

APPLICANT: ALAN CHRISTOPHER DODSON

COURT FOR WHICH APPLICANT APPLIES: CONSTITUTIONAL COURT

1. The candidate's appropriate qualifications

1.1 The candidate has the following degrees and qualifications:

1.1.1. B.Com (University of KwaZulu-Natal, Pietermaritzburg) 1982

1.1.2. LLB Cum Laude (University of KwaZulu-Natal, Pietermaritzburg) 1984

1.1.3. LLM (University of Cambridge) 1988

1.1.4. Post graduate diploma in Tax Law (University of Cape Town), 1992

1.2 The candidate's academic qualifications, together with his legal experience in the area of human rights in general and the restitution of land rights in particular, spanning a period of 35 years period, appropriately qualifies the candidate for appointment.

1.3 The candidate is not currently serving as a judge. While it has become the norm for candidates for appointment to the Constitutional Court to be sitting judges, it is not a constitutional requirement. Section 174(5) of the Constitution requires that "*at all times at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court*". Given the current composition of the Constitutional Court, this requirement is met.

- 1.4 The candidate was also previously a judge, appointed for a five-year non-renewable term, as a member of the first Land Claims Court between 1995 to 2000. In addition to this appointment, the candidate has *quasi-judicial* experience. The candidate served as the chairperson: of the Housing and Property Claims Commission, established by the United Nation Human Settlements Programme (UN Habitat) in Kosovo, from 2000 to 2007. The candidate has served as both the vice-chair (2006 to 2011) and the chairperson (2011 to date) of the Independent Regulatory Board for Auditors' Disciplinary Committee. The candidate has served as an acting judge on 6 occasions in the past 8 years. The candidate has thus served either in a judicial capacity or *quasi-judicial* capacity for an uninterrupted period of 25 years.
- 1.5 The candidate has the necessary judicial experience to qualify him for appointment to the Constitutional Court.

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

- 2.1 There is nothing in the candidate's application or to the reviewers' knowledge that suggests that the candidate is not a fit and proper person. The candidate discloses a military criminal record for refusal to obey an order to conduct armed patrols in townships during state of emergency in the mid 1980's, when he was called up to compulsory military camp with the South African Defence Force. The candidate discloses that the refusal was based on political and conscientious reasons.

2.2 A review of the candidate's judgments and the information in the public domain provide no indication that the candidate is unfit for the position applied for.

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 male.

3.2 There are currently only nine permanent members of the Constitutional Court (five men and four women, not one of whom is white). The appointment of the candidate would not adversely disturb the balance of the racial or gender composition of the bench.

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

4.1 The candidate's legal practice has been predominantly, though not exclusively, in the area of human rights and land restitution. In addition, the candidate's practice includes matters relating to environmental and labour law. The reported cases the candidate records as the most significant, where he appeared either as counsel or the instructing attorney, are those dealing with all aspects of the enforcement of human rights and constitutional obligations.

4.2 The candidate's knowledge of the law, as reflected in his judgments, show a deep understanding of the law pertaining to each issue placed before him.

4.3 The candidate has an extensive knowledge of the law, including constitutional law and he has an ability to succinctly summarise the relevant facts, identify the law and properly and correctly apply the facts to the law, then reaching a correct finding in both fact and law.

- 4.4 The candidate's knowledge of the Constitution is interwoven in his dispensing of justice. His judgments, more particularly those handed down in his capacity as a judge of the Land Claims Court, tease out an interpretation of the legislation within the prism of the constitution, to give effect to rights enshrined in the constitutional and advance land restitution.
- 4.5 The candidate's judgments reflect an understanding of both the procedural and substantive law, which extends to areas beyond his area of expertise.
- 4.6 Even in matters of the commercial substantive law, the candidate uses the opportunity to develop the common law, commensurate with the Constitution. For example, in *Airports Company South Africa Ltd v Airport Bookshop (Pty) Ltd t/a Exclusive Books* 2016(1) SA 473 (GJ), the candidate carefully analysed the requirements for a valid cancellation of a contract. While the candidate found there had not been a valid cancellation of the contract, the candidate did not shy away from dealing with the constitutional law defence of a collateral challenge raised by the respondent. The candidate made a careful analysis of the applicable authority in developing the common law in the area of contract law. The appeal against the decision was dismissed by the Supreme Court of Appeal. The SCA chose not to address the question of the collateral challenge given its decision that there had not been a valid cancellation of contract.
- 4.7 The candidate has published widely in the areas of human rights, environmental law and restitution of land. The candidate has presented papers at numerous conference and workshops. These

publications and presentations display the candidate's deep knowledge of the law, in particular in the area of land restitution.

- 4.8 The reviewers were not able to locate any published decisions of the candidate as vice-chair and chair of the Independent Regulatory Board of Auditor's Disciplinary Committee, which adjudicates enquiries into the conduct of auditors because these decisions are confidential.
- 4.9 The reviewers have not consequently been able to consider the reasoning of the candidate in these IRBA matters.
- 4.10 The reviewers were able to locate a review of a decision of the candidate. In *Du Plessis v Independent Regulatory Board for Auditors and others* [2017] 3 All SA 137 (WCC), the court refused to review and set aside the candidate's decision that the applicant breached the Auditor Professions Act on grounds of procedural unfairness in that the applicant was convicted on a matter that the charge had not called her to meet. The applicant's ground of review was premised on evidence that she had herself introduced in evidence in chief in the inquiry. This decision reflects the candidate's sound understanding of both the procedural and substantive law.
- 4.11 The candidate's adjudicative role as chair of the IRBA's Disciplinary Committee indicates his capacity to deal with commercial matters and, most importantly, matters of fraud and corruption. This is significant at a time when audit firms are subject to intense judicial and public scrutiny over their role in enabling corrupt practices. It is not insignificant that the candidate has this nature of commercial

experience given the role of the Constitutional Court as the apex court.

- 4.12 The reviewers were also unable to locate the decisions handed down by the candidate in his capacity as chairperson of the UN Housing and Property Claims Commission for the Area Kosova, established by the United Nations Human Settlements Programme.

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

- 5.1 The candidate's commitment to the constitution is reflected not only in the matters he has dealt with in his professional career, but also the candidate's participation in community organisations which seek to give real and lived expression to rights entrenched under the constitution.
- 5.2 The candidate's judgments as a judge in the Land Claims Court dealt specifically with reference to the property clause (25 of the Constitution). The decisions of the candidate during his tenure as a judge are seminal judgments of that Court and continue to be applied and upheld by the Supreme Court and the Constitutional Court. The candidate's decision in *Zulu and Others v Van Rensburg* 1996(4) SA 1236 (LCC) was approved by the Supreme Court in *Ngcobo and Others v Salimba CC; Ngcobo and Others v Van Rensburg* [1999] 2 All SA 491 (A).
- 5.3 The candidate has held various positions with non-governmental organisations dealing with community, land and development related issues. The candidate has served as a board member of both the Surplus People's Project (which deals with forced removals, housing and development related issues affecting the poor) and a trustee of

the Richtersveld Community Trust (which allocates funds for education of young persons in the Richtersveld). The candidates' commitment to the Constitution is part of his personal ethos. The candidate's entire professional career displays a genuine and fundamental commitment to the values of the Constitution.

6. Whether any judgments have been overturned on appeal

- 6.1 The candidate's judgments are rarely overturned on appeal. The candidate refers to one judgment where he sat as an assessor in the Labour Appeal Court and concurred with the majority decision of Farlam J (as he then was). That decision (*Council for Scientific and Industrial Researchers v Fijen* 1996(2) SA 1 (A)) was overturned on appeal.
- 6.2 The reviewers have been unable to locate any other judgments which were overruled on appeal.
- 6.3 The candidate's judgements have been considered by other courts as set out below.
- 6.4 The full bench in *Benson and Another v Standard Bank of South Africa (Pty) Ltd and Others* 2019(5) SA 152 (GJ), disagreed with the candidate's judgment in *Kgomo and Another v Standard Bank of South Africa* 2016(2) SA 184 (GP) in relation to the implications to serve notices required under the National Credit Act.
- 6.5 The candidate's test on what constitutes racial discriminatory laws and practices for the purpose of Section 25(7) of the Constitution, laid down in the decision of *Minister of Land Affairs of the Republic of South Africa and Another v Slamdien and Others* 1999(4) BCLR

415 (LCC) was rejected by the Constitutional Court in *Alexkor Ltd and Another v Richtersveld Community and Others* 2004(5) SA 460 (CC).

- 6.6 Juta Law Reports incorrectly reflect that the judgment of the candidate in the matter of *Bondev Midrand (Pty) Limited v Rasalanavho and Others* (47616/2014) [2015] ZAGPPHC 538 (10 June 2015) was criticised. On the contrary, the judgment was upheld in both an application for leave to appeal and by the Court of Appeal hearing a similar matter, *Bondev Midrand (Pty) Ltd v Puling and another* and a similar case 2017 (6) SA 373 (SCA)
- 6.7 The candidate's decisions as a judge of the Land Claims Court remain authoritative decisions, particularly in the area of land restitution. For example, the decision of *Farjas (Pty) Ltd and Another v The Regional Claims Commissioner, KwaZulu-Natal*, 1998(2) SA 900 (LCC), is considered by the Land Claims Court as authoritative in the right to administrative justice in the decisions of *Dew Crisp Properties (Pty) Ltd v Regional Land Claims Commissioner, Gauteng Province and Another* [2017] ZALCC 23 (27 September 2017); *Blue Horison Investments 10 (Pty) Ltd and Another v Regional Land Claims Commissioner, Mpumalanga and Another* [2012] ZALCC 18 (30 January 2012); *Mahlangu NO v Minister of Land Affairs and Others* ZASCA 74 (14 September 2004).
- 6.8 Similarly, the other decisions the candidate refers to as his most significant in his capacity as a *Land Claims Court judge*, namely *Chief Nchabeleng v Chief Phasha* 1998(3) SA 578 (LCC); *Hlatshwayo and Others v Hein* 1999(2) SA 834 (LCC); *Minister of*

Land Affairs and Another v Slamdien 1999(4) BCLR 413 (LCC) remain authoritative decisions referred to by not only the Land Claims Court, but also Appeal Courts.

6.9 The candidate's judgments in the area of land reform have been analysed and considered by Appeal Courts. While the Appeal Courts may not always have agreed with his decisions, his clear analysis of the legal issues reflected in his judgments have added to the body of knowledge, particularly in the area of land reform.

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

7.1 The candidate has, by virtue of his vast legal experience as an attorney, a judge of the Land Claims Court, a practising attorney, a director of the constitutional litigation unit for the Legal Resources Centre, an author of academic publications and the presentation of academic papers, and extensive and varied experience in the law.

7.2 The candidate has handed down an extensive number of judgments in his judicial capacity. The reviewers have limited themselves to the published decision of the candidate in his capacity as a judge of the Labour Court and as an acting judge of the High Court and the Labour Court.

7.3 The reviewers have not considered the decisions of the UN Housing and Property Claims Commission for the area of Kosovo, which were written by or settled by the candidate in his capacity of chairperson of that commission. The candidate wrote or settled these decisions (over 29 000 during a period of time, when the candidate was a practising advocate). The disciplinary decisions of Independent Regulatory Board of Auditors are confidential. The reviewers have

not been able to consider the reasoning of the candidate in these *quasi*-judicial decision-making fora.

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

8.1 The candidate writes clear, concise and well-reasoned judgments.

8.2 The candidate has an excellent linguistic ability and has an enviable ability to identify and to distil complex legal issues into simple and understandable terms.

8.3 The candidate gives a clear exposition of his interpretation of the facts, the issues in dispute and the law, in a structured and logical format allowing the reader to follow the reasoning arrived at by the candidate.

8.4 As a land claims court judge, the candidate referred to and relied on various academic writings to develop the common law in the area of property law, with reference to the Constitution and, in particular, interpreting the rights enshrined in terms of the Constitution.

8.5 The candidate's carefully crafted judgments show parity and even-handedness in the dispensing of judgments.

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

9.1 The candidate is known to produce well-written judgments quickly. All the judgments reviewed were produced in a reasonable period of time.

9.2 The candidate disclosed that there were no judgments outstanding at the date of his application.

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

- 10.1 The candidate's reasoned judgments show that he has a sound sense of fairness and acts impartially.

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

- 11.1 The candidate's independent mindedness is reflected in his ability to grapple with novel areas of the law and to develop the common law. The candidate's judgments in the Land Claims Court during his stint as a judge of that court remain seminal and authoritative decisions in his interpretation of the restitution of land rights to those who had been disenfranchised. As one of the first judge of the Land Claims Court, the candidate's judgments interpreted the then fledging legislation in the area of land restitution in the prism of firstly the interim Constitution and later the Constitution. Many of these judgments continue to be applied by the Land Claims Court and Appeal Courts.
- 11.2 The candidate does not shy away from dealing with complex legal issues indicative in his analysis and interpretation of the collateral challenge in the *Airports Company South Africa Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books*.
- 11.3 Reference has already been made to the candidate's refusal to obey an order to conduct armed patrols in townships during state of emergency in the mid 1980's. This is illustrative of his lived commitment to human rights and independent-mindedness under extremely challenging circumstances.

12. The candidate's ability to conduct court proceedings

- 12.1 The candidate has 35 years' experience in various capacities as a legal practitioner, including five years as a judge of the Labour Court.
- 12.2 The candidate's judgments reflect a good understanding of the rules of court, the rules of evidence and a commitment to procedural fairness.
- 12.3 The candidate shows an ability to conduct court proceedings in an efficient and effective manner.

13. The candidate's administrative ability

- 13.1 There is no reason to believe that the candidate does not have the appropriate administrative ability.
- 13.2 The candidate's involvement in NGOs, both as a trustee and a board member, display the candidate's administrative ability.

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

- 14.1 To the best of our knowledge, the candidate is well-respected and has a reputation of being a person of integrity. The candidate is respected internationally as an expert in housing rights, property restitution, constitutional law and related themes, through his work, not only for the United Nations, but also in delivering papers at various international conferences.
- 14.2 The candidate's judgments reflect a strong sense of judicial integrity.

15. The candidate's judicial temperament

15.1 The candidate has a calm and courteous manner in all his dealings with representatives before the court. The candidate's judgements show that he has managed to bring cases to finality in an objective, impartial and practical manner.

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 committed to human rights, as is indicative from the matters he has been involved with in his professional career. His commitment to access to justice commenced even in his student years. As an attorney the candidate worked in a public interest law department prior to democracy and represented persons affected by unjust laws, a state of emergency, conscientious objection objectors and political prisoners.

16.2 The candidate continued to work in the area of constitutional law as a practising advocate. As a judge of the Land Claims Court, the candidate's commitment to human rights and the value and the needs of the community is reflected in his decisive decisions, interpreting and applying the provisions of the Constitution to land restitution, restoring the dignity of many of the applicants.

16.3 The candidate has used his skills as a legal practitioner to use the courts as a vehicle to articulate and give expression to the values of the Constitution in the lived experiences of those affected by decisions where their constitutionally entrenched rights have been infringed.

16.4 This has not only been a professional or academic exercise for the candidate, but he has, through his community and organisational work, been involved in non-governmental organisations dealing with issues of land, such as the Surplus People's project and a trustee of the Richtersveld Community Trust. The candidate's involvement in these community organisations shows his commitment to human rights is both fundamental and lived.

17. **The candidate's potential**

17.1 The candidate has had extensive exposure and experience in the area of human rights, spanning a 35-year professional career. The candidate has utilised his knowledge in the area of constitutional law to develop the common law, particularly in the area of the interpretation of the property clause, access to land and restitution for those dispossessed under apartheid.

17.2 The candidate is recognised as an expert internationally in the area of human rights in general and the area of property rights and restitutionary rights in particular.

17.3 The candidate's work internationally is interwoven with his work nationally and his experiences from the Land Claims Court thread into his term as the chairperson of the UN Housing for the Area Corsiva and that experience, in turn, is interwoven into his practice as an advocate, particularly in the area of property rights, as reflected in the judgments both handed down by the candidate and the judgments where the candidate represented parties in such disputes.

17.4 The candidate's experience and exposure in commercial matters adjudicating decisions before Independent Regulatory Board of

Auditors is relevant to the candidate's capacity to adjudicate such matters where the Constitutional Court sits as the apex court.

17.5 The candidate has the potential to contribute as a Constitutional Court judge in an area of his expertise and experience. The candidate would be an asset to the development of the Constitution and the law.

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

18.1 The candidate's appointment would indicate that a lifelong commitment to the Constitution and a professional career, committed to the values of the Constitution and the development of the law to reflect those values, is rewarded by a further opportunity to serve the community.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED**Reported decisions**

Airports Company South Africa Ltd v Airports Bookshop (Pty) Ltd t/a Exclusive Books 2016(1) SA 473 (GJ)

Atkinson v Van Wyk and Another 1999(1) SA 1080 (LCC)

Chief Nchabeleng v Chief Phasha 1998(3) SA 578 (LCC)

De Kock v Juggels and Another 1999(4) SA 43 (LCC)

Esterhuyze v Khamadi 2001(1) SA 1024 (LCC)

Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, KwaZulu-Natal 1998(2) SA 900 (LCC)

FNM v Refugee Appeal Board and Others 2019(1) SA 468 (GP)

Hen-Boisen and Another NNO v Loliwe 2000(1) SA 796 (LCC)

In Re Kranspoort Community 2000(2) SA 124 (LCC)

In Re Farmerfield Communal Property Trust 1999(1) SA 936 (LCC)

Kanhym (Pty) Ltd v Mashiloane 1999(2) SA 55 (LCC)

Kgomo and Another v Standard Bank of South Africa and Others 2016(2) SA 184 (GP)

Khuzwayo v Dhudla 2001(1) SA 714 (LCC)

Malan v Gordon and Another 1999(3) SA 1033 (LCC)

Malangu v De Jager 1996(3) SA 235 (LCC)

Minister of Land Affairs of the Republic of South Africa and Another v Slamdien
1999 (4) BCLR 415 (CC)

Ngcobo and Another v Van Rensburg and Others 1992(2) SA 525 (LCC)

Pickard v Stein and Others 2015(1) SA 439 (GJ)

Sentrale Karoo Distriksraad v Roman; Sentrale Karoo Distriksraad v Koopman;
Sentrale Karoo Distriksraad v Krotz 2001(1) SA 711 (LCC)

Van Zyl NO v Maarman 2001(1) SA 957 (LCC)

Zulu and Others v Van Rensburg and Others 1996(4) SA 1236 (LCC)

Unreported decisions

Changing Tides 17 (Pty) Ltd NO v Vitex Investments 878 CC and Another [2012]
ZAGPJHC 273 (26 October 2012)

De Jager and Sons v Khumalo [1999] ZALCC 23 (14 May 1999)

Henred Fruehauf (Pty) Ltd v Hlongwane NO and Others (JR1982/2009) [2012]
ZALCJHB 82 (8 August 2012)

J.S. Beukes (Edms) Beperk t/a Dennegeur Boerdery v Jagers and Others [2000]
ZALCC 2 (18 January 2000)

Kranspoort Community Re: Farm Kranspoort 48 LS [1999] ZALCC 67
(10 December 1999)

Mahlangu and Another v Van Eeden and Others [2000] SALCC 17 (2 June 2000)

Ngcobo and Another v Van Rensburg and Others [1997] ZALCC 9 (9 December
1997)

Nkosi v Road Accident Fund (08/25592) [2018] ZAGPPHC 597 (12 July 2018)

Rochville Properties (Pty) Limited and Another v City of Tshwane Metropolitan Municipality and Another (82807/2016) [2018] ZAGPPHC 496 (15 June 2018)

Zulu and Others v Van Rensburg [1996] ZALCC 2 (17 May 1996)

Judgments upheld on appeal

Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd T/A Exclusive Books 2017 (3) SA 128 (SCA)

Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg 1999 (2) SA1057 (SCA)

The courts in the following matters, referred to and followed the decisions of the candidate:

Benson and Another v Standard Bank of South Africa (Pty) Limited and Others (5024/2018) [2019] ZAGPJHC 30; 2019 (5) SA 152 (GJ) (21 February 2019)

Bondev Midrand (Pty) Limited v Rasalanavho and Others (47616/2014) [2015] ZAGPPHC 538 (10 June 2015)

Blue Horison Investments 10 (Pty)Ltd and another V Regional Land Claims Commissioner, Mpumalanga and others (LCC 115/2010) [2012] ZALCC 18(30 January 2012)

Boltman v Kotze Community Trust Re: Farm Quispberg 805 District of Calvinia (LCC5/99) [1999] ZALCC 36 (11 August 1999)

City Council of Springs v Occupants of the Farm Kwa-Thema 210 (LCC10R/98) [1999] ZALCC 40 (2 September 1999)

Former Highlands Residents Re: Area formerly known as The Highlands (now Newlands Extension 2) Pretoria In Re: Sonny v Department of Land Affairs (LCC116/98) [1999] ZALCC 65 (30 November 1999)

Hall and Another v Downs (LCC18/01) [2001] ZALAA 13(10 May 2001)

Hadebe v Hadebe and Another (LCC138/99) [2000] ZALCC 20 (14 June 2000)

Kgomo and Another v Standard Bank of South Africa and Others 2016(2) SA 184 (GP)

Lappeman and Others v Mphela NO and Others (LCC37/02) [2003] ZALCC 26 (27 November 2003)

Land & Landbouontwikkelingsbank van South Afrika v Conradie [2005]4All SA 509 (SCA)

Mahlangu NO v Minister of Land Affairs and others (572/2003) [2004] ZASCA 74 (14 September 2004)

Mlifi v Klingenberg (LCC2/97) [1998] ZALCC 7 (3 August 1998)

Ncholo Trust v Mphhofu and Another (LCC 8 (10March 2014)

Pretorius v Beginsel and Another (LCC94R/01) [2001] ZALCC 52 (13 December 2001)

Storm v Absa Technology Finance Solutions (Pty)Ltd; in re Absa Technology Finance Solutions (Pty) Limited v Le Bros Auto Electrical Sales & services (34754/2016) [2017] ZAGPPHC 211 (19 May 2017)

Van Zuydam v Zulu (LCC27/98) [1999] ZALCC 10 (3 March 1999)

Judgments overturned on appeal

The candidate, as an assessor, concurred with the decision of Farlam J in *Fijen v Council for Scientific and Industrial Researchers* (1994) 15 ILJ 759. This decision was overturned on appeal in *Council for Scientific and Industrial Researchers v Fijen* 1996(2) SA 1 (A)

The candidate's decision in the matter of *Changing Tides 17 (Pty) Ltd NO v Vitex Investments 878 CC and Another* [2012] ZAGPJHC 273 para 22-24 was criticized by Spilg J in *Changing Tides 17 (Pty) Ltd N.O v Congwane* (2015/94919) [2016] ZAGPJHC 128 (30 May 2016)