

CANDIDATE: ADVOCATE DIANE MARGARET DAVIS SC

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**COURT FOR WHICH CANDIDATE APPLIES: WESTERN CAPE
DIVISION OF THE HIGH COURT, CAPE TOWN**

1. The candidate's appropriate qualifications:

- 1.1. BA (UCT) awarded in 1985;
- 1.2. LLB (Magna Cum Laude) (UCT) awarded in 1987;
- 1.3. The candidate is, as such, appropriately qualified.

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

- 2.1. We have always been (since her admission as a member of the Cape Bar in July 1994) and remain of the view that the candidate is a fit and proper person and know of no fact or reason that may be an impediment to her permanent appointment as a judge. The candidate is known by members of the profession as capable, responsible, hardworking, thorough, and a person of the utmost integrity.
- 2.2. The candidate was born in 1965 in Umtata in the Eastern Cape Province (i.e. a South African citizen by birth). She matriculated from the Clarendon High School for Girls, in East London in 1982 with an A-aggregate.

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2.3. The candidate has the requisite tertiary qualification (LLB *Magna Cum Laude* degree awarded to her by the University of Cape Town in 1987) and, in our view, more than sufficient experience as a legal practitioner and acting judge to be permanently appointed as a judge (at the time this report was compiled the candidate was sitting as an acting judge of the Western Cape Division of the High Court, Cape Town). The details of the candidate's experience as a legal practitioner and acting judge are set out below.

2.4. To the best of our knowledge, the candidate has no criminal convictions and no complaints of unprofessional conduct have to date hereof been made against the candidate with any regulatory body of the legal profession (i.e., to the best of our knowledge neither the Cape Law Society, as it then was, at the time when the candidate was a candidate attorney and practising attorney, nor the Cape Bar, whilst practising as an advocate, have received any complaint of unprofessional conduct against the candidate).

2.5. There is, as such, no reason to find that the candidate is not fit and proper.

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

3.1. The candidate is a white woman.

3.2. While her appointment will contribute to gender representivity, it will not contribute to the racial transformation of the judiciary.

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

4.1. As part of the candidate's successful silk application she submitted a narrative in which she stated she believed she had demonstrated her commitment to transformation and the attainment of a representative bar, and to the values of the constitution, by *inter alia*.

4.1.1. transferring her knowledge and skills through participating in the advocacy training programme and involving black juniors in matters on a fee-sharing basis;

4.1.2. contributing to efforts to reform the silk application process in the interests of promoting diversity in the senior ranks of the Cape Bar;

4.1.3. promoting access to justice by devoting a significant amount of time to pro bono work; and

4.1.4. acting pro bono or as amicus curiae in public interest or human rights cases.

4.2. In particular, since 2007 the candidate served annually as part of the panel of instructors at the Cape Bar which conducts advocacy training. She lectures the pupils on insolvency practice and provides them with written notes which she updates from time to time. The candidate

regularly sits on the panel of examiners which administers oral examinations to the pupils, and has sat on the panel which interviewed applicants for pupillage.

4.3. The candidate also, following the General Council of the Bar's release in 2015 of a new silk application form and its call for comments thereon, researched the silk application process in England, Scotland, Australia and New Zealand and prepared lengthy submissions and recommendations based on her research and personal reflections regarding the situation at the Cape Bar.

4.4. The underlying theme of her submissions was the need to promote diversity in the senior ranks of the Cape Bar by broadening the pathways to promotion so as to facilitate access to senior status by talented and competent individuals who face exclusion due to factors having nothing to do with their ability. The candidate argued that recognition should be afforded to a greater range of skills, and that emphasis should be placed on the demonstrated competence of candidates, with reference to a clearly articulated set of competencies. A number of the candidate's recommendations which she put forward were adopted in the 2016 silk application form, including the statement at paragraph 45 of the guidelines that none of the criteria (apart from the 14 years domestic seniority requirement) would be treated as a threshold requirement, and the requirement that candidates submit a sample of their recent written work in order to demonstrate their competence in written advocacy.

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4.5. The candidate has also demonstrated her commitment to promoting the right of access to justice by regularly (as an advocate) taking on pro bono work. The unreported judgments of *Nedbank Limited v Lizeka Lucy Tshabe* (WCC case no. 3724/14) and *Lizeka Lucy Tshabe v Nedbank Limited* (WCC case no. 3829/15) are examples of important human rights cases (dealing with the right of access to adequate housing) where the candidate acted *pro bono* for the litigants against Nedbank Limited.

4.6. In light of the above, we are of the view that the candidate is dedicated and committed to protecting and promoting the values of the Constitution.

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

5.1. As mentioned above, the candidate was awarded a BA degree in 1985 and an LLB (*Magna Cum Laude*) degree in 1987 by the University of Cape Town, respectively.

5.2. During the period from February 1988 to July 1988, the candidate worked as a research assistant to Professor Reinhard Zimmerman at the University of Regensburg, Germany, editing text and checking Latin references to the *Corpus Iuris Civilis* and *Institutes* of Gaius in the draft of Professor Zimmerman's work which was later published as *The Law of Obligations* Juta & Co, Ltd (1990).

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- 5.3. During the period from September 1988 to March 1989, the candidate studied two semester courses at the University of Toronto in administrative law and alternative approaches to legal scholarship.
- 5.4. The candidate has continuously (save for the periods when she sat as an acting judge of the High Court of South Africa, without interruption) been practising law in South Africa since September 1989 (this is the date when she commenced her articles of clerkship). The candidate has thus demonstrated the ability to understand and apply South African law in practice for more than 29 years.
- 5.5. The candidate's fields of practice and interests as a practising advocate include administrative law and constitutional law. In July 2012, the candidate also attended the SAJEI training course for aspirant judges.
- 5.6. At the time this report was prepared the candidate has periodically sat as an acting judge of the Western Cape Division of the High Court, Cape Town, for a combined total period of 24 months. During these periods, the candidate has handed down various judgments dealing with constitutional issues and promoting the values underlying the Constitution. Examples of recent judgments handed down by the candidate dealing with constitutional issues / law are:
- 5.6.1. *Friedman v Friedman* (28 August 2019) (case no. 6664/19) (WCC) at paras 27 to 55, 30, 40 to 42 and 71 to 77;
- 5.6.2. *Luanga v Perthpark Properties Ltd* 2019 (3) SA 214 (WCC);

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5.6.3. *TC v SC* 2018 (4) SA 530 (WCC) at paras 43 – 45, 66 and 71;
and

5.6.4. *S v Kruse* 2018 (2) SACR 644 (WCC).

6. Whether any judgments have been overturned on appeal:

6.1. The following three judgments handed down by the candidate have been overturned on appeal:

6.1.1. *S v Salie* (CC 07/2013) WCC (appeal case no. 116/2017).

6.1.2. *MB Barter and Trading (Pty) Ltd v J G Asbury* (7058/07) [2012] ZAWCHC 177 (25 October 2012).

6.1.3. *Snyman v Honourable Magistrate: Folscher and Others* (6919/2012) [2013] ZAWCHC 127 (6 September 2013).

6.2. None of the judgments handed down by the candidate since October 2017 have been overturned on appeal.

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

7.1. 1986 (July – Dec) The candidate was appointed as a part-time tutor in the 1989 (May – Aug) Department of Roman Dutch Law and Private Law at UCT;

7.2. 1988 (Feb – July) The candidate worked as a research assistant to Professor Reinhard Zimmerman at the University of Regensburg, Germany, editing text and checking Latin references to the *Corpus Iuris*

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Civilis and *Institutes* of Gaius in the draft of Professor Zimmerman's work which was later published as *The Law of Obligations* Juta & Co, Ltd (1990);

- 7.3. Sept 1989 – 1991 She completed her articles of clerkship at Mallinck, Ress, Richman and Cloenberg Incorporated, Cape Town;
- 7.4. Oct 1991 She was admitted as an attorney of the then Cape of Good Hope Provincial Division;
- 7.5. March 1994 She was admitted as an advocate of the then Cape of Good Hope Provincial Division;
- 7.6. Feb – July 1994 She completed her pupillage at the Cape Bar under the mentorship of Advocate Sven Olivier (now SC);
- 7.7. July 1994 She passed the General Council of the Bar examinations and became a member of the Cape Bar;
- 7.8. July 1994 She practises as an advocate at the Cape Bar; present date;
- 7.9. 2010 She became an associate of the Association of Arbitrators (Southern Africa) (“AASA”);
- 7.10. 2010 – 2011 She became an accredited mediator at the Africa Centre for Dispute Resolution (“ACDS”);
- 7.11. 2011 She completed the AASA certificate course in arbitration;
- 7.12. 2012 She became a member of the Equillore Panel of Mediators;

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- 7.13. July 2012 She attended SAJEI training course for aspirant judges;
- 7.14. Oct 2012 She was appointed as an acting judge of the High Court; Sept 2013;
- 7.15. 2014 She received mediation accreditation from ACDS, Conflict Dynamics (SA) and Centre for Effective Dispute Resolution (UK);
- 7.16. Oct 2016 She was recommended by the Cape Bar for the conferral of Silk/ Senior Counsel status;
- 7.17. March 2018 She received her letters patent from the President formally conferring her with Silk status;
- 7.18. Oct 2017 She was appointed as an acting judge of the High Court;
June 2019
- 7.19. July 2019 She was appointed as an acting judge of the High Court; Sep 2019.

8. The candidate's linguistic and communication skills:

- 8.1. The candidate has exceptional linguistic and communication skills in English. For example:
 - 8.1.1. during 1986 – 1987, the candidate served on the editorial board of *Responsa Meridiana*, an annual law review published by the students of the Universities of Stellenbosch and Cape Town; and

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8.1.2. during 1987, the candidate wrote an essay titled “The Legal Position of the Embryo In Vitro in South African Law” which was published in (1987) 5-3 *Responsa Meridiana* 173.

8.2. The candidate is also capable of writing and communicating in Afrikaans.

8.3. Save for Afrikaans, the candidate is not known to have any proficiency in any other African languages.

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

9.1. The candidate is known to hand down her judgments promptly.

10. The candidate’s fairness and impartiality:

10.1. The candidate is known to always be fair and impartial as an arbitrator, mediator and acting judge.

11. The candidate’s independent mindedness:

11.1. The candidate has demonstrated her independent mindedness in the various reported and unreported judgments she has handed down over the years.

11.2. The candidate’s abovementioned report / submissions to the General Council of the Bar in January 2016 which contributed to promoting diversity in the senior ranks of the Cape Bar is also indicative of her independent mindedness and commitment to transformation.

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

12.1. The candidate has proven her ability to conduct court proceedings during her various appointments as an acting judge.

12.2. The candidate is well respected amongst the members of the legal profession and able to be authoritative (if needed) in order to protect the dignity of the judiciary.

13. The candidate's administrative ability:

13.1. We are not able to comment on the candidate's administrative abilities in her capacity as an acting judge.

13.2. The candidate has, however, efficiently served as a member of the Pupillage Committee and been actively involved in the training of pupil advocates at the Cape Bar for many years.

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

14.1. The candidate is well respected amongst the members of the legal profession and known to have the utmost integrity and ethical behaviour.

15. The candidate's judicial temperament:

15.1. The candidate is known to respond appropriately to arguments presented and submissions made to her from counsel. Her judicial temperament can also be described as rational and appropriate.

15.2. She is considered to have a sound judicial temperament.

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

16.1. The candidate has through her conduct both as a practising advocate and acting judge demonstrated her commitment to human rights and the advancement of the rights and values of the South African community. She has over the years acted *pro bono* or as *amicus curiae* in various public interest or human rights cases. For example:

16.1.1. In 2011, the candidate appeared as *amicus curiae* at the request of the General Council of the Bar in the matter of Standard Bank of South Africa Ltd v Bekker 2011 (6) SA 111 (WCC). The case concerned the effect of a recent amendment to rule 46(1)(a) of the Uniform Rules of Court regarding execution against immovable properties. A Full Court was convened to consider the matter and to make an authoritative pronouncement on what was required before a Court could authorise the issue of a writ of execution against an immovable property which served as the primary residence of a debtor. In particular, the Court was

required to consider the import and effect of the decision of the Constitutional Court in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) regarding execution against immovable property which serves as the primary residence of the debtor. The Bekker case was important from a constitutional perspective, in that it concerned the right of access to adequate housing. The judgment of the Full Court in Bekker has served to shape the practice and procedure at the time in all matters in the Western Cape Province involving execution against residential properties.

16.1.2. In 2014, the candidate acted pro bono at the request of the Legal Resources Centre, Cape Town, in the matter of *S A Homeloans (Pty) Ltd v C F Coetzee and Others* (WCC A100/2014). In this matter the candidate represented a financially distressed widow in an appeal against the decision of a magistrate on whether or not the death of a spouse married in community of property has the effect of automatically terminating debt review proceedings initiated by both spouses. The magistrate held that it did not, and SA Homeloans appealed this decision, seeking to execute against the respondent's home in order to obtain immediate payment of the full balance owing on the mortgage loan instead of being forced to accept the instalments ordered by the magistrate in terms of the debt review provisions of the National Credit Act. On the strength of the written heads of argument prepared by the

candidate and Michael Bishop, the appellant capitulated and entered into a favourable settlement with the respondent in terms whereof she was permitted to continue making payments as ordered in terms of the debt review until she received a pension pay-out from which she undertook to settle the mortgage loan.

- 16.1.3. In 2015, the candidate accepted a pro bono brief from Lawyers for Human Rights, Cape Town, to prepare and bring an application on behalf of Sonke Gender Justice to have the sections of the Correctional Services Act pertaining to the Judicial Inspectorate for Correctional Services declared unconstitutional, on the grounds that the legislation does not confer an adequate degree of institutional independence on the inspectorate to enable it to function credibly and effectively as a “watchdog” for the Department of Correctional Services. The case has important implications for prison oversight and the protection of the human rights of inmates in South Africa.

17. The candidate’s potential:

- 17.1. The candidate’s performance as an acting judge and commitment to transformation demonstrate that she has the potential to be an exceptional judge.

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

18.1. The candidate is a woman and her appointment will send a positive message to the community at large.

18.2. The candidate's appointment would instil a sense of confidence in the community at large. She possesses the necessary characteristics, experience and commitment to the Constitution, Human Rights and transformation. Her lifelong dedication to the development of South African law makes her a worthy and deserving candidate for the appointment of such a prestigious office.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Manwood Underwriters (Pty) Ltd and others v Old Mutual Life Assurance Company (South Africa) Limited [2013] 1 All SA 701 (WCC)

Retmil Financial Services (Pty) Ltd v Sanlam Life Insurance Company Ltd and others [2013] 3 All SA 337 (WCC)

Alderbaran (Pty) Ltd and Another v Bouwer and Others [2018] 3 All SA 71 (WCC);
2018 (5) SA 215 (WCC)

TC v SC 2018 (4) 530 (WCC)

Kruse v S 2018 (2) SACR 644 (WCC)

Luanga v Perthpark Properties Ltd 2019 (3) SA 214 (WCC)

Unreported Decision

S v Philander (CC 53/2012) WCC

S v Salie (CC 07/2013) WCC

Konsult One CC v Strategy Partners (Pty) Limited [2013] JOL 30206 WCC

Absa Bank v Nicholas and another [2013] JOL 30256 (WCC)

Retmil Financial Services (Pty) Ltd v Sanlam Life Insurance Company Ltd and others [2013] JOL 30346 (WCC)

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Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Company Limited
[2013] JOL 30953 (WCC)

S v Bartlett & Others (CC 24/2017) WCC

S v Nkololo (CC 61/2017) WCC

S v Murphy (CC 27/2018) WCC

Friedman v Friedman (28 August 2019) (case no. 6664/19) WCC

Full Court Appeals

Kotze v RAF A415/2012 (26 July 2013) (with Louw J and Savage AJ)

Burns v S A414/2016 (27 October 2017) (with Erasmus and Parker JJ)

Otto v State A280/2018 (29 January 2019) (with Gamble and Parker JJ)

Dass v RAF A106/2018 (31 January 2019) (with Erasmus and Dolamo JJ)

Bester v Nduna A337/2018 (14 June 2019) (with Salie-Hlophe and Papier JJ)

Judgments upheld on appeal:

Konsult One CC v Strategy Partners (Pty) Limited [(2607/10) [2013] ZAWCHC 55
(19 March 2013)

Kotze v RAF (SCA case no. 20587/2015)

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Judgments overturned on appeal:

S v Salie (CC 07/2013) WCC (appeal case no. 116/2017)

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Snyman v Honourable Magistrate: Folscher and Others (6919/2012) [2013] ZAWCHC 127 (6 September 2013)

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