

**APPLICANT: MS LOKWALO ROSE MOGWERA**

**COURT FOR WHICH APPLICANT APPLIES: HIGH COURT:  
KWAZULU-NATAL DIVISION**

**1 The candidate's appropriate qualifications**

1.1 The candidate holds the following qualifications:

1.1.1 Bachelor of Law (B. Juris);

1.1.2 Bachelor of Laws (LLB);

1.1.3 Master in Laws (LLM);

1.1.4 The candidate studied at the University of Bophuthatswana, University of the North West and the Nelson Mandela Metropolitan University;

1.2 The candidate is appropriately qualified.

**2 Whether the candidate is a fit and proper person**

2.1 The candidate has been a Regional Magistrate since 2004 up to the present time.

2.2 The candidate has acted as a Judge in the High Court for four sessions. She sat mostly in the criminal courts but also dealt with a few civil appeals.

2.3 In the JSC's questionnaire under paragraph 9.4, the candidate was asked whether any of her judgments had been taken on appeal to which she

replied that there were none. However, one of her judgments, the matter of *State v Khumalo*, was taken on appeal on sentence to the Full Bench of the KwaZulu-Natal High Court, Pietermaritzburg. Her sentence of life imprisonment imposed on the accused was set aside by the Full Bench and substituted with an order that the accused undergo twenty years' imprisonment. The Full Bench decision is reported in the criminal law reports, the citation of which is *S v Khumalo* 2013 (1) SACR 96 (KZP).

2.4 The candidate's conviction and sentence of the accused in the case of *State v Thembinkosi David Mpulo* (AR No.266/15, Pietermaritzburg) where she convicted the accused of one count of murder and three counts of attempted murder and sentenced him to undergo twelve years imprisonment in respect of the murder and three years in respect of the counts of attempted murder, was taken on appeal to the High Court. Both the conviction and sentence were set aside on the basis that the candidate did not enquire from the accused whether he required to be tried with assessors as provided for in Section 93 of the Magistrates' Court Act. On appeal both the conviction and sentence imposed were set aside.

2.5 We have been made aware of two judgments which have been reserved by the candidate whilst she presided in the Regional Court. The first case is *Saras Perumal v Hemelene Chetty* (PMB/RC 1157/19). Written argument on the content of the plaintiff's claim had been handed up on 16 October 2019. Some five months have passed and judgment is still being awaited by the parties. The second case is *RW Koningkramer v CB Chamblor* (PMBRC 1128/15). The trial in this matter was

completed on 24 October 2018. More than 16 months has passed and the parties are still awaiting judgment.

2.6 We have received complaints from some members of the Bar that the candidate, whilst presiding as a Regional Magistrate, frequently does not commence court proceedings on time, often making the parties and their legal representatives wait for her for long periods.

2.7 We have been advised by some of our members that the candidate, whilst presiding as a Regional Magistrate, often absents herself from work. This despite the fact that in the JSC's questionnaire, the candidate does not appear to have any health issues.

2.8 These issues are relevant to whether the candidate is a fit and proper person to hold the position of Judge in the High Court.

### **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.

3.2 The candidate's appointment would help to transform the racial and gender composition of the bench.

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

4.1 Under **SECTION 2: LEGAL BACKGROUND**, apart from mentioning that her career progressed from a clerk in the Department of Justice to a Regional Magistrate and that she acted as a Judge for certain sessions doing mostly criminal work, the other enquiries posed

were either met with a negative responsive or a response of ‘*not applicable*’.

4.2 The candidate’s statement in paragraph 10 of the questionnaire that she ensures that her judgments are delivered timeously is not borne out by the aforementioned two reserved judgments which are considerably overdue.

4.3 The candidate has attached five judgments to her application.

4.3.1 The first was an appeal from the Magistrates Court to the High Court which challenged the decision of the Magistrate absolving the defendant from the instance at the close of the plaintiff’s case. The candidate, sitting with Madam Justice Poyo-Dlwati J upheld the appeal.

4.3.2 The second was a criminal appeal to the High Court from the Magistrates’ Court relating to the sentence imposed by the magistrate. The appeal was upheld, and the sentence of three years’ imprisonment imposed by the magistrate was set aside and substituted with a fine which was wholly suspended for five years. The appellants had been convicted of possession of drugs. Acting Judge Barnard AJ concurred with the candidate’s decision.

4.3.3 The third was a criminal trial whilst the candidate sat in the High Court, Pietermaritzburg. The candidate sat with two assessors and they found both accused guilty of murder and housebreaking with intent to rob and were sentenced to terms of imprisonment.

4.3.4 The fourth was an action in which the candidate presided over a trial relating to the dissolution of a customary marriage. The candidate found for the plaintiff and dissolved the bonds of marriage existing between them.

4.3.5 The fifth was a civil matter relating to the rescission of an order granted on the issue of liability in an unlawful arrest and malicious prosecution of the plaintiff. She granted the application for rescission.

4.4 In none of the judgments did any constitutional points arise. Be that as it may, the judgments were properly articulated with respect to the facts and the law.

4.5 Having regard to her professional profile which inter alia states that she *'has been able to amass a great wealth of experience, knowledge and skills in adjudicating both criminal and civil matters...evident from the judgments which she has produced'*, one would have expected her to attach more of her judgments in order to properly and fully assess her knowledge of the law including constitutional law. We may mention in the latter regard that the constitutional issue of fair trial rights often arise in the criminal context.

4.6 We repeat that there is a concern that the candidate does not have the requisite civil experience to occupy the High Court Bench.

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

5.1 As mentioned above, the judgments put up by the candidate do not pertinently raise any constitutional issues.

5.2 There is no reason to doubt the candidate's commitment to the values of the Constitution.

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

6.1 We refer to the above-mentioned two judgments which were reversed on appeal.

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

7.1 Apart from being a prosecutor, magistrate, regional magistrate and acting as a judge for the sessions mentioned, the candidate, as appears from the answers furnished in the JSC's questionnaire, does not appear to have any other professional experience.

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

8.1 The candidate lists the languages in which she is able to communicate as being English, Afrikaans and Setswana.

8.2 All the candidate's judgments have been penned in English and have been well structured. Her English is good.

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

9.1 No adverse comments have been received.

## **10 The candidate's fairness and impartiality**

10.1 No adverse comments have been received.

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

11.1 There is nothing to suggest in the judgments which have been put up by the candidate, that she was partial to any of the parties. All the cases were run of the mill and did not have complex and difficult factual or legal issues.

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

12.1 The candidate has acted as a magistrate and a regional magistrate over a long period of time and has also acted as a judge in the High Court. There is no reason to doubt the candidate's ability to conduct court proceedings. There is a concern with the complaints that she does not start her court on time.

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

13.1 In her professional profile the candidate lists her key roles and accountabilities to be the following:

13.1.1 Adjudicating criminal matters and giving rulings in criminal trials.

13.1.2 Adjudicating civil matters and making appropriate orders related thereto.

13.1.3 Adjudicating divorce matters and related applications.

13.1.4 Hearing argument related to applications and giving rulings in the Motion Court.

13.1.5 Preparing written judgments to be delivered in court.

- 13.1.6 Attending meetings aimed at enhancing effective and efficient case flow management.
- 13.1.7 Doing administrative duties such as to complete statistics for purposes of accountability.
- 13.1.8 Conducting meetings with court staff to facilitate case flow management in her court.
- 13.1.9 Attending judicial training courses and workshops so as to keep abreast with legal developments.
- 13.2 Accordingly, we are of the view that the candidate has the necessary administrative skills.

#### **14 The candidate's reputation for integrity and ethical behaviour**

- 14.1 Save for the concerns referred to above and the complaints received, we do not express any negative comments on the candidate's integrity and ethical behaviour.

#### **15 The candidate's judicial temperament**

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

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

- 16.1 The candidate in her professional profile states that she attended and facilitated in many training workshops hosted by the Law, Race and Gender Research Unit and organised and facilitated in a training

workshop for Magistrates in Port Elizabeth on understanding issues relating to HIV/AIDS.

16.2 Apart from having been a member of JOASA from 2002 to 2005 and ARMSA from 2005 to date, the candidate, from the questions posed in the questionnaire, does not appear to have belonged to any other human rights organisations.

**17 The candidate's potential**

17.1 The candidate has potential but before taking up a position in the High Court Bench, we are of the respectful view that the candidate requires more experience in civil law.

17.2 Her reservations of judgment as alluded to above, is also a serious concern.

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

18.1 The candidate is a black woman and her appointment would be in line with the need for racial and gender transformation of the courts. However, this objective should not be sought to be achieved at the expense of other considerations such as the need for judicial experience in civil matters including constitutional law, delays in handing down judgments, timeously commencing court proceedings and absenteeism from court.

18.2 In addition, concerns have been raised regarding the candidate's lack of experience in civil law – she herself admits that she has mostly been

exposed to criminal law – and her failure to take the JSC into her confidence on matters pertaining to whether she is fit and proper to hold the position of Judge of the High Court.