

**APPLICANT: JUDGE ZEENAT CARELSE**

**COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL**

**1. The candidate's appropriate qualifications:**

1.1. The candidate holds two degrees: a BA and an LLB, both from the then University of Durban, Westville.

1.2. According to her CV, she has also completed the attorney's practice and procedure examination.

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

2.1. The candidate has been a judge of the High Court since 2009, and has since then – from time to time – acted in the Land Claims Court. She has also acted in the SCA: first, from 1 October 2018 until March 2019; and now, since 1 December 2020 (until 31 May 2021).

2.2. In all this time, the candidate has faced only a single complaint to the JSC. That complaint was dismissed.

2.3. In light of this, as well as us not being aware of any adverse comments received in respect of this application, we can only conclude that the candidate is a fit and proper person.

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

3.1. As a black (coloured) woman, the candidate's appointment would indeed help to reflect the racial and gender composition of South

Africa. Of the 22 permanent judges on the SCA, only eight (36%) are women. Of the seven black women, six are African, and one is of Indian descent.

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

4.1. The candidate appears to have significant judicial and other relevant experience in numerous areas of the law, including both civil and criminal matters. Given her length of time on the bench, and the wide range of issues considered in her judgments, this appears to have translated into a broad knowledge of the law.

4.2. A number of her judgments, including in her capacity as an acting judge of the Land Claims Court, indicate a particular competence in constitutional law.

4.3. The candidate reports that only two of her judgments have, to date, been overturned on appeal. One of these, a judgment in which she concurred dealing with the interpretation of contracts, raises some concerns. (This is addressed in the next section).

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

5.1. Many of the candidate's judgments indicate a strong commitment to the values of the Constitution, including a commitment to respecting, protecting, and promoting the rights in the Bill of Rights, as well as the rule of law and the independence of the judiciary.

5.2. This commitment is also evident in the candidate's reflection (in her application) on her most significant contribution to the law and the pursuit of justice in South Africa, and in particular, on the choice of judgments she presented as evidence of her commitment.

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

- 6.1. The candidate lists two judgments that were overturned on appeal.
- 6.2. Given the basis upon which the first judgment (*Areva v Eskom*) was overturned by the Constitutional Court (on standing), and the fact that the SCA had upheld the original High Court judgment on that very issue, no adverse conclusions should be drawn.
- 6.3. The same cannot be said of the second judgment (*SAFA v Fli-Afrika*), a full court decision in respect of which the candidate concurred, but was not the writing judge. The SCA's decision shows that the judgment was flawed, with the full court having misapplied *Endumeni* in interpreting the contract at issue.

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

- 7.1. In addition to ±11.5 years as a permanent judge, including regular secondments to the Land Claims Court and two acting stints on the SCA, the candidate has the following professional experience:
- 7.1.1. four years as a prosecutor (1994 to 1998);
- 7.1.2. ten years as a magistrate (1998 to 2008), including the last four as a regional magistrate;
- 7.1.3. one year as an acting judge (2008); and
- 7.1.4. just under six months as the acting DJP in the Gauteng Local Division (June through November 2020).
- 7.2. The nature and extent of her experience suggests that she may not yet have accumulated the experience required for elevation to the SCA. It would have been expected that due to the duration of her

appointment as a Judge of the High Court (11 years), she would have written more judgments.

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

8.1. There is nothing in the candidate's application or judgments to suggest that she is lacking the linguistic and communication skills required of a judge of appeal.

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

9.1. As of 27 November 2020, the candidate had only one reserved judgment, in respect of a Land Claims Court matter that was heard on 13 November 2020. The judgment does not yet appear to have been delivered.<sup>1</sup>

9.2. Despite this, a consideration of the candidate's judgments shows a clear ability on her part to produce judgments promptly.

**10. The candidate's fairness and impartiality:**

10.1. No adverse comments have been received in this regard.

10.2. The candidate's judgments strongly suggest that she is both fair and impartial.

**11. The candidate's independent mindedness:**

11.1. No adverse comments have been received in this regard.

11.2. The candidate's judgments strongly suggest that she is independent minded, including in particular in *Florence*, a complex case in

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<sup>1</sup> The judgment is not reflected on <https://www.justice.gov.za/lcc/judgments.html>

respect of which she was finally vindicated by the Constitutional Court.

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

12.1. The candidate has over two decades' experience as a judicial officer, during which time she would have presided over large numbers of matters, including as the writing judge in full bench/court matters.

12.2. Over the entire period, she has faced a single complaint, which was dismissed. There is thus every reason to believe that the candidate has the ability to conduct court proceedings appropriately.

**13. The candidate's administrative ability:**

13.1. The ability to deliver high quality judgments on time suggests strong administrative ability; so too does being called upon to act as DJP in the busiest division in the country, and being able to move between the High Court and the Land Claims Court with apparent ease.

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

14.1. No adverse comments have been received in this regard. Insofar as the candidate's judgments have been taken on appeal, there is nothing in the appellate decisions even to suggest her integrity and/or ethics have ever been compromised.

**15. The candidate's judicial temperament:**

15.1. No adverse comments have been received in this regard. No concerns appear from the judgments we have considered.

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

16.1. A consideration of many of her judgments, including in particular those handed down in the Land Claims Court, indicate a strong commitment to human rights. Her application form and CV both show a person who has remained in touch with the values and needs of the type of community from which she comes.

**17. The candidate's potential:**

17.1. While the candidate shows great potential for elevation, we are of the view that despite the length of time served as a judge of the High Court, she may not be quite ready to be appointed to the SCA in view of the low number of the judgments delivered in that time that have been reported.

17.2. Such an appointment would also deprive the Land Claims Court of an experienced judge steeped in its jurisprudence.

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

18.1. The candidate's appointment would send a message that there is no single career path to a seat on the country's highest courts, and that prosecutors and magistrates may be well-placed to be appointed to serve on superior courts. It would also send a message that there is place on our courts for all committed to upholding and advancing the values of the Constitution.

## **ANNEXURE: LIST OF JUDGMENTS CONSIDERED**

### **Reported decisions:**

*CDH Invest NV v Petrotank South Africa (Pty) Ltd and Others* 2019 (4) SA 436 (SCA)

*S v Thobela* 2020 (2) SACR 222 (GJ)

*Khanye v The State* 2020 (2) SACR 399 (GJ)

*NM v Presiding Officer of Children's Court, Krugersdorp and Others* 2013 (4) SA 379 (GSJ)

### **Unreported decisions:**

*Emantanjeni Community v Commission on Restitution of Land Rights and Others* (LCC 17/2018) [2019] ZALCC 31 (8 November 2019)

*C Wobo Minor (I C) v Passenger Rail Agency of South Africa* (8283/2018) [2019] ZAGPJHC 205 (28 June 2019)

*Juna Trading DMCC v We R the Stars Trading and Projects CC* (A5034/2018) [2019] ZAGPJHC 541 (10 June 2019)

*Stow v Regional Magistrate PE NO and Others; Meyer v Cooney NO and Others* (911/2017; 047/2018) [2018] ZASCA 186 (12 December 2018)

*Wales v Myburgh* (2017/16776) [2018] ZAGPJHC 505 (31 July 2018)

*BMW South Africa (Pty) Ltd v Commissioner for the South African Revenue Service* (A553/16) [2018] ZAGPJHC 720 (28 June 2018)

*Ntozini and Others v African National Congress and Others* (18798/2018) [2018] ZAGPJHC 415 (25 June 2018)

*Public Servants Association v South African Revenue Services* [2018] ZAGPJHC 416 (22 June 2018)

*Vermaak v Road Accident Fund* (16/04133) [2017] ZAGPJHC 427 (15 December 2017)

*Ntuli and Another v Taag Trust and Others* (LCC98/2017) [2017] ZALCC 20 (3 November 2017)

*V v Road Accident Fund* (16/04133) [2017] ZAGPJHC 424 (16 February 2017)

*Hencorel & Partners v Gale Consulting* (35641/2012) [2016] ZAGPPHC 1238 (7 December 2016)

*Mpume v Drakenstein Municipality and Another* (128/2014) [2016] ZALCC 11 (24 June 2016)

*Westinghouse Electric Belgium v Eskom Holdings* (2014/35650) [2015] ZAGPJHC 315 (19 May 2015)

*Van Den Berg N.O. v Road Accident Fund* (10528/2011) [2014] ZAGPPHC 66 (17 February 2014)

*Pietersen v Van Deventer* (LCC 158/2009) [2010] ZALCC 5 (25 March 2010)

**Judgments upheld on appeal:**

*Florence (Dodgen) v Broadcount Investments (Pty) Ltd and Others* [2012] ZALCC 11 (5 June 2012)

*Mabotwane Security Services CC v Pikitup Soc (Pty) Ltd and Others* (1027/2018) [2019] ZASCA 164 (29 November 2019)

*BMW South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service* 2018 JDR 1830 (GJ)

*Du Plooy v The State* (940/13) [2014] ZASCA 200 (28 November 2014))

*Khumalo v The State* (62/17) [2017] ZASCA 53 (18 May 2017))

**Judgments overturned on appeal:**

*Fli-Afrika Travel (Pty) Ltd v South African Football Association* (A5024/17, 2013/12184) [2018] ZAGPJHC 474 (24 August 2018)

*Areva NP Incorporated in France v Eskom Holdings Soc Limited and Others* 2017 (6) SA 621 (CC)