Sasol Chemical Industries (Pty) Ltd*, Case No. 31/CR/May 05 CT 2009

Judgments upheld on appeal

ABSA Bank Limited v De Villiers and Another 2009 (5) SA 40 (C) (Fourie J, Saldanha J & Madima AJ) – appeal to SCA dismissed and held that the court below rightly refused the application for review, but for the wrong reasons. It did not consider whether the Magistrate's decision was indeed susceptible to review (which it was not). The more appropriate order in the court below should have been to strike the matter off the roll. [[2010] 2 ALL SA 99 (SCA), 2009 JDR 1167 (SCA) (Navsa, Ponnann, Maya, Mhlantla JJA and Tshiqi AJA)]

Judgments overturned on appeal

None.