

CANDIDATE: JUDGE ZUKISA LAURA LUMKA TSHIQI

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COURT FOR WHICH CANDIDATE APPLIES: CONSTITUTIONAL COURT

1. The candidate's appropriate qualifications

1.1. The candidate has the following qualifications:

1.1.1. BProc from University of the Witwatersrand in 1989; and

1.1.2. Post Graduate Diploma in Labour Law from the University of Johannesburg in 2001.

1.2. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

2.1. The candidate is currently serving as a judge of the Supreme Court of Appeal (SCA) since 2009 and has been serving as a permanent judge since 2005.

2.2. There is nothing in the candidate's application to suggest that she is not 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 woman. At present, there are nine permanent Judges on the Constitutional Court. Of these, there are six men

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(comprised of four Black men and two White men) and three women (all Black).

3.2. The appointment of female candidates to senior positions in the judiciary currently lags behind the goal of equal gender representivity, and the candidate's appointment would therefore further this end.

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

4.1. The candidate has had substantial experience on the bench and has heard cases in respect of a wide variety of legal areas.

4.2. The candidate was part of a unanimous Supreme Court Appeal judgment in the *Solidarity obo Barnard v South African Police Service* 2014 (2) SA 1 (SCA) which was heavily criticised by the Constitutional Court. The Constitutional Court found that the Supreme Court of Appeal had misconceived the issues before it, as well as the controlling law.

4.3. The candidates served on the bench as an:

4.3.1. Acting judge in the Constitutional Court. However, she has not written any ground-breaking Constitutional judgments;

4.3.2. Judge of the Supreme Court of appeal from 2009 until the present;

4.3.3. Judge of the Gauteng Local Division, Johannesburg from 2005 until her appointment to the Supreme Court of appeal; and

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- 4.3.4. Since 2003 the candidate has held acting appointments to the Gauteng Local Division, Johannesburg, the Labour Court, and the Competition Appeal Court.
- 4.4. A statistical analysis of a sample of judgments in which the candidate has been a member of the bench reveals that the candidate has been a court member in 216 cases. She has concurred in 175 judgments (81.02%) and has written 41 judgments (18.98%). Of the 41 judgments written by the candidate, 34 were in the Supreme Court of Appeal. Of the full sample of judgments written, 11 were in civil matters and 18 were in criminal matters.
- 4.5. A single judgment, or in some cases two judgments, were written in other fields.
- 4.6. The percentage of cases in which the candidate has written judgments for the Supreme Court of Appeal is considerably lower than would have been expected, having regard to her period on the Supreme Court of Appeal bench.
- 4.6.1. A review of the cases in which the candidate sat as a member of the Supreme Court of Appeal bench demonstrates that she has been exposed to a variety of topics within different areas of civil law;
- 4.6.2. Whilst this exposure was inevitably beneficial, the relatively small number of judgments written by the candidate does not permit any empirical appraisal to be made of the range of her legal expertise; and

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- 4.6.3. In addition, there is no clear evidence of development of a field, or fields, of expertise in a particular area of civil law.
- 4.7. The candidate has written a number of judgments in criminal matters.
- 4.8. The judgment referenced by the candidate, when acting on the Constitutional Court bench in *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd* (unreported judgment of 20 April 2015, neutral citation (CCT133/14) [2015] ZACC 8, concerned the application of section 197 of the Labour Relations Act to public entities. Both the Labour Court and the Labour Appeal Court had found that the section did apply. In dismissing the appeal to the Labour Appeal Court, Davis JA had raised, en passant, the question as to whether the applicability of this section to the situation where a municipality had assumed the obligation from a previous outsourcing agreement, imposed an unacceptable financial burden on the public entity. In the judgment written for the Court by the candidate it was found that City Power was a private company performing a public service (paragraph 22) and that it was an organ of state performing public functions akin to those of a municipality (paragraph 23). The judgment went on to find that the Labour Relations Act prevailed over the Municipal Systems Act in employment matters, and that section 197 was not in conflict with sections 152 and 160 of the Constitution (paragraphs 30 and 31). The judgment of the Constitutional Court, whilst providing further clarity on the interaction between national legislation, interpreted in accordance with the Constitutional principles, did not establish any new legal principle not previously traversed.

- 4.9. In *Coughlan NO v Road Accident Fund 2015* [ZACC] 10 the candidate wrote the unanimous judgment for the Constitutional Court. The Supreme Court of Appeal had found on appeal that foster child grants were not *res inter alios acta* in the case of a child's loss of support claim against the Road Accident Fund (RAF), and that these grants were a consequence of the death of the parent, but for which the foster parents would not have claimed the grants (paragraph 19). The candidate's judgment pointed out that the Court's answer to the legal question would lay down a general principle applicable to children who had a claim for loss of support arising from the death of a parent, and who are placed under foster care including a foster child grant (paragraph 25). This general principle was not considered by the Supreme Court of Appeal.
- 4.10. The candidate commenced her analysis into whether double compensation would arise by addressing the state's constitutional obligation in terms of sections 27 and 28 of the Constitution to children in need of care, leading to an analysis of the nature and purpose of foster child grants (paragraph 33). After a careful analysis the candidate found that an award for damages for loss of support was no substitute for foster parenting and that there was no basis to deprive a child of compensation for loss of support because they are in foster care (paragraph 44). The judgment is a welcome addition to the Constitutional jurisprudence on this topic.
- 4.11. The judgment in *Coughlan N.O. v Road Accident Fund; 2015* (4) SA 1 (CC) demonstrates that the candidate does have an appreciation for the constitutional grundnorms against which national legislation falls to be

interpreted. But apart from the two Constitutional Court judgments referenced by the candidate, she has not written any judgments in the Supreme Court of Appeal which give any sense of a wider expertise in the application of Constitutional principles.

- 4.12. It is, of course, noted that the expanded jurisdiction of the Constitutional Court provides that the Court sit as an apex court in relation to all matters of law of general public import. The Court's jurisdiction is thus no longer strictly limited to Constitutional matters. It follows that the consideration of the candidate's appreciation of matters of a Constitutional nature is not the only determining factor in her application to that Court.

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

- 5.1. No information is available to indicate that the candidate is not committed to the values of the Constitution.

6. Whether any judgments have been overturned on appeal

- 6.1. Seven judgments written by the candidate that has been taken on appeal were found. Of these seven, five have been overturned on appeal and two have been upheld on appeal. The candidate has also written one CCMA award that has been successfully reviewed by the Labour Court.

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

- 7.1. The candidate practised as an attorney specialising in Labour Law and has served as a commissioner at the CCMA.
- 7.2. Since her appointment as a judge, the candidate has served in the Gauteng Local Division, Johannesburg, the Competition Appeal Court and the Supreme Court of Appeal.
- 7.3. Further, the candidate has served as an Acting Judge in the Constitutional Court.
- 7.4. The candidate has heard matters covering a wide spectrum of the law. She has primarily written judgments in criminal Law matters (totalling 44% of the candidate's written judgments).
- 7.5. The candidate has only written two Constitutional judgments.

8. The candidate's linguistic and communication skills

- 8.1. The judgments of the candidate are clearly written and well-reasoned.

9. The candidate's ability to produce judgments promptly

- 9.1. The candidate produces judgments promptly.

10. The candidate's fairness and impartiality

- 10.1. No negative comments have been received in this regard.

11. The candidate's independent mindedness

11.1. In the sample of cases heard and judgments produced by the candidate, she has never written a minority judgment. She has, in 81% of the cases she has heard, concurred with the majority judgment. In 19% of the cases heard she has written a judgment.

12. The candidate's ability to conduct court proceedings

12.1. No negative comments have been received in this regard.

13. The candidate's administrative ability

13.1. There is no reason to believe that the candidate lacks administrative abilities given her years of experience on the bench.

13.2. The candidate's involvement in the organised profession as an attorney, as a senior partner and as a member of a number of community organisations indicates that she has sufficient administrative skills to suit the position for which she is applying.

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

14.1. No negative comments have been received in this regard.

15. The candidate's judicial temperament

15.1. The candidate seems to be able to manage court proceedings well and treats all parties fairly. No negative comments have been received in this regard.

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

16.1. The candidate is involved in training aspirant judges, training newly appointed judges, developing training manuals and curricula for judges and magistrates.

16.2. The candidate is the deputy chairperson of the Steering Committee of the United Nations Development Programme on HIV, TB and Human Rights.

16.3. The candidate is involved in trial advocacy training at several universities and in the take-a-girl-child-to-work project and is also involved in educating the community on legal issues.

16.4. The candidate delivers presentations on several topics including environmental matters and child trafficking.

17. The candidate's potential

17.1. The candidate's enormous experience will stand her in good stead in the Constitutional Court.

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

18.1. The appointment of the candidate will address the gender imbalance in the Constitutional Court. Her disinclination to write judgments is a concern and does not give an adequate indication of independent thinking and productive capacity, such as to deserve appointment to the highest court of the country.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions:

Booyesen v S 2011 (1) SACR 448 (SCA)

CEO of the South African Social Security Agency N.O and Other v Cash Paymaster Services (Pty) Ltd [2011] 3 All SA 233 (SCA)

Chretien and Another v Bell [2010] 2 All SA 428 (SCA)

Commissioner for the South African Revenue Services and Others v Moresport (Pty) Ltd and Others [2009] 4 All SA 198 (SCA)

Fletcher and Another v S [2010] 2 All SA 205 (SCA)

Minister of Safety and Security v Van Der Walt and Another [2015] 1 All SA 658 (SCA)

Porritt and Another v National Director of Public Prosecutions and Others [2015] 1 All SA 169 (SCA); 2015 (1) SACR 533 (SCA)

Solidarity obo Barnard v South African Police Service 2014 (2) SA 1 (SCA)

Van der Watt v S [2010] 3 All SA 434 (SCA)

Unreported decisions:

Aberdeen International Incorporated v Simmer and Jack Mines Ltd (273/09) [2010]

Biyela v S (859/10) [2011]

City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others (CCT133/14) [2015]

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*Commissioner for South African Revenue Service v Saira Essa Productions (Pty)
Ltd and Others (162/10) [2010]*

Grigor v S (607/11) [2012]

Grove v The Road Accident Fund (74/10) [2011]

Herman v S (948/12) [2013]

Mahlase v S (255/13) [2013]