

QUALIFICATIONS AND EXPERIENCE:

1997	:	SENIOR CERTIFICATE MPUMALANGA DEPARTMENT OF EDUCATION
1998-2003	:	LLB UNIVERSITY OF PRETORIA (PART-TIME FROM 1999)
1999-2003	:	SERVING ARTICLES WITH MOLLEMA ATTORNEYS VERSFELD NKOSI ATTORNEYS P J FAURIE ATTORNEYS
2003	:	ADMISSION AS ATTORNEY
2004	:	PUPILAGE AT PRETORIA SOCIETY OF ADVOCATES
2005	:	PRACTICING MEMBER OF THE PRETORIA SOCIETY OF ADVOCATES

JUDGMENTS OF SOME OF THE REPORTED OR MORE NOTABLE CASES INVOLVED IN
AS ONLY, OR LEAD COUNSEL:

Firststrand Bank Ltd v Beyer 2011 (1) SA 196 (GNP)

General Council of the Bar of South Africa v Geach and Others 2013 (2) SA 52 (SCA)

Pithey v Road Accident Fund 2013 (5) SA 226 (GNP)

Pithey v Road Accident Fund 2014 (4) SA 112 (SCA)

De Kock v Dr Middelhoven 2018 (3) SA 180 (GP)

Janse van Rensburg v Minister of Police (424/2018) [2019] ZASCA 25 (28 March 2019)

NW Civil Contractors CC v Anton Ramaano Inc & Another 2020 (3) SA 241 (SCA)

PROFILE:

Etienne Botha is an advocate who has been practising as a member of the Pretoria Society of Advocates and the General Council of the Bar of South Africa for 19 years.

He practises mainly in the field of medical law, insurance law and insurance-related work. This includes personal injury, product liability, professional liability and professional defence cases, as well as other work of a contractual - , property – and commercial nature.

He regularly appears in the High Court, doing mainly trial work, and the motion and appeal work related thereto. He often appears in front of professional bodies of inquiry, particularly the Health Professions Council of South Africa, the South African Veterinary Council, the Engineering Council of South Africa and the South African Pharmaceutical Council.

He has appeared in the Supreme Court of Appeal with a junior or on his own on four occasions, the first occasion being in 2012 when he had been at the bar for 8 years. On each of these occasions he appeared against two or more advocates being his seniors and on three occasions against silks. He has not yet appeared in the Constitutional Court.

He has been involved in the training and upliftment of students, pupils, and advocates since 2010, when he started lecturing and was trained as an advocacy trainer. He is an active member of the Training Committee of the Pretoria Society of Advocates, where he plays a leading role in Practical Advocacy Training. He is also the Course Director of the General Council of the Bar of South Africa's Northern Regions Pupillage Course, where the pupils of the Polokwane, Mahikeng, Mpumalanga and Free State bars are trained. He has been an Advanced Advocacy Trainer of the GCB since 2018, training advocates on a local, regional, national and international level. He was invited by the International Advocacy Training Council as a trainer to the inaugural Dubai International Financial Centre Courts Advocacy Training course in Dubai. The IATC has also sent him to train pupil barristers in Hong Kong. He has completed the Advanced Advocacy Course at Keble College, Oxford.

He was elected to the Bar Council of the Pretoria Society of Advocates for 2020, a watershed-year for the Society. In this capacity he was part of a team that displayed immense leadership and perseverance and which was instrumental in the survival of the society that has existed for more than a century. He was reelected in 2021.

He is a past member of the South African Medico-Legal Association and has, in the past lent assistance to the association in some respects of its training courses.

Before being called to the Bar he very briefly practiced as an attorney, having been admitted in December 2003, after serving articles with a few smaller, relatively unknown attorney's firms, and whilst being a part-time law student at the University of Pretoria for 4 years.

He has been married to Ilze for 19 years and they have three children, Josua, Rohan and Liya. Apart from trying to spend as much time as possible with them, his hobbies are ultra-trail running, mountain biking, baking artisan bread and pretending to be able to play the acoustic and the electric guitar.

P G CILLIERS SC
THE CHAIRPERSON OF THE
PRETORIA BAR AND OF THE
COMMITTEE OF SILKS
BY HAND

Dear Colleague,

31 May 2023

MY APPLICATION FOR SILK

I include my application for Silk, together with my *curriculum vitae*.

The application for Silk consists of my motivation, dealing with information required by the criteria under separate headings, listed in the table of contents, as well as three letters from Silks nominating and supporting me and four letters of other Silks that support me in the application.

I have not bound the documents together by more permanent means as I accept that it will have to be copied or scanned for the purpose of distribution. I hope you find that in order.

I consider the application to be comprehensive, but please feel welcome to contact me should you or any member of the committee require any further information from me.

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Kind regards,

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APPLICATION FOR SILK

ETIENNE BOTHA

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- 1) JOHN MULLINS SC
- 2) PAT ELLIS SC
- 3) JANNET GILDENHUYS SC

SUPPORT

- 4) MERCEDES MOKADIKOA-CHAUKE SC
- 5) DON WILLIAMS SC
- 6) SALIE JOUBERT SC
- 7) ALWYN ROSSOUW SC

A. ADMISSION, MEMBERSHIP AND QUALIFICATIONS

a) General

1. I have been practising as an advocate and member of the Pretoria Society of Advocates for 19 years. My pupillage commenced on 15 January 2004 and I was admitted as an advocate on 22 April 2004.¹
2. I grew up in the town of Middelburg, Mpumalanga, where I obtained my Senior Certificate, after which I enrolled at the University of Pretoria where I obtained my LLB degree.
3. I studied full-time for a year-and-a-half and then started studying part-time when I became a candidate attorney. Although it had always been my intention to come to the Bar, I wanted practical experience and doing my articles whilst studying part-time gave me the means to achieve that.
4. I was admitted as an attorney on 4 December 2003. I was fortunate that, by the time I came to the Bar, I had already done a number of motions and trials in various Magistrate's Courts.

b) First Five Years at the Bar

5. In the first five years my work in the High Court comprised mainly unopposed and opposed motions of a commercial nature, summary judgment applications, unopposed divorces, and the odd urgent application. From the outset I was doing a considerable number of Magistrate's Court trials, varying from small contractual and property disputes, motor vehicle accident cases, personal

¹ The difference was caused by the fact that I was admitted as an attorney on 4 December 2003 and first had to be removed from the roll of attorneys before being able to apply for admission as an advocate. The Bar was fully aware of the circumstances under which I commenced pupillage.

injury cases and RAF cases to the odd maintenance court trial. I never did any Criminal work or Labour-related matters and what little Family Law practice I had quickly fizzled out.

c) Five to Ten Years

6. The next five years of my practice I did more or less the same work, but primarily in the High Court.
7. It also saw me have the first opportunity of appearing in the Supreme Court of Appeal, an occasion to which I will return below.²

d) Ten Years Until Now

8. About eight years ago my practice started turning towards the field of Medical Law and evolved into the majority of my work being in that field. However, as I go on to explain below, I continued to practise in other areas as well.

B. ANALYSIS OF TYPE OF WORK AND SPECIALISATION

a) General Analysis of Type of Work and Specialisation

9. For the last five years I have been practising mainly in the field of Medical Law and other work related to insurance and professional indemnity. This includes fields such as Personal Injury, Professional Liability in its various forms, Product Liability and Professional Defence cases.
10. I consider myself as having specialist knowledge and experience in Medical Law, which constitutes about 80% of the work I do. I will elaborate on this below.

² Paragraph D., p 8.

11. The balance of the work I do includes other areas such as the Law of Contract, Property Law, Unlawful Arrest and Detention, Pension Fund Disputes and other work of a more commercial nature. All the other work I do jointly constitutes about 20% of my practice.
12. Although the work in the other areas I practice in is less, I have sound knowledge of and experience in most prevalent areas of the law, an ability to grasp new areas and my skill in advocacy is in no material way diminished because I do less of it. Some examples of this work appear in my discussion of cases under the headings below. I regard it as important that I continue to practice in other fields as it is very rare that any case or legal problem is isolated to one area of the law. This is particularly true of Medical Law.
13. In addition to the other cases that I refer to below, my level of experience and competence in other fields is demonstrated by those instances where I ended up in the Supreme Court of Appeal, where I most often appeared against Silks.

b) Work Normally Entrusted to Silks

14. The majority of court cases that I am briefed in are medical cases and in most of them I act for either defendants or respondents, mainly doctors and hospitals.
15. In most of these cases I am briefed against Silks or teams of two advocates who are often specialists in the field. It is also true of many of the other cases that I am briefed in.
16. I can honestly say that most of the work that I am involved in are cases that are usually entrusted to Silks.

c) The Extent of My Practice in Medical Law

17. It is important to note that my practice in Medical Law is not limited to medical malpractice cases but also involves disciplinary conduct inquiries, inquests, motion court work such as urgent applications, and work of an advisory nature. Before I turn to the specific cases required by the criteria, I provide some explanations and examples of what this work entails.

d) Disciplinary Committees

18. A substantial part of my practice comprises representing doctors and other professionals such as veterinary surgeons and nurses before their professional bodies. I do so on a monthly basis and often more than once a month. A large portion of the trial work I do is before disciplinary committees, but these cases are by no means easy or simple.
19. Usually, they are complex cases with potentially severe outcomes for my clients. I most often appear in front of disciplinary committees of the Health Professions Council of South Africa and the South African Veterinary Council. I also have experience representing clients before the Engineering Council of South Africa, the South African Pharmaceutical Council and the South African Nursing Council.
20. Although my opponents in these inquiries are not Silks, they are usually seasoned litigators with specialist knowledge of those professions, appearing in these inquiries week in and week out. The members of the committees include members of that profession and the cases almost always include expert witnesses whom I have to lead and cross-examine. I include some examples below.

e) Urgent Applications to Treat Patients

21. I represent doctors in approaching the courts on an urgent basis to obtain orders allowing them to treat their patients, usually children.
22. In *Dr Ismael v M[...M[...]* and *P[...M[...S[...M[...]*³ that was heard by Basson, J on 20 June 2021, I represented Dr Ismael in an urgent application allowing her to provide indicated medical treatment to an infant, particularly administering medication and blood products, including the transfusion of blood. It was a matter of life and death. The infant's parents had refused the treatment and opposed the application on the basis of their religious convictions, making it a very important and sensitive issue. The order was granted and the infant's life was saved.
23. I dealt with a similar case in *Dr Magudumana v L[...A[...W[...]* & *M[...A[...W[...]*⁴ that was heard by Tsoka J on 30 January 2021, with the same result.

f) Advice

24. I regularly advise in respect of regulatory and other aspects concerning professions, particularly the profession of medicine. An example of this is where I was requested in 2021 to provide my opinion on whether Dr Vukovic had to comply with a subpoena *duces tecum* to disclose records concerning her patient to the registrar in terms of rule (as opposed to the court),⁵ under

³ The full names of the respondents are available but I use their initials here to respectfully protect their identities, having taken into account the facts, the sensitive nature of the case and that a minor is involved. However, bearing in mind that the committee requires full particulars, I include the Case No: 27942/2021, Gauteng North.

⁴ I use initials here for the same reason as in n3 above. The case was heard in the Johannesburg High Court and the case number is 2021/3718.

⁵ In terms of rule 38(1)(b)(ii).

circumstances where her patient had refused consent, but in circumstances where it may be relevant to issues including the interests of children. It raised interesting questions concerning the Constitution, *Health Professions Act*,⁶ *Children's Act*,⁷ *Promotion of Access to Information Act*,⁸ the *Superior Courts Act*⁹ and, particularly, the protection of the doctor-patient privilege. The waters had been muddled by a then recent decision.¹⁰ I concluded that this decision was wrong and that the correct legal position should be that any obligation to disclose (such as in cases concerning the interests of children) should be subject to the scrutiny and direction of the court, who must be the final arbiter in deciding whether or not the information sought is material and relevant. Handing over a patient's file to the Registrar, thereby giving unfettered access to the defendant and, by implication, the public, does not provide adequate protection to the patient's right to privacy and could dissuade patients seeking treatment from making full disclosure to their doctors and therapists. We have not yet had occasion to test this in the courts with regard to doctors, but a recent case in the SCA lends some support to the conclusions that I reached.¹¹

25. Another example is the case of Dr Scheepers, who was involved in a judgment by Fischer, J in the High Court, who had referred him and a number of other professionals to their respective professional bodies. In 2020 I was asked to advise Dr Scheepers in respect of his right to intervene in the application for leave to appeal. I advised him that he could intervene and that he should in fact

⁶ 56 of 1974.

⁷ 38 of 2005.

⁸ 2 of 2000.

⁹ 10 of 2013.

¹⁰ *Devine Inspiration Trading 205 (Pty) Ltd & Another v Gordon & Others* Unreported case [2021] JOL 49822 (WCC).

¹¹ *Deltamune (Pty) Ltd and Others v Tiger Brands Ltd and Others* 2022 (3) SA 339 (SCA).

do so. He declined, choosing to wait and see what happened to the appeal and, if necessary, face the HPCSA. The SCA overturned the orders¹² but obviously excluded the order that had been made against Dr Scheepers¹³ because he had not appealed.

g) Inquests

26. I am experienced in acting on behalf of doctors and hospitals in inquests.
27. A recent example is the *Inquest in re Baby Kruger* (Lephalale, Inquest No: 4/10/12) that had been going for years and was finalised on 6 March 2023.
28. This is a tragic case where I represented the doctor who had treated a baby who had sustained burn wounds at home whilst in the care of her parents, and who had passed away from complications of the burn injuries. The parents, towards whom one had to be sympathetic, wrongly blamed my client and the nurses that treated the baby. In the end, the court found that the baby's death had not been brought about by any act or omission *prima facie* involving or amounting to an offence on the part of the doctor or the hospital staff.

C. WHY I RESPECTFULLY AND HUMBLY BELIEVE THAT I AM WORTHY OF THE CONFERMENT OF SILK STATUS

29. I respectfully and humbly believe that I am worthy of the conferment of Silk status, and will in accordance with that conviction outline my experience and appearances in various courts; the complexity of the cases I am involved in; my interactions with Silks and juniors; my involvement with the Bar such as the

¹² *The Road Accident Fund v Taylor and other matters* (1136-1140/2021) [2023] ZASCA 64 (8 May 2023).

¹³ Dr Scheepers was mentioned in para [4], [8], [7], [23] and [24]. In the last-mentioned paragraph the SCA referred to the fact that Dr Scheepers had not appealed. In paragraph [29] the SCA held that such orders were appealable and that the professionals did not have to await the outcome of the disciplinary proceedings against them.

training and upliftment of pupils; my professionalism and ethics; and a little about my personal life.

30. In essence, I believe that the nature and the extent of my practice discussed above, the cases and other facts that I set out below and the Silks that nominate and support me show that I have the necessary values, standing, experience, knowledge and expertise in advocacy to practise as Silk, both in my area of specialisation and the law in general.

D. APPEARANCES IN THE APEX COURTS

31. I have appeared in the Supreme Court of Appeal with a junior or on my own on four occasions.
32. The first occasion was in 2012 when I had been at the Bar for eight years.
33. On each of these occasions I appeared against two or more advocates being my seniors and on three occasions against Silks leading juniors. I have never appeared there being led by a Silk.
34. On the last two occasions I led a junior, Tebogo Mogale.

a) *General Council of the Bar of South Africa v Geach*

35. In the case of *General Council of the Bar of South Africa v Geach and Others*¹⁴ I represented our colleague Steph Guldenphennig. The facts of the case are well-known and I do not deem it necessary to elaborate.
36. Guldenphennig was a respondent in the appeal after the GCB appealed the full court's decision not to strike him from the roll.¹⁵ In his case, he had admitted to 90 counts of double-briefing and overreaching. The full court suspended him

¹⁴ 2013 (2) SA 52 (SCA).

¹⁵ I was led by Freek Terblanche SC before the full court.

for 12 months.¹⁶ In addition, he was ordered to pay a fine of R90,000.00 and to repay an amount of R864,000.00 to the RAF.

37. The appeal turned on the question whether the full court had correctly exercised its discretion in respect of sanction, or whether, as the GCB argued, it had misdirected its enquiry and Guldenphennig ought to have been struck from the roll.

38. The appellants were represented by Hilton Epstein SC (with Andy Bester,¹⁷ C Malema and R Wilson).

39. The difficult nature of the case is best demonstrated by the fact that in respect of Guldenphennig¹⁸ there was a three-two split decision,¹⁹ with the majority finding in his favour and dismissing the GCB's appeal.

40. I have to profess that, although I was on my own for the only party not represented by a Silk or a Silk and one or more juniors, I constantly sought and obtained valuable advice from the Silks in the case. For that, and Guldenphennig's confidence in me at the time, I remain grateful.

b) Pithey v Road Accident Fund

41. Two years later, I appeared in *Pithey v Road Accident Fund*.²⁰ It was not the usual kind of RAF dispute but one that turned on a difficult point which involved statutory interpretation and a consideration of the objects of the *Road Accident*

¹⁶ Of which six months were suspended. This was in addition to a two-month suspension he had already served.

¹⁷ Who has since taken Silk.

¹⁸ And some of the other respondents.

¹⁹ Nugent JA (Mpati P and Ponnann JA concurring) being the majority in our part of the appeal and Wallis JA (Leach JA concurring), being the minority.

²⁰ 2014 (4) SA 112 (SCA).

Fund Act.²¹ I appeared for the appellant, the victim of a hit-and-run motor vehicle accident.

42. The appellant had erroneously completed her claim form, indicating that she was advancing a claim in terms of section 17(1)(a) in respect of an identified owner or driver, whereas it was evident from her supporting documentation that it was, in fact, a claim in terms of section 17(1)(b) in respect of an unidentified owner or driver. The RAF repudiated her claim and raised a special plea that no claim had been filed and that any claim she may have had had prescribed in the meantime.
43. First we lost before a single judge (Sapire AJ), then, after obtaining leave to appeal from him, we lost before the full court (Bertelsmann J, Preller J and Mabuse J concurring) (also reported as *Pithey v Road Accident Fund* 2013 (5) SA 226 (GNP)).
44. On behalf of the RAF, Frank Snyckers SC (with A Viljoen) argued that the correct identification of the claim as being 'identified' or 'unidentified', must be regarded as peremptory and that there was no valid claim. I argued that the provisions concerning the completion of the claim form were in fact directory and that substantial compliance was sufficient. The argument continued that the RAF had been given sufficient information from which it was clear on what basis the appellant had actually claimed. The full court disagreed with my argument and the appeal was dismissed.
45. Although the judgment of the full court was well-reasoned, carefully drawing the distinction between the two types of claims, I held the view that the full court's

²¹ 56 of 1996.

decision was wrong. I also knew that it would have the undesirable effect of preventing thousands of deserving claimants from claiming, merely because they or their attorneys had made a similar mistake on the claim form. I advised that we apply for special leave to appeal to the Supreme Court of Appeal, which we did, with it being granted.

46. On appeal, the issues and the arguments were substantially the same as those before the full court. The SCA held in Ms Pithey's favour, finding that *"[t]o uphold the Fund's contentions in the circumstances of the present case would be to: (a) elevate form above substance; (b) be rigidly technical against a just result; and (c) subvert the objects of the Act."*²²

c) Janse van Rensburg v Minister of Police

47. In *Janse van Rensburg v Minister of Police*²³ I represented the appellant in an action for unlawful arrest and detention and on appeal to the Supreme Court of Appeal.
48. Whilst driving his employer's vehicle, the appellant had accidentally struck a cyclist who then died on the scene of the accident. The police arrived and after a short investigation arrested the appellant on the suspicion of having made himself guilty of culpable homicide, a serious offence in terms of Schedule 1, giving rise to a discretion on the part of the arresting officer to arrest the suspect. The appellant was detained for three days and later charged.
49. On the appellant's behalf and the facts before the trial court, I argued that the discretion to arrest had not arisen, because the arresting officer could not have formed a reasonable suspicion. Also, the decision to arrest was irrational having

²² Paragraph [26].

²³ (424/2018) [2019] ZASCA 25 (28 March 2019).

regard to the appellant's circumstances and the prevailing circumstances at the time of the arrest.

50. The trial court held that the arrest was lawful, and dismissed the action. The possible effect of the judgment was worrying as it effectively meant an officer could arrest any driver involved in an accident in which someone died, even without any evidence of negligence. The court granted leave to appeal to the SCA.
51. On appeal, the respondent's advocates, the late André Ferreira SC (with L Pretorius)²⁴ abandoned one of the justifications for the arrest, but persisted with the argument that the arresting officer reasonably suspected the appellant to have committed the crime of culpable homicide and that he had been entitled to arrest him.
52. I led Tebogo Mogale and our argument was essentially the same as it had been before the trial court, but requiring a careful evaluation of (a) the principle that the suspicion formed by an arresting officer must be objectively sustainable, requiring an analysis and assessment of the quality of the information at his disposal, and (b) the principle that the officer's discretion to arrest must be exercised in good faith and rationally, not arbitrarily.
53. My client's appeal was upheld.

²⁴ Linda Pretorius had brought the late André Ferreira SC in for the appeal. Ferreira SC was a well-known specialist in the field and at the time Pretorius already had vast experience in it.

d) NW Civil Contractors CC v Anton Ramaano Inc and Another

54. In *NW Civil Contractors CC v Anton Ramaano Inc and Another*²⁵ I was briefed by the Legal Practitioners Indemnity Insurance Fund²⁶ to apply for leave to join the appeal to the SCA as *amicus curiae*. The case also involved statutory interpretation, this time concerning the *Attorneys Act*.²⁷ I asked that Tebogo Mogale be brought in as my junior.
55. The case arose from a number of applications that were dealt with in the High Court. In one of these, a rescission was applied for on the basis that the appellant's attorney had been practicing without a fidelity fund certificate. The High Court made an order that "... *proceedings initiated and executed by [the relevant attorney] who practised or purported to have practiced as such ... are declared null and void ab initio and are set aside.*"²⁸ [emphasis added]
56. This order was granted because the attorney did not have a fidelity fund certificate, something that is, regrettably, very common. The order would have the untenable effect of rendering similar actions by every other attorney practising without a certificate *null and void ab initio*.
57. Although the attorney's conduct in practising without a certificate could not be approved of in any way, we held the view that the order was wrong. In addition, it was clear that the clients of such attorneys would be severely prejudiced in a number of ways by such an order and the precedent it set. It was on this basis that the LPIIF sought to join the appeal.

²⁵ 2020 (3) SA 241 (SCA).

²⁶ Hereinafter, "*the LPIIF*".

²⁷ 53 of 1971.

²⁸ My emphasis.

58. Despite the respondent's opposition, our application for joinder as *amicus curiae* was granted and we were allowed to make submissions to the SCA.
59. What made the case difficult, was summarised by the SCA as follows:²⁹ *"What is controversial is the consequence that flows from such non-compliance. One of the earliest cases to consider the consequence for the validity of an act in conflict with a statutory prohibition was Schierhout v Minister of Justice, in which Innes CJ said: 'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.' But that will not always be so. Whether that is so, as later cases have made clear, will depend upon a proper construction of the legislation in question."*
60. Tebogo and I realised that there was an argument and some applicable authorities that none of the parties before the SCA had raised. There had been some conflicting decisions on relevant points, but also some authority in the SCA that made it possible to resolve the conflict in the appellant's, our client's and the public's favour. One of our arguments was that the case of *S v Theledi*³⁰, a decision of the full bench in our division (that would lend some credence to the High Court's finding), ought to be overruled by the SCA.
61. In upholding the appeal as it did, the SCA had particular regard to our arguments and the authorities we had referred it to;³¹ overruled *S v Theledi* in the process³² and said, *"The arguments advanced were of great value in deciding the matter."*³³

²⁹ At [12]. Footnotes omitted.

³⁰ 1993 (2) SA 402 (T).

³¹ At [16] – [19].

³² At [18].

³³ At [20].

62. The instances where I appeared in the SCA do not relate to the area in which I have specialised knowledge and experience, but more to the remainder of my practice. Medical Law cases (particularly cases relating to medical treatment in the private sector, which is where most of my work is) often settle at least partly because of reputational issues, and seldom make their way to the SCA. A case in point is the reported case of *De Kock v Dr Middelhoven* that I refer to below.³⁴ There, the plaintiff lost and obtained leave to appeal to the SCA, but never continued with the appeal despite there being some important issues at stake.

e) Constitutional Court and Labour Appeal Court

63. I have not yet appeared in the Constitutional Court or the Labour Appeal Court.

E. REPORTED CASES

64. The following are reported cases in which I appeared:

a) *Firststrand Bank Ltd v Beyer* 2011 (1) SA 196 (GNP). I acted for Firststrand Bank in an application for summary judgment.

b) *Pretoria Society of Advocates and Another v Geach and Others* 2011 (6) SA 441 (GNP). Here, I was led by Freek Terblanche SC.

c) *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA). I already referred to this case under my discussion of appearances in the SCA.

d) *Pithey v Road Accident Fund* 2014 (4) SA 112 (SCA). I already referred to this case under my discussion of appearances in the SCA.

³⁴ Paragraph 64.f.

e) *Pithey v Road Accident Fund* 2013 (5) SA 226 (GNP). This was the decision of the full court that I referred to earlier under my discussion of appearances in the SCA.

f) *De Kock v Middelhoven* 2018 (3) SA 180 (GP). I acted for Dr Middelhoven against Jurie Wessels SC (with RJ de Beer) of the Johannesburg Bar.

g) *NW Civil Contractors CC v Anton Ramaano Inc and Another* 2020 (3) SA 241 (SCA). I already referred to this case under my discussion of appearances in the SCA.

F. COMPLEX CASES

65. Below are some of the more complex matters I have been involved in over the past three years.

a) *NW Civil Contractors CC v Anton Ramaano Inc and Another*

66. I have already referred to the above case.

b) *Kalanyane v Dr Tsuari & Clinix Botshelong Empilweni Private Hospital (Pty) Limited* (Johannesburg, Case no. 48552/2011)

67. Trial date: 27 August 2018 (Mojapelo, DJP); 26 July 2020; and 27 July 2020 (Ally, AJ).

68. The plaintiffs, parents of a brain-injured child suffering from spastic, quadriparetic cerebral palsy, sued the hospital and the doctor, a specialist obstetrician and gynaecologist, for their alleged negligence during the child's birth.

69. I acted for the hospital against Gerhard Strydom SC (with E Serfontein) of the Johannesburg Bar.

70. There were 29 experts in various disciplines that were going to testify for the plaintiffs. We had 13. After joint minutes were obtained, the experts were still at odds with one another on many issues.
71. The disputes were vast and intricate involving questions of liability, including the possible apportionment of liability between the hospital and the doctor; causation, particularly having regard to the nature and extent of the child's brain injury and the question whether it could have been prevented at all, and, if so, by whom; the life expectancy of the child; and the notorious difficulty of quantifying these cases.
72. From the hospital's perspective, the case was made more difficult because the doctor whom we believed carried a large part of the blame was apparently uninsured and the plaintiff was intent on holding the hospital liable for all if not the greater portion of the damages. The hospital's dispute was not only with the plaintiff, but also with the doctor.
73. Before I had become involved in the matter, the hospital had made an offer to pay a portion of the damages, based on the hospital's risk and on the opinion that the doctor had to carry a substantial portion of the blame.
74. On the first day of trial, the doctor applied for and was granted a postponement. Now faced with a long delay, the plaintiffs accepted the hospital's offer with regards to liability, and chose to attempt settling the *quantum* with the hospital. This, however, was not to be, due to the plaintiffs' high expectations.
75. The case continued for another two years with the plaintiffs seeking payment of an amount in excess of R14,000,000.00. I spent months preparing for trial, dissecting the experts' summaries and quantifying the matter. In my

assessment I came to the conclusion that the plaintiffs' claims were worth no more than R9,000,000.00. We made a reasonable tender beforehand. In the end, the case was finalised on the second day of the trial with the parties settling and the hospital having to pay a little over R8,000,000.00.

c) Ras & Chinn v Life Wilgers Hospital (Pretoria, Case no: 80570/2018)

76. Trial date: 13 March 2023 (Jansen van Nieuwenhuizen, J).
77. The plaintiffs sued a number of specialists and the hospital, alleging that they had been negligent in a number of pre- and post-operative respects, leading to the second plaintiff suffering a stroke shortly after being discharged from the hospital.
78. I represented the hospital against Salie Joubert SC. The doctor-defendants were represented by Wendy Munro.
79. From the hospital's perspective, the issues entailed questions whether any of the nurses involved in the treatment of the second plaintiff had been negligent, but there was also an important dispute between the parties as to the nature and likely cause of the stroke. In the hospital's case, this was very important because the nurses were *inter alia* alleged to have caused or contributed to the stroke for failing to inform the doctors of the second plaintiff's high risk of suffering such an event. In fact, one of the nurses had been fired and a hospital manager (incorrectly, in our view) had conceded to her having been negligent. Further, the likely cause of the stroke was important because the nurses were alleged to have been negligent in the management of the second plaintiff's blood pressure. It was my view that, despite the mistake of the nurse that had been fired, the hospital manager's concession and on the evidence of the other

nurses, there was no negligent conduct and, even if there was, it was not the cause of the stroke. The same went for the management of the plaintiff's blood pressure.

80. On the day before the trial, the plaintiffs correctly withdrew their claims against the hospital and continued against the doctors.

d) Health Professions Council of South Africa v Dr Kruger (Conduct Inquiry, Pretoria, MP 0693120/23250944)

81. Date of hearing: 25-26 October 2022; 18-20 January 2023; 13-15 February 2023; and 4-6 April 2023.

82. I represent Dr Kruger and the *pro forma* complainant is advocate Meshack Mapholisa.

83. The complainant's daughter passed away three days after Dr Kruger performed a laparoscopic oophorectomy. It is alleged that Dr Kruger failed to timeously diagnose an injury caused to the deceased's rectum and that he intervened too late. It is common cause that the injury was only diagnosed on the third day after the surgery and that that is when Dr Kruger intervened. Dr Kruger's case was that he could not diagnose the injury any earlier and that he had intervened as soon as he was reasonably able to. He pleaded not guilty to all the charges.

84. The hearing continued for eleven days. The *pro forma* complainant led the evidence of the complainant, the surgeon who performed the corrective surgery, the state pathologist and an expert obstetrician and gynaecologist. I led Dr Kruger and another expert obstetrician and gynaecologist.

85. Some of the more important disputes in the case were the following: What was the nature of the injury; was it a detectable injury such as direct trauma, or was

it an ischaemic injury that slowly led to a perforation? Was it possible to diagnose the injury intra-operatively? Were the intra-operative measures taken by Dr Kruger in accordance with the current state of medicine? Was there an obligation on Dr Kruger to convert to laparotomy because the surgery became difficult? Were there any early signs of the injury or infection? What was the effect of an existing disorder the deceased had on the masking of early signs of infection? On all these, there were major disputes among the experts.

86. The cross-examination of the *pro forma* complainant's expert's evidence had to be careful, systematic, and accurate, and required sound knowledge of the facts, the state of medicine and the applicable literature. In the end, the concessions made by the expert and the contradictions in his evidence resulted in the *pro forma* complainant having to resort to evidence given by Dr Kruger 'in hindsight' (which is irrelevant in considering his conduct at the time), as well as an answer to a question by a committee member that fell outside the ambit of the charge (also irrelevant), in an attempt to persuade the committee to find Dr Kruger guilty.

87. The parties filed heads of argument and are awaiting the committee's decision.

e) *South African Veterinary Council v Dr du Plessis (Conduct Inquiry and Appeal, Pretoria, DM2202)*

88. Date of hearing: 6 October 2020; 2 November 2022.

89. I acted for Dr du Plessis and the *pro forma* complainant was Mr Ric Martin, a well-known and experienced litigation-attorney that often fulfils this role.

90. Dr du Plessis, a veterinary surgeon, performed surgery on a Doberman that later died. It was alleged that the Doberman probably had a congenital bleeding

disorder, Von Willebrand Disease, a disorder found commonly in Dobermans; that Dr du Plessis missed it because of an inadequate pre-operative examination; and that he had performed surgery that was not indicated or, in fact, contra-indicated, having regard to the likelihood of the dog having the disorder and bleeding to death after the surgery.

91. As is sometimes the case, Dr du Plessis' note keeping was not of the highest standard and there were various factual disputes among the witnesses, including the extent of the examination, the indication for surgery and whether there was evidence that the dog had the disorder.
92. The committee found Dr du Plessis guilty on account of his pre-operative assessment being inadequate. I advised him to appeal, which he did.
93. On appeal, the question was whether there was sufficient evidence of the offence that Dr du Plessis was charged with, bearing in mind the complainant's own evidence under cross-examination and that given by Dr du Plessis.
94. The *Ad hoc Appeal Committee* upheld the appeal, set aside the finding of the inquiry committee, and found Dr du Plessis not guilty of the charge.
- f) *Doornhoek Equestrian Estate Homeowners' Association v CSOS & Others, the Doornhoek Residents Action Group as amicus curiae* (Pretoria, 32190/2021)
95. Date of Hearing: 18 October 2021 (Hulley, AJ); 22 February 2022 (Bam, J); 17 June 2022 (leave to appeal) (Bam, J).

96. The case concerns an appeal to an award by an Adjudicator in terms of Section 57 of the *Community Schemes Ombud Service Act*.³⁵ The Adjudicator found that an occupational restriction limiting occupation of units to persons older than 40 was unreasonable and had to be struck out as being a form of unfair discrimination as contemplated in Section 9(4) of the Constitution.
97. I represent the *amicus curiae*, Andries Els represents the applicant and Francois Botes SC represents the respondents that opposed.³⁶
98. On the merits, the *amicus curiae*'s argument was that the limitation does not amount to discrimination and, to the extent that it does, it is not unfair discrimination. However, in opposing the appeal, a procedural issue was raised by the respondents.
99. The respondents argued convincingly on the back of a decision of the full court in *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another*³⁷ that the procedure adopted by the appellant in prosecuting the appeal was incorrect. When the applicant filed a notice of appeal and the record in abundance of caution, the respondents objected on the basis that it was an irregular step and launched an application to set it aside.
100. On behalf of the *amicus curiae*, following an analysis of *Stenersen* and other authorities, it was argued that the conclusion arrived at by the respondents was incorrect, that neither of the two procedures were peremptory, and that it had been open to the applicant to follow the procedure that it did. The applicant was also supported in its argument that the procedural issue raised did not arise

³⁵ 9 of 2011.

³⁶ CSOS and the Adjudicator did not oppose.

³⁷ 2020 (1) SA 651 (GJ).

from the rules but from the statute, and that it was not open to the respondents to follow the irregular step – proceedings in terms of the rules.

101. The court found in favour of the respondents and later granted leave to appeal to the full court.

102. The appeal will be heard early in 2024.

g) Silvo v Coertze (Pretoria, Case no: 57539/2019)

103. Date of hearing: 17–20 April 2023 (Raulinga, J).

104. The plaintiff sued an orthopaedic surgeon for negligently performing an arthroscopy on her left shoulder. Eighteen months earlier she had sustained injuries to her neck, back and left shoulder. The surgery was recommended as treatment for the problems she continued to experience with her left shoulder.

105. I represented the doctor and Alwyn Rossouw SC (with R Bouwer) represented the plaintiff.

106. Some time ago, the parties had settled the issues concerning liability on the basis that the doctor undertook to pay the plaintiff's damages arising from the performance of the arthroscopy.

107. In the meantime, the plaintiff had also sued the RAF and had obtained an order, holding it liable for the damages arising from the accident.

108. After the questions concerning liability were dealt with, the actions were consolidated and a few months before the trial the plaintiff filed a consolidated, amended particulars of claim. The doctor and the RAF³⁸ were held jointly and

³⁸ Represented by our colleague at the Polokwane Bar, Godfrey Senyatsi.

severally liable for more than R8,000,000.00, alternatively asking the court to apportion the damage between them.

109. What made the case complex was the overlap in the *sequelae* caused by the accident on the one hand, and the surgery on the other. It required a difficult dissection of the facts with the opinions of experts, and a postulation of the plaintiff's condition and the consequences thereof having regard to and disregarding the accident and having regard to and disregarding the surgery.
110. The complexity of the quantification was demonstrated by the order sought by the plaintiff. In addition, a dispute arose whether the plaintiff now made out a case for the relief sought, requiring us to take an exception.
111. The matter proceeded to trial, starting with our arguments on the exception. The court reserved judgment until the next morning, when we were informed that the second day would also be used by the court to consider the exception. In the meantime, the parties' attorneys had recommenced settlement discussions and by the fourth day all the disputes were settled. The doctor had to pay less than a quarter of the claimed damages.

G. SILKS AND JUNIORS

a) Juniors

112. In two of the cases where I appeared in the Supreme Court of Appeal, *NW Civil Contractors CC v Anton Ramaano Inc* and *Janse van Rensburg v Minister of Police*, I led a junior.
113. In both cases it was our colleague, Tebogo Mogale. Ms Mogale has since left the Bar but is still practising.

b) Led by Silks

114. In *Close-Up v Lutzkie* I was led by Pat Ellis SC (Pretoria, Case no. 65739/2020). We represented Lutzkie in opposing an application to review an arbitrator's award and in an application to make the award an order of court. Our opponent was Ben Swart SC. The applications were heard by Raulinga, J on 4 October 2021, and our client was successful in both. Leave to appeal to the Supreme Court of Appeal was applied for and granted. After we filed heads of argument but before the appeal was heard by the SCA (Case No. 286/2022) earlier this year, our mandate was ended. Our erstwhile client was successful on appeal and I have been told that our heads of argument were relied on by the Silk that replaced us.³⁹ The appellants have since applied for leave to appeal to the Constitutional Court.

115. In *Munyai v MEC for Health, Gauteng* (Case no: 89923/2015) I was led by Johann Ströh SC and later by George Alberts SC. Our opponent in the case was Hennie Joubert. We represented the plaintiff in a claim for damage suffered by her after the doctors and staff at a hospital were negligent in treating burn injuries she had sustained at home, rendering her severely disabled. The liability was heard and finalised on 28 January 2020. The *quantum* was determined after argument of a stated case before Potterill, J on 11 and 14 October 2021.

116. In *Maleka v MEC for Health, Limpopo* (Case no: 85910/2014) I am being led by John Mullins SC. Our opponent in the case is Mercedes Mokadikoa-Chauke

³⁹ *Close-Up Mining (Pty) Ltd and Others v The Arbitrator, Judge Phillip Boruchowitz and Another* (286/2022) [2023] ZASCA 43 (31 March 2023).

SC. We represent the plaintiff in a claim for damages suffered by her and her son, who suffers from Cerebral Palsy due to a brain injury at birth. The case will probably go to trial during 2024.

117. In *Bertie van Zyl (Pty) Limited v SANRAL*, I am led by Henk Havenga SC. The case is still in its infancy with us having drafted the founding papers. It is an application to compel SANRAL to comply with their statutory obligations, the terms of an order and the terms of agreements between various parties. The order and agreements give effect to a complex but fair plan to build facilities for and move hawkers that have been illegally occupying a road reserve falling under SANRAL's control. The case will probably only go to court some time in 2024.

c) Against Silks

118. In *Kalanyane v Dr Tsuari & Clinix Botshelong Empilweni Private Hospital (Pty) Limited* (Johannesburg, Case no. 48552/2011) I appeared against Gerhard Strydom SC (with E Serfontein). I refer to the case above.
119. In *Ras & Chinn v Life Wilgers Hospital* (Pretoria, Case no: 80570/2018) I appeared against Salie Joubert SC. I refer to the case above.
120. In *Mulder v Dr Kuhn* (Pretoria, Case no: 41405/2019) I represent Dr Kuhn against Salie Joubert SC, who represents the plaintiff. Dr Kuhn performed a right total knee arthroplasty on the plaintiff. Later, the plaintiff's right leg had to be amputated above the knee after becoming infected and after less severe steps to save his leg were unsuccessful. The broad dispute is whether Dr Kuhn could and should have diagnosed the infection and managed it earlier or by other means. Within this, there are various and more complex factual disputes

such as the condition of the wound on various dates, as well as disputes among the experts. The case was set down for a special trial before Koovertje, J, on 10 May 2022. A few days before the trial, further evidence in the form of photographs were brought to the advocates' attention, which necessitated a postponement for various reasons, including an attempt to objectively determine the dates upon which the photographs were taken. The case is now set down for a special trial on 14 August 2023.

121. In *Doornhoek Equestrian Estate Homeowners' Association v CSOS & Others, the Doornhoek Residents Action Group as amicus curiae* (Pretoria, 32190/2021) I appeared against Francois Botes SC. I refer to the case above.
- 121A. In *Silvo v Coertze* (Pretoria, Case no: 57539/2019) I appeared against Alwyn Rossouw SC (with R Bouwer). I refer to the case above.
122. In *Engelbrecht v Dr de Bruin* (Pretoria, Case no. 51438/2019) I appeared for Dr De Bruin against Don Williams SC. The case is one of medical negligence where the plaintiff alleges the doctor was negligent in failing to diagnose stenosis of a ureter following corrective surgery he had performed. Harry van Bergen SC acts for another doctor, sued by the same plaintiff. The doctor for whom I act raised a special plea of prescription that was argued as a stated case before Nyathi, J on 9 May 2023. Judgment was reserved.
123. I include letters of support from Joubert SC, Rossouw SC and Williams SC, my Silk opponents in the last three months.

H. EXPERIENCE OUTSIDE THE BAR

a) Candidate Attorney and Attorney

124. As stated earlier, before being called to the Bar I very briefly practised as an attorney, having been admitted in December 2003 after serving articles and whilst being a part-time law student for four years.
125. As a candidate attorney I regularly appeared in motions and trials in various Magistrate's Courts. The experience I gained in those courts and whilst assisting attorneys and advocates in cases in the High Court was valuable at the start of my practice at the Bar and forms part of my experience.

b) School Governing Body

126. This is my third year serving on the School Governing Body of Pretoria Boys High School. I serve as chair of the Legal Committee.
127. Serving in this capacity has exposed me to fields of law that I have had very little exposure to until now, or that I have not had exposure to for some time. This includes Education Law in general, particularly the *South African Schools Act*,⁴⁰ the *Employment of Educators Act*,⁴¹ as well as Labour Law and some aspects of Public Law. Although my work in the field of Medical Law requires some knowledge of the law relating to Children, including the *Children's Act*,⁴² serving in this capacity has certainly broadened my knowledge thereof.
128. My experience in disciplinary proceedings related to professionals has been helpful to me in fulfilling my role in the rare instances that I had to chair disciplinary proceedings.

⁴⁰ 84 of 1996.

⁴¹ 76 of 1998.

⁴² 38 of 2005.

I. FACTS THAT MIGHT INFLUENCE THE DECISION

a) Training and Upliftment

129. I have been involved in the training and upliftment of students, pupils and advocates since 2010, when I started lecturing and was trained as an advocacy trainer. I regularly lecture pupils, particularly in the areas of Law of Evidence, Civil Trials, Appeals and Legal Writing. I have been an active member of the Training Committee for more than a decade.
130. I have had many pupils and have mentored many juniors on an informal basis.
131. It is well-known that my door is always open to help and it very rarely happens that I turn someone away because I am too busy.
132. I have played a leading role in practical advocacy training at the Pretoria Bar and beyond. I have been an advanced advocacy trainer since 2018, training advocates on a local, regional, national and international level.
133. I am the current Course Director of the GCB's Northern Region Pupillage Course. I have taught at the course since 2019 and I have been its director since 2021. The course plays an extremely important role in the training of pupils of the bars in the north of the country that are not as well equipped as we are, to provide practical advocacy training to the pupils at the level that it is required. It is essential to the GCB's commitment to ensuring that it provides practical advocacy training to all the pupils in every constituent bar in every area with a High Court seat. This includes one larger bar, Limpopo and three smaller ones, Mpumalanga, Mahikeng and Free State.⁴³ More than 90% of the pupils

⁴³ This year, because of the difference in numbers of pupils at the bars in the norther regions and those bars that usually fall in the coastal regions, the Mpumalanga and Free State pupils are joining the coastal regions course that has fewer pupils than those in Limpopo and Mahikeng.

at this course (usually numbering in the 40s, occasionally more than 50) are from previously disadvantaged backgrounds, and many of them are poor. The course provides them with the same practical advocacy training that our pupils receive, by some of the best trainers in the country and from abroad. Although much remains to be done, I am also proud to say that the faculty assembled by us for the course every year is one of the most diverse anywhere and that its diversity keeps improving. In June 2021 I had only one week to move the course online as the third wave of COVID-19 had arrived, preventing us from doing it in person but refusing that the pupils miss out or be prevented from qualifying at the end of the year.

134. In 2020, in the midst of the pandemic, the year that we almost lost the Pretoria Bar and whilst I was serving on the Bar Council, the Training Committee, and the Transformation Committee, Paul Wallis SC of the Durban Bar and I arranged and held what we still understand to be the first ever online intermediate trial advocacy course in the world. In view of some of the limitations we had, we could only accommodate 16 juniors, eight from Kwazulu-Natal and eight from Pretoria, but we ensured that the majority of the participants were female and black. The course was a great success and, although it is true that online courses cannot replace in-person ones, this certainly made a difference to those who were able to attend. Many of those participants have since been trained as advocacy trainers.

b) Leadership

135. I was elected to the Bar Council of the Pretoria Society of Advocates in 2020, a watershed year for the Society. I was part of a team that displayed notable

leadership and perseverance and which was instrumental in the survival of the society that had existed for more than a century. I was re-elected in 2021.

c) Removing Artificial Barriers and Advancing the Profession

136. In 2021, recognising the difficult circumstances under which the most junior members of the Bar were practising and in an attempt to remove some of the artificial barriers to entry to the profession such as affording bar expenses, Julianna Themane and I brought a motion before the AGM to reduce the bar expenses paid by the most junior members. In the end, 77% of our members voted in favour of the motion. Because of this, members of one year's call pay only R500.00, those of two years' call R750 and those of three years' R1 000.00.
137. I have served on various *ad hoc* committees, particularly of the Training Committee, contributing to and advising the Bar Council on many important aspects that had to be dealt with from time to time, specifically with regard to our profession and the training of pupils.
138. The most notable examples are reports I have written on the need for the *Legal Practice Act* regulations to be amended to provide for the supervised right of appearance of pupils in the High Court, and the opposition of proposed amendments to the regulations to align the training provided to pupils with that of candidate attorneys. Both these reports were adopted by the GCB and used in making representations to the LPC. An adapted version of the latter-mentioned report was also published as an article in *Advocate*.
139. In 2022, the Pretoria Bar was given the opportunity to host the GCB's Future Leaders Symposium here in the capital. I was the convener of the committee

that arranged it, bringing together future leaders from all the bars in the country to discuss current issues of importance to the profession, the Bar, and the junior Bar in particular.

d) International Exposure

140. In 2020, the International Advocacy Training Council invited me to train Emirati lawyers at the inaugural Dubai International Financial Centre Courts in Dubai. The pandemic prevented the course from happening that year, but I was invited back the next year when it was held online.

141. Earlier this year, invited by the IATC and the Hong Kong Advocacy Training Council, I went to train pupils of the Hong Kong Bar in Hong Kong.

142. I completed the Advanced Advocacy Course at Keble College, Oxford, in 2022.

e) Ethics and Professionalism

143. I have never been found guilty of unprofessional or unethical conduct by the Bar, the Legal Practice Council or, before that, the Law Society of the Northern Provinces. No disciplinary proceedings have ever been instituted against me, and this includes my time as a candidate attorney, attorney or whilst being a student at the University of Pretoria.

144. I must point out that in deciding the appeal in *Janse van Rensburg* that I referred to earlier, Rogers, AJA (as he then was), made the following remark about my conduct in the trial:⁴⁴ “... *there was inappropriate acrimony in the exchanges between counsel (being [me] and the respondent’s present junior counsel).* Such behaviour is contrary to professional decorum and does not serve the administration of justice.” Justice Rogers’ comment was completely justified. I

⁴⁴ At [23].

had allowed myself to become frustrated, take matters too personal and became personal with my opponent. I was embarrassed by my own conduct, which was something that had not happened before and has not happened again since despite me having experienced similar and greater frustrations in court. At the time, in 2019 I had started considering applying for Silk in the near future and the experience made me realise it was another respect in which I was not fully ready yet. I learnt from the experience and it has made me a better advocate.

145. I believe that the colleagues and the judges that know me can testify that I am not perfect but that I strive to uphold the highest ethical and professional standards.

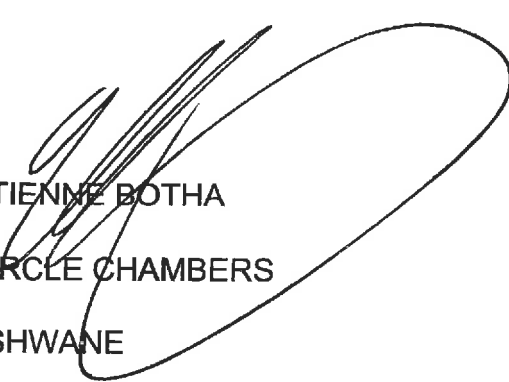
f) Personal

146. As much as I value and have a passion for my chosen profession and the work I do, as much as I strive to uphold the highest standards expected of me, and as much as I am confident that I will do the tradition and status of Silk proud should I be given the honour, my work is not the most important thing in my life. That place is occupied by my faith in Jesus Christ, my family and a commitment to living a life of purpose that will hopefully extend beyond my own life here.
147. I have been married to Ilze for 19 years and we have three children: Josua, Rohan and Liya. I have no greater love in this world. In addition to trying to spend as much time as possible with them, I try to live a balanced, healthy life.
148. My main sport is ultra-trail running, focusing on distances of 100 km or more, and I am currently training to run a 100 mile trail run later this year. I also enjoy mountain biking, baking artisan bread and pretending to be able to play the

acoustic and electric guitars. I hate shopping and cucumber, but please do not hold that against me.

J. CONCLUSION

149. For all the above reasons I believe I have the necessary values, standing, experience, knowledge and expertise in advocacy to practise as Silk, both in my area of specialisation and the law in general.
150. The kind of work I do is generally entrusted to Silks, and the attorneys that brief me trust me sufficiently to brief me against Silks, often in complex and high-value cases. I have been briefed to lead juniors in cases that called for it, and being a Silk will provide more opportunities to do so.
151. I have demonstrated the ability to represent my clients' cases with excellence in advocacy in most forums. This includes the Supreme Court of Appeal, where I have always appeared on my own or whilst leading a junior, and against Silks and teams of more than one advocate. I have shown that I can hold my own against Silks.
152. I believe that I will do the honour of Silk and the profession proud, that I will continue to do justice to my clients' cases through excellence in advocacy, and that I will fulfil my obligations to the courts and the law with the dignity and pride that the carrying of Silk represents and requires.
153. I respectfully and humbly believe that I am worthy of the conferment of Silk status and respectfully request the committee to make a favourable recommendation.



ETIENNE BOTHA

CIRCLE CHAMBERS

TSHWANE

31 MAY 2023

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26 May 2023

TO THE SILK COMMITTEE

Dear colleagues

MY NOMINATION AND RECOMMENDATION OF ETIENNE BOTHA FOR SILK:

1.

Knowing him as I do, having seen him in action in court, as a trainer and as my junior, I unhesitatingly nominate and support Etienne Botha's application for silk.

2.

My knowledge of Etienne:

- 2.1 I first noticed him when he was a pupil (I was either still in charge of training at the time, or at least intensively involved in training).

Every pupillage group has a few standouts. He was *the* standout of his year (2004, I see from paragraph 1 of his application).

- 2.2 I must have seen him in action from time to time after that (I can honestly say that whilst I wouldn't be able to tell you what the occasions were, I have always been impressed with him as an advocate), but what I very

clearly remember is his appearance before the SCA in the extremely charged atmosphere of the General Council of the Bar of Africa v Geach and Others case (2013 (2) SA 52 (SCA)).

The court was packed. I have never seen so many advocates robed and in a single courtroom. The atmosphere was, as I say, extremely charged. Careers and ethical fundamentals were at stake. I hope my good colleague Cedric Puckrin SC won't mind me relaying this, but he was first up, on behalf of Botha. We all know how good an advocate Cedric is, but in that atmosphere, I clearly remember that Cedric lost all his eloquence and began to stumble. I was representing two of our colleagues, sitting perhaps a row behind Cedric, and I remember wondering to myself "If Cedric stumbles in this atmosphere, how am I going to do it?"

And next up after Cedric, in that atmosphere, was the only junior counsel who didn't have a leader. Etienne.

That was in November 2012, Etienne's eighth year at the bar. He was still a relatively rank junior. His performance was calm and competent. Given what had just gone before, and given the atmosphere and his junior rank, that performance spoke volumes for him.

- 2.3 Since then I don't believe I have ever had a case against Etienne (he might remember; if I have, my failing memory has forgotten them), but we have worked together on cases (and, in fact, we are presently working together on at least one case).

As a junior, Etienne is again a standout. The members of the committee will know from experience how you get juniors and you get juniors. You get the juniors who you have to help rather than the other way around. And then you get the juniors you can rely on, and who help you. Etienne falls distinctly within the latter camp.

- 2.4 I have also dealt with Etienne in his capacity as an advocacy trainer.

Again, he is a standout. And this doesn't nearly speak to his contribution to the Pretoria Bar. I have always said that the mere fact that one is a good advocate doesn't make one a good trainer, but that *you have to be a good advocate to be a good trainer*. Experience bears me out on that. Etienne is an exceptionally good trainer.

3.

So much for my experiences with Etienne. Turning from there to the primary reasons why I unhesitatingly recommend his application:

3.1 I have always believed that in testing whether a colleague is fit for silk one must look at the following, probably in the following descending order:

3.1.1 The most important is their *gravitas* – does my experience of them, my observation of them, tell me that they command respect when they appear and in their professional dealings, such that they are suited to wearing silk?

3.1.2 How often they are up against silks?

That speaks for itself – it means that their instructing attorneys regard them as being good enough to go up against silks.

3.1.3 How often they lead other advocates?

I don't place as much weight on this as on the factor of being up against silks. But still it does speak for itself, because it means that the instructing attorneys regard them as being good enough to lead others.

3.1.4 How does their field or fields of expertise fit into the bar, and the need for silks in that field or those fields?

3.2 I have spoken above to the first (and in my view the most important) quality, viz Etienne's *gravitas*.

He is an excellent advocate. He treats others with respect, and he is treated with respect, including from what I have been able to see by the judiciary. I also do work for attorneys who brief Etienne and I know how highly they speak of him.

I have no hesitation in saying that Etienne commands respect and is suited to the status.

- 3.3 Turning to the second, I have perused Etienne's application. He clearly often appears against silks.

That speaks volumes. It also tells you that if you confer silk on him, it won't be a big jump.

- 3.4 Etienne's application also shows that he does lead juniors (usually, it seems to me, against silks).

- 3.5 Finally, is there space in his main field of specialisation, medical law, for another silk? I think there clearly is. I do that work. It's the type of work that lends itself to the briefing of silks, because the amounts at stake are often substantial, and the issues are often very complex.

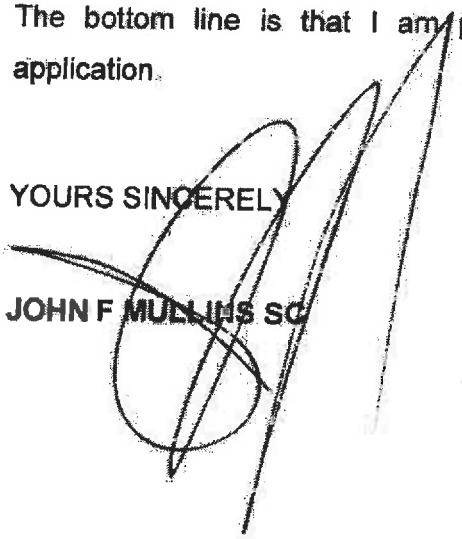
I can easily see Etienne stepping into that space as a silk.

4.

The bottom line is that I am perfectly satisfied that this is a very worthy application.

YOURS SINCERELY

JOHN F MULLINS SC



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31 May 2023

The Chairman

Pretoria Society of Advocates

By Hand

Dear Colleague

APPLICATION FOR SENIOR STATUS: ETIENNE BOTHA

Etienne has been a member of the Bar for 19 years. I had him as my junior once, *Close-Up Mining v Lutzkie*. It started off as a very acrimonious application to review an arbitration award given in favour of Lutzkie, by retired judge Philip Boruchowitz. It involved extremely lengthy and involved answering affidavits, which were masterfully drawn by him and settled by me. When the Heads were to be filed, I was snowed under and again relied heavily on him to prepare a draft. In the end, most of the arguments we had to deal with, were abandoned by the applicant, then represented by Ben Swart SC as leading counsel. The court found in Lutzkie's favour, and so did the SCA, also on heads, initially prepared by Etienne and settled by me, although the client decided to make use of new counsel in the appeal.

Etienne is a dedicated advocate and has a specialist practice in the field of medical law. This is becoming an ever more litigious field of the law, and his expertise as a silk will be much in demand.

Apart from his leadership in the field of medical law and general practice, he excelled in sharing his knowledge with others and his leadership in the training of pupils is evident from his CV. He has also served the Bar with distinction and dedication, and has not been lacking in enthusiasm for serving his community in whatever capacity he may be called upon to serve.

His integrity is without question, and he has served on the Training Committee with distinction.

Etienne is a well-balanced individual, dedicated to his work and his family, and with the composure and stature needed of a silk.

I have no hesitation to nominate him for the granting of senior status and supporting his application.

Yours faithfully

A handwritten signature in black ink, appearing to be 'P. Ellis', written in a cursive style.

P ELLIS SC

JANNET GILDENHUYS SC
Advocate of the High Court of South Africa

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29 May 2023

The Chairperson
Pretoria Society of Advocates

Sir,

**IN RE: NOMINATION OF ADVOCATE ETIENNE BOTHA FOR THE GRANTING
OF SENIOR STATUS**

I have the honour to hereby nominate Etienne Botha for the granting of senior status and to support his application.

INTRODUCTION

1. I practice as a full-time member of the Pretoria Society of Advocates and the Cape Bar. I have been in full-time practice for almost 24 years.
2. I encountered Botha for the first time in 2020 when he was elected to the Bar Council in what turned out to be a truly challenging year for the Pretoria Bar. I was soon struck by -
 - 2.1 his integrity, dedication and humility;
 - 2.2 his high ethical standards;
 - 2.3 his tireless commitment to serving the Bar; and

2.4 his good judgment.

3. Botha is married to Ilse and they lead a full family life with three young children with him also serving on the school governing body and running ultra-marathons. That makes what is set out below about Botha even more remarkable.

4. COMPETENCE AND STATURE

- 4.1 Botha's description of his practice shows how it has developed from basic bread and butter work to being entrusted to appear on his own against silks in complex and specialised matters.
- 4.2 His competence as an advocate is evident from his list of reported judgments, the complexity of cases entrusted to him and the fact that he has appeared in the Supreme Court of Appeal on four occasions with him leading a junior on two of those occasions and appearing against teams of silks with juniors on three of those occasions.
- 4.3 Botha is held in high regard by all colleagues who have had the pleasure of working with him both in court and in various committees of the Bar and GCB.
- 4.4 Botha makes mention of his involvement in training and upliftment of students, pupils and advocates, but the scale and the level thereof need to be highlighted. He spends countless hours and days on developing courses, presenting lectures and training advocates not only at our Bar but also regionally and nationally and, lately, also internationally. It is truly commendable.

4.5 He is held in very high esteem by the advocates' profession at large on account of his abilities as a trainer and his dedication to the cause of training and upliftment ranging from students and pupils to advanced advocates.

4.6 He has also served with distinction on the Bar Council for two years and on the Training and Transformation Committees. I have personal knowledge of his leadership skills and perseverance. As a member of the Bar Council in 2020-2021, he spared no time or effort to ensure the continued existence of the Pretoria Society of Advocates and the continuation of training during the Covid pandemic.

4.7 There is no doubt in my mind that Botha has the competence and stature deserving of the conferment of senior status.

5. INTEGRITY AND PROFESSIONAL CONDUCT

5.1 Botha's conduct has never been the subject of a complaint to the professional and ethics committee.

5.2 His integrity is underscored by his disclosure of the remark made by Mr Justice Rogers in his motivation letter, as it is by his recognition of our fallible human nature. In my view, it should not negatively influence any decision of the committee. To the contrary, Botha's reaction thereto bears testimony to his character.

6. SENIORITY

Botha has been practising at this Bar for some 19 years and has in my view reached

maturity as a legal practitioner.

7. NATURE OF PRACTICE

7.1 It is evident from the large number of cases with respect to medical negligence in which Botha has acted, that he has a large, specialised practice in this field.

7.2 Equally evident is that he has a *de facto* silk practice, regularly appearing on his own against silks or leading juniors in important and complex matters.

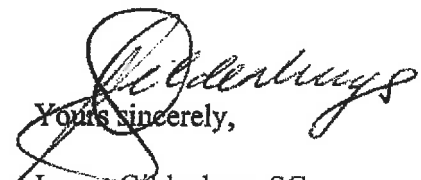
8. NEED FOR SENIOR TRAINERS AND LEADERS AT THE BAR

8.1 Botha has remarkable talents as a trainer, and he is a natural and ethical leader.

8.2 It is in my view necessary that he be promoted to senior status so that he can take up his role as a senior leader not only in matters of training but also in the profession.

9. CONCLUSION

I hold the view that Etienne Botha has shown himself to be an advocate who has the degree of experience, knowledge and integrity to warrant the conferment of silk status upon him, and to assume the position of a senior member and, indeed, senior leader at the Bar.


Yours sincerely,

Jannet Gildenhuys SC

ADV.M.M. MOKADIKOA-CHAUKE SC

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30 MAY 2023

To: Silk Committee,

RE: Application for Conferment of the Senior Counsel Status in favour of Etienne Botha

1. This letter serves to confirm my support for Advocate Etienne Botha in his application to the Bar Council's Silk Committee for consideration and approval, and the recommendation to the Judge President of the Gauteng High Court and the President of the Republic of South Africa for the conferment of Senior Counsel status.

2. I have the honour and privilege of knowing and working with Etienne for the last 8 years. Botha's knowledge and experience in his field of expertise are not matched by many. As counsel, sufficiently experienced and that he enjoys the respect of his colleagues and judges respectfully.

3. I submit that he is deserving of the conferment of silk. His integrity and his professional conduct generally are beyond reproach.

Hope you find the above in order.

ADV Mercedes Mokadikoa-Chauke SC

ADV J O'D WILLIAMS SC

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29 May 2023

The Chairperson
Committee of Silks
Pretoria Society of Advocates

Dear Gerhard

APPLICATION FOR SENIOR STATUS – ADV ETIENNE BOTHA

I am honoured to support our colleague, Etienne Botha's application for silk. He has waited 19 years to apply. I have encountered him often as an opponent over the years. Most recently we argued a stated case, where the formulation of the facts and issues were more challenging than the argument itself. Etienne had a sure understanding of the issues (referred to in paragraph 112 of our colleague's submission).

Etienne is very precise. He is very eloquent. His grasp of the issues is obvious. The Heads of Argument he submitted in our most recent case, attests to this.

The matters that Etienne refers to in his submission, are all substantial matters, with complex issues where the stakes are always high. It is a stressful, mostly trial-based environment. Etienne has conducted himself diligently, assertively and courteously.

Indeed, I have always been struck by his courtesy, as well as the respect he shows to his more senior colleagues. It is also noteworthy that he has given back much to the Bar, particularly in the realm of training pupils and the sharing skills. With the retirement of our colleague Ströh SC, the move of Farrell SC to the Johannesburg Bar, as well as the looming retirement of some older medical/delictual law practitioners, there is a definite void to be filled by Etienne. He has paid his dues and is ready to take on the responsibilities of being a senior.

Yours faithfully



ADV J O WILLIAMS SC

SALIE JOUBERT SC

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30 May 2023

TO: THE CHAIRPERSON
PRETORIA SOCIETY OF ADVOCATES

Sir,

IN RE: APPLICATION FOR SENIOR STATUS: ETIENNE BOTHA

1. It is a privilege to support Etienne's application for senior status.
2. I have, on a professional basis, met Etienne during a difficult inquest many years ago. Since then, I have on a regular basis interacted with him in discussions and I am aware of the nature of his practice. This is in particular set out in his application for Silk.
3. What is evident from his application is that he is a well-polished counsel, dealing with a busy and demanding practice, essentially focusing on medical law, but with a wide range of experience in other fields of law. His interaction with senior counsel in many of the matters that he deals with, is a clear indication that his input to this profession sets a high benchmark.
4. I have particular appreciation for his wide range of experience outside the Bar, as set out in his application. It is also of great appreciation to note his involvement in training and upliftment of students, pupils and advocates since 2020, when commencing the lecturing and training as an advocacy trainer.
5. The character of Etienne is one of the highest integrity, devotion to his profession and a clear ability to have a balanced life, and his commitment to live a life of purpose.

6. I unreservedly support Etienne's application for senior status and he will be an excellent addition to the ranks of the Silks at the Pretoria Bar.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Salie Joubert', written over a horizontal line.

SALIE JOUBERT SC



ADV A B ROSSOUW S C

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CONTACT: 083 259 2547 / alwynrossouw@icloud.com

Your Ref.: E BOTHA

Date: 25 May 2013

The Chairperson

Pretoria Society of Advocates

RE: APPLICATION FOR SENIOR STATUS: ETIENNE BOTHA

In compliance with the requirements set out in the Rules for Applications for Silk, I wish to state the following:

I support Etienne's application wholeheartedly.

Etienne started practising in 2004 and he has more than 20 years of experience. I include his years as a candidate attorney, which is a valuable experience for any legal practitioner. The fact that he was admitted as an attorney automatically places him in a different

category, which should, with respect, be taken into consideration when considering his application.

From his application it is clear that he has a general working knowledge of basically all branches of the law which is, in my respectful view, a *sine qua non* to practice as a silk.

The contents of Etienne's application do not do justice to what this member is capable of.

Litigation in the medical and construction field is more taxing than most other fields and it requires dedication, discipline and, above all, a basic understanding of all the technicalities involved in this type of litigation. This is definitely not the average legal practitioner's cup of tea.

The mere fact that he was the lead counsel in two SCA matters and that he appeared in numerous cases against silk is a clear indication of his abilities and the trust which attorneys have in him. This speaks for itself.

Etienne has established himself as a leader, not only in litigation, but also as a member of our bar and as a member of the community.

Ettiene's involvement in the training and upliftment of pupils and his international exposure in this regard is exemplary.

Etienne has been my opponent and I can from first hand experience testify that he is one of the most knowledgeable and best prepared opponents that I have ever had. I personally think that Etienne is one of the better silks this Bar has never had thus far.

Furthermore, to have seven cases reported in the blue books is no small feat, especially if regard is had to the fact that three of these cases were in the SCA.

Etienne has impressed me as a person who is able to get a firm grip on any aspect of the law with relative ease. He is hard-working, conscientious, organised, not susceptible to intimidation and disciplined, all of which are essential attributes of a successful silk.

I have no doubt that Etienne can master *any field of the law*. All one needs is intelligence, a passion for the law and a good work ethic and Etienne ticks all these boxes.

Etienne has a strong personality and I have no doubt that he possesses all the qualities that are needed to lead junior counsel in any matter.

Etienne has always struck me as a honest and straightforward person with high ethical standards. Etienne is known to have a good, but firm, relationship with all his colleagues, which is the hallmark of any good leader.

Mindful of the aforesaid and the contents of his application, there can in my opinion be little doubt that he should be regarded as a very strong candidate for silk.

Yours sincerely,

A handwritten signature in dark ink, appearing to be 'A.B. Rossouw', with a stylized flourish at the end.

Alwyn B Rossouw SC

