

APPLICANT: CASSIM MAHOMED SARDIWALLA

COURT FOR WHICH APPLICANT APPLIES: GAUTENG DIVISION

1 The candidate's appropriate qualifications

1.1 The candidate obtained a B Proc degree in 1981.

1.2 The candidate is appropriately qualified.

2 Whether the candidate is a fit and proper person

2.1 The KwaZulu-Natal Law Society has issued a letter of good standing for the candidate.

2.2 There is no reason to doubt that 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 male of Indian origin.

3.2 The candidate's appointment would help to transform the racial composition of the bench but not the gender composition.

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

- 4.1 Our ability to assess the candidate's knowledge of the law was hampered due to difficulties in accessing the candidate's judgments. These comments should be viewed in light of this constraint. Judgments sourced and considered were primarily Land Claims Court matters and criminal matters. These judgments dealt with a range of issues including constitutional and administrative law, procedural matters, contract and delict.
- 4.2 The candidate takes care in his judgments to research and consider the law and sets out the basis for his legal findings. His judgments are generally well reasoned.
- 4.3 In one of the candidate's early judgments in a criminal trial involving rape of a mentally disabled child (2001), a full bench of the KwaZulu Natal court held that the candidate misdirected himself in his approach to sentencing in the context of the applicable minimum sentencing legislation. See section below dealing with appeals.
- 4.4 Some of the candidate's criminal judgments raise a concern about the candidate's understanding of the constitution and constitutional values. We draw attention to the following decisions and paragraphs which are referred to further in the section on the Constitution:
- 4.4.1 *Ngcobo v S* (AR-68/13) [2014] ZAKZPHC 10 (27 February 2014) at paragraph 13. This is the full bench decision referred to above overturning a sentence

imposed by the candidate in a criminal trial involving rape of a mentally disabled child.

4.4.2 *Salzmann v S* (Case no A99/2016 – supplied by candidate) at paragraph 126. This is an appeal against certain convictions and sentences imposed by the Specialised Commercial Crimes Court in connection with the Electronic Communications and Transactions Act 2002.

4.5 The candidate has extensive exposure to land law having served in the Land Claims Court. In this role, he has been responsible for several important judgments, more particularly the *Salem*, *Rooyendal* and *Blue Horison* judgments. The SCA upheld the decisions in each of these cases and the Constitutional Court refused leave to appeal in the *Blue Horison* matter on the basis that there were no prospects of success on appeal. A decision from the Constitutional Court is awaited in the *Salem* decision. The Land Claims Courts decisions show an appreciation of the challenges confronting land claimants and the delicate process of balancing the rights of land owners and land claimants. The *Salem* judgment is important on the impact of the frontier wars on whether land rights were lost during conquest. The judgment is perhaps less clear in its reasoning about whether customary title was extinguished by registered common law title, but this is an inherently difficult question.

4.6 The candidate has a broad array of experience over his career in different areas of law including specialist areas. See further below.

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

5.1 The candidate's commitment to the values of the Constitution is most evident in his judgments emanating from the Land Claims Court, for example the *Salem* decision.

5.2 It is also broadly evident from his professional commitments.

5.3 There are certain remarks in the judgment in *Ngcobo v S* (AR-68/13) [2014] ZAKZPHC 10 (27 February 2014) that require highlighting. This is the full bench decision referred to above overturning the sentence imposed by the candidate in a criminal trial involving rape of a mentally disabled, 13 year old child. While we do not have the judgment *a quo*, the full bench quotes the following extract from the candidate's judgment:

"This crime is as bizarre as you can find them. Sometimes immorality is responsible for rape where there is a certain level of attraction caused by the female herself but here we have the weakest of the weakest, a young disabled child. In fact, if there ever was the death sentence still available to these courts, it may well have been argued that this was an ideal scenario for that sentence. The court has an obligation to protect society from people like the accused and behaviour of this nature. [There] cannot be a more appropriate sentence than the life sentence, given the fact that there are absolutely no substantial and compelling circumstances, in fact, aggravating circumstances." (own emphasis)

- 5.4 The comments on the death penalty may not have been appropriate in circumstances where the Constitutional Court had years earlier made its position on the death penalty clear.
- 5.5 The comment on immorality being responsible for rape where there is a certain level of attraction caused by the female herself is concerning as it removes agency from perpetrators and seeks to apportion blame to victims.
- 5.6 In *Salzmann v S* (Case no A99/2016 – supplied by candidate) the candidate appears to have considered an accused’s exercise of his right to appeal as a factor indicating a lack of remorse. It is difficult to see how the exercise of a guaranteed right of appeal can be a fact that demonstrates a lack of remorse.

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

- 6.1 Yes.
- 6.2 In answering question 9.4 of the application form, which asks whether any of the candidate’s judgments have been taken on appeal and what the result of the appeal is, the candidate answers: Yes. He refers simply to: ‘Sentence increased from 10 to 20 years.’
- 6.3 The case where his judgment was overturned on appeal is not identified. Despite a diligent search we were unable to locate this case.

6.4 We did find the following further cases in which the candidate's judgment was overturned on appeal:

6.4.1 *Ngcobo v S* 2014 JDR 0485 (KZP);

6.4.2 *Adendorffs Boerderye (Pty) Ltd v Shabalala* 2017 JDR 0584 (SCA)

6.5 We have referred *Ngcobo* above. On the merits of the judgment, the appeal court found that the candidate had misdirected himself as to the proper approach to sentencing in a minimum sentencing case and found that the imposition of life imprisonment was disproportionate to the crime. The finding of the appeal court concerned the proper approach to the exercise of judicial discretion and to proportionality in sentencing. Furthermore, the Supreme Court of Appeal had not long before handed down the authoritative decision on this point in *S v Malgas* 2001 (2) SA 1222 (SCA) which set out the approach to be followed by courts when applying the minimum sentencing legislation. The candidate had not followed the approach set out in *Malgas*.

6.6 In the *Adendorffs* matter the applicants sought an order removing the respondent's livestock from the applicant's farm on the basis that the respondents breached a grazing agreement by keeping more livestock than allowed which led to overgrazing. The court on appeal found that the candidate did not apply the correct law and incorrectly applied ESTA.

Furthermore, the Court *a quo* granted orders that were not asked for and did not afford the parties an opportunity to file further affidavits or present argument before granting these orders, which ought not to have been granted. The Appeal Court found that the failure of the candidate to forewarn the parties that he was inclined to grant orders not sought in the notice of motion is contrary to well established principles stated by the Constitutional Court in the *Molusi v Voges* matter [2016] ZACC 6: 2016 (3) SA 370 (CC) paras 27 to 28.

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

- 7.1 The candidate's experience, except for the periods during which he has acted as a judge, has been in his capacity as an attorney.
- 7.2 He has broad experience in various fields of law which include amongst others Commercial, Criminal, Maritime, Land Restitution, Family, African customary law, Engineering, Tax and Intellectual Property Law.
- 7.3 The candidate represented clients in political matters in the 1980s.
- 7.4 The candidate has participated in the drafting of the Rules for The Promotion of Access to Information Act, The Promotion of Access to Justice Act and also research and drafting of The Engineering Professions Act.

- 7.5 The candidate has conducted research on the Review of the Civil Justice System in South Africa and prepared a joint concept paper and terms of reference with the Department of Justice.
- 7.6 The candidate has been a chairperson and member of various commissions of enquiry as well as disciplinary committees. Throughout his career he has participated in a range of professional activities that serve the profession and transformation (including for example NADEL).
- 7.7 He has acted as a judge in the KwaZulu-Natal Provincial and Local Divisions, Eastern Cape Provincial and Local Divisions, the Land Claims Court and the Gauteng Division.

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

- 8.1 The candidate indicates that he speaks English, Afrikaans and Zulu.
- 8.2 No adverse comments have been received in respect of his communication skills.
- 8.3 A consideration of the judgments reveals that the candidate has the ability to write judgments well. He also has the ability to explain his reasoning and evaluation of evidence clearly.
- 8.4 However, it should be noted that some judgments would benefit from careful editing and unnecessary lengthy narration of evidence and case law.

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

9.1 The candidate has no outstanding judgments despite having acted as a judge over a substantial period of time.

9.2 In his letter of support, retired Judge President Somyalo, who invited the candidate to act in his division in Grahamstown and Port Elizabeth commented favourably on the fact that the candidate left with no outstanding judgments.

9.3 We have assessed the candidate's ability to produce judgments promptly using a limited sample of judgments in the table supplied below. The sample constitutes all of the judgments in respect of which we could verify information using Jutastat, Lexis Nexis, or Saflii. There were some errors in the candidate's information as supplied in the list of judgments at pp 38 to 42 and accordingly we did not rely on the information supplied unless we could independently verify it. Further, certain of the information provided relates to decisions of the Supreme Court of Appeal rather than decisions of the candidate.

9.4 Based on the sample of judgments considered, albeit of only a few judgments, the following observations can be made:

- 9.4.1 Two judgments in interdict proceedings were handed down on the day of the hearing which is, where possible, a laudable approach.
- 9.4.2 A number of judgments were handed down in time frames that, on the face of it, are reasonable.
- 9.4.3 There was a lengthy period between hearing and judgment in the following matters.
- 9.4.3.1 Truter is a relatively simple case and it is unclear why it took so long for judgment to be delivered. The judgment was delivered almost six months after the hearing date.
- 9.4.3.2 Rooyendal appears to have been a complex case factually. However, whether the time taken was warranted may be the subject of legitimate enquiry during interview.
- 9.4.3.3 We cannot ascertain how long the Salem judgment took to deliver – but it is a legally and factually very difficult matter.
- 9.4.3.4 In *Ndaba v Braithwaite* the judgment was delivered almost eight months after the hearing date.

10 The candidate's fairness and impartiality

10.1 There are no adverse comments received in respect of these qualities. There are letters of support which speak favourably of the candidate in this respect. We refer to the letters from Gabriel SC and Krige.

10.2 The judgment on appeal in *Shabalala* raises an issue relating to fairness.

11 **The candidate's independent mindedness**

11.1 No adverse comments have been received.

11.2 There is reference to a recusal application in a matter in which the candidate was involved being *Normandien Farms (Pty) Ltd v Mathimbane and others* (LCC 196/2013) [2015] ZALCC 14 (5 November 2015) but we are unable to ascertain what transpired.

11.3 There is no reason to doubt that the candidate is independently minded.

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

12.1 No adverse comments have been received in this regard.

12.2 Favourable comments are provided on this issue by Gabriel SC and Krige.

12.3 There is no reason to doubt that the candidate is able to conduct court proceedings.

13 The candidate's administrative ability

13.1 No adverse comments have been received.

13.2 On the information to hand it is notable that the candidate has made himself available for service in a number of roles that may signal administrative ability.

13.3 There is no reason to doubt that the candidate has the necessary administrative ability.

14 The candidate's reputation for integrity and ethical behaviour

14.1 No adverse comments have been received.

14.2 The candidate did not fill in the first question of section 4 in the application form relating to whether there are any circumstances, financial or otherwise that may cause embarrassment in undertaking the office of a judge.

15 The candidate's judicial temperament

15.1 There are no adverse comments received in this regard.

15.2 Favourable comments are given by Gabriel SC (p 8) and Krige (pp10-11).

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

16.1 The candidate was involved in representing parties in political trials in the 1980s.

16.2 The candidate has been a member of several community based organisations reflecting a commitment to community concerns affecting socio-economic matters, local government and development. For example, Ladysmith Emnambithi (local council Deputy Major), Flood Liaison Committee (Chairperson), Acacia Housing Committee (Co-chairperson), E-Section Ezakheni Development Committee (Member), Steadville Development Committee (Member), Project Amanzi (member) and Parent Teacher Association.

16.3 The candidate has served in a range of capacities which can be regarded as enhancing access to justice, such as serving as a small claims commissioner, serving on the ADR Committee of the Rules Board, Chairing an Advisory Committee on court-annexed mediation, addressing conferences on mediation and other related roles detailed more fully in his answer to question 7 of the application form.

16.4 The sections in the candidate's CV relating to his efforts to improve access to and efficiency of the Land Claims Court are also relevant.

17 **The candidate's potential**

17.1 The candidate is 62 years old, has practised as an attorney for a long time and has served frequently as an acting judge.

17.2 In view of the candidate's extensive and long-standing experience, he can appropriately be evaluated on his track

record and significant experience rather than upon his potential.

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

18.1 The candidate has a clear commitment to the realisation of the Constitution's promises, notably regarding land reform, and an appreciation of the challenges the country faces in view of its land history. He also has a notable concern with access to justice.

18.2 The breadth of experience and the wide range of civic activity that the candidate has been engaged in over his lifetime, both ancillary to his professional life and independently of it, is also positive. His commitment to service is notable on the face of the record.

18.3 It is disappointing that the candidate did not complete the application form with sufficient rigour and thus excluded some important information.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Judgments Considered

The candidate supplied two different schedules of judgments.

The first is a list of thirty-eight judgments handed down by the candidate during the period 2001 to 2017 at the Gauteng Division of the High Court and the Land Claims Court. This is found at pages 38 to 42 of the

application. The second is a list of sixty-seven judgments handed down by the candidate during the period 2011 to 2016. In terms of the index to the application, this second list is intended as a list of judgments handed down specifically at the Land Claims Court but also includes judgments from both the Land Claims Court and unmentioned divisions of the High Court, some of which had already been mentioned in the first schedule. It was thus unclear as to what differentiation was sought by the candidate and the purpose thereof.

We sought to review the judgments supplied by the candidate in the application, as well as an additional sample of judgments by sourcing judgments available from the following databases and resources:

- LexisNexis;
- Saflii;
- Juta; and
- The Land Claims Court website.

We note that the team experienced difficulty in sourcing the majority of the judgments listed by the candidate. Some judgments are simply not available on these databases and difficulties were exacerbated because at times the candidate has not correctly spelt case names, provided citations and correct dates of hearings / judgments.

We note the following in reference to the sample of judgments ultimately considered:

- the sample is only a small quantity of judgments from the total listed by the candidate;

Reported Judgments Considered by Review Team		
Case name	Citation	Nature of Case
*Rooyendal (Pty) Ltd and Others v Minister of Land Affairs and Another	[2013] 3 All SA 588 (LCC)	Land claim
Nortje v Maree	2013 JDR 1285 (LC)	Land claim
*Blue Horison Investments 10 (Pty) Ltd v Regional Land Claims Commissioner Mpumalanga	2013 JDR 1288 (LC)	Land claim
The Salem Community v The Government of the Republic of South Africa	[2015] 2 All SA 58 (LCC)	Land claim

- the sample is mainly made up of criminal and land claims matters, with

Unreported Judgments Considered by Review Team		
Case name	Citation	Nature of Case
Hlatshwayo v Wingfield and Others	(LCC125/2011) [2012] ZALCC 19 (19 October 2012)	Land claim
Ndaba v Braithwaite NO and Others	(LCC179/11) [2012] ZALCC 20 (14 November 2012)	Land claim
*S v Magoso and Others	CCD 77/12 (15 December 2014)	Criminal
*Mkhabela and Others	(A334/15) [2016] ZAGPPHC 936 (8 November 2016)	Criminal

the inclusion of one RAF and one procedural matter; and

- our comments on the decisions considered can be found in the text of the comment form.

*Note: Judgments marked with an asterisk were supplied by the candidate in his application

*Mkhabela and Others v S	(A334/15) [2016] ZAGPPHC 936 (8 November 2016)	Criminal
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*Salzman v S	A99/2016 (9 March 2017)	Criminal	
*Nkosi v S	A425/2016	Criminal	
Truter v Road Accident Fund	(54790/2017) [2017]	RAF damages claim	
Judgments Upheld on Appeal	ZAGPPHC 230 (1 June 2017)	Considered by Review Team	
Case name	Citation on Appeal	Citation on Appeal	Nature of Case
Van Zyl v Joubert	(62990/2015) [2017]		Amendment of Pleadings
*Rooyendal (Pty) Ltd and Others v Minister of Land Affairs and Another	ZAGPPHC 326 (30 June 2017) [2013] 3 All SA 588 (LCC)	*2015 JDR 1694 (SCA)	Land Claim
*Blue Horison Investments 10 (Pty) Ltd v Regional Land Claims Commissioner Mpumalanga	2013 JDR 1288 (LC)	*The Manok Family Trust v Blue Horison Investments 10 (Pty) Ltd (220/13) [2014] ZASCA 92 (13 June 2014)	Land Claim
*The Salem Community v The Government of the Republic of South Africa	[2015] 2 All SA 58 (LCC)	*Salem Party Club v Salem Community (20626/14) [2016] ZASCA 203 (13 December 2016)	Land Claim

Judgments Overturned on Appeal Considered by Review Team			
Case name	Citation a Quo	Citation on Appeal	Nature of Case
S v Ngcobo	Regional Court a quo decision unavailable on databases	Ngcobo v S (AR 68/13) [2014] ZAKZPHC 10 (27 February 2014)	Criminal
Adendorff Boerderye (Pty) Ltd v Shabalala	Land Claims Court a quo decision unavailable on databases	2017 JDR 0584 (SCA)	Land Claims

**ANNEXURE
TABLE REFLECTING TIME TAKEN FOR JUDGMENT**

**Sample made up of cases where information could be verified
on Jutastat, LexisNexis or Saflii**

<u>CASE / NATURE OF CASE</u>	<u>HEARING DATE</u>	<u>JUDGMENT DATE</u>	<u>TIME TAKEN</u>	<u>SOURCE OF INFO</u>	<u>COMMENT</u>
<p>1. Salzman v State</p> <p>Gauteng, Johannesburg. Appeal from Specialized Commercial Crimes Court</p>	14 Nov 2016	9 March 2017	Just under 4 months	Information supplied by candidate verified as correct	<p>Judgment on appeal took in excess of three months. Apparently complex matter evidentially relating to computer evidence and over December period.</p> <p>Delays during trial rather than appeal.</p>

<p>2. The Salem Community v the Government of the Republic of South Africa</p> <p>Land Claims Court Restitution</p>	<p>2012-2013</p>	<p>2 May 2014</p>	<p>Not possible to calculate on information supplied but in excess of 3 months and potentially significantly so depending on when case ended in 2013.</p>	<p>Judgment supplied by candidate. Dates of hearing not available on databases</p>	<p>Complex matter evidentially and legally. And matter of great importance. Candidate might clarify how long it in fact took, however in light of the need to expedite the land claim process and the fact that the issue of feasibility had been separated out.</p>
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<p>3. Rooyendal (Pty) Ltd and others v The Minister of Land affairs and others</p> <p>Case re whether oral agreement concluded between land claimants and state after settlement relating to amount of compensation payable.</p> <p>Land claims court</p>	<p>29 July 2011 3 – 7 October 2011 29 February – 2 March 2012 24 October 2012</p>	<p>14 May 2013</p>	<p>Just under 7 months from the date of last hearing</p>		<p>In excess of 3 months</p> <p>The trial was a very lengthy trial according to Gabriel SC letter of support.</p> <p>Unclear why decision warranted time taken save that trial entailed protracted evidence and included documentary and oral evidence.</p>
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<p>4. Blue Horison Investments 10 (Pty) Ltd v Regional Land Claims Commission, Mpumalanga</p> <p>Review application relating to whether Commissioner should have accepted and gazette a claim that had previously been rejected</p> <p>Land Claims Court</p>	<p>According to Jutastat heard on 30 Jan 2012</p>	<p>30 Jan 2012</p>	<p>Ex tempore</p>	<p>Information obtained from Jutastat</p>	<p>No concern assuming Jutastat information correct</p>
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<p>5. Hlatshwayo v Wingfield and others</p> <p>(Interdict / Urgent application, relating to access to a home)</p> <p>Land Claims Court</p>	<p>19 October 2012</p>	<p>19 October 2012</p>		<p>Information obtained from SAFLII and incorrect on the application form.</p>	<p>This was a final interdict, the candidate having granted an interim interdict to enable the applicant access to a home and related relief. Interim interdict granted promptly in September 2011. Reason for delay in adjudicating final interdict not known but no reason to attribute to candidate.</p>
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<p>6. Ndaba v Braithwaite N.O and others</p> <p>Interdict to stop removal of applicant, family and livestock from farm</p> <p>Land Claims Court</p>	<p>16 March 2012</p>	<p>14 Nov 2012</p>	<p>8 months</p>	<p>Information on application form confirmed and verified.</p>	<p>Well in excess of 3 months - warrants explanation</p> <p>Case concerned eviction</p> <p>Application was dismissed including on basis that applicant was unable to prove that were imminently threatened with eviction and that matter within ambit of ESTA</p>
<p>7. Truter v Road Accident Fund</p> <p>Gauteng, Pretoria</p> <p>RAF damages for bodily injuries</p>	<p>2 Dec 2016</p>	<p>31 May 2017</p>	<p>6 months</p>	<p>Incorrect information on form.</p> <p>Correct information sourced from SAFLII.</p>	<p>Well in excess of 3 months - warrants explanation</p> <p>Case does not appear complex and only merits in issue</p>

<p>8. Van Zyl v Joubert</p> <p>Gauteng, Pretoria</p> <p>Amendment to particulars of claim, rule 28</p>	1 June 2017	30 June 2017	1 month	Judgment not delivered at time of application submission, info sourced on SAFLII	Although minor procedural issue objection to amendment was substantive - time not unreasonable in broader context
<p>9. Nortje v Maree</p> <p>Land Claims Court</p> <p>Appeal from Magistrates Court : on return day Magistrate had declined to uphold rule nisi in circumstances where wife had been buried - order sought to bury wife on land</p>	22 Oct 2012	22 Oct 2012	Ex tempore	Information obtained on SAFLII, incomplete info supplied by candidate	No concern