

CANDIDATE: JUDGE LV THERON

COURT FOR WHICH CANDIDATE APPLIES:

CONSTITUTIONAL COURT

1. The candidate's appropriate qualifications

1.1. The candidate holds the following degrees:

1.1.1. BA (1987) (Natal);

1.1.2. LLB (1989) (Natal); and

1.1.3. LLM (1990) (Georgetown).

1.2. The candidate is currently a Judge of the Supreme Court of Appeal.

1.3. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

2.1. The candidate was an Advocate of the High Court from December 1991 until her appointment as a Judge of the High Court in October 1999. The candidate was an Acting Judge of the Supreme Court of Appeal from May 2006 to June 2007 and December 2009 to March 2010. She received permanent appointment to the SCA in December 2010. The candidate has recently served as an Acting Judge of the Constitutional Court from February to May 2015.

CANDIDATE: JUDGE LV THERON

2.2. The candidate is nominated by the Centre for Applied Legal Studies, Sonke Gender Justice, the South African Chapter of the International Association of Women Judges, and Advocates for Transformation (KZN). All nominations speak highly of the candidate and her judicial record.

2.3. No adverse comments have been received.

2.4. 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. The candidate is a black woman.

3.2. Of the ten permanent judges of the Constitutional Court at present, five are black men, three are white men, and two are black women. As is apparent, there is a significant gender imbalance on the Court. It is also notable that the Constitutional Court has never had more than three permanently-appointed women at any given time.

3.3. Women have historically been under-represented in senior judicial office and the elevation of a female candidate would be an important contribution to the gender transformation of the judiciary.

3.4. Of particular relevance, the candidate is a coloured woman, a group which is particularly poorly represented on the bench.

CANDIDATE: JUDGE LV THERON

- 3.5. In its nomination, Advocates for Transformation (KZN) remarks that the candidate comes from humble origins, having grown up in a township outside Durban. She was the first of her family to obtain a Matric and to go on to university. During her schooling and studies, she worked as a part-time cashier in a branch of OK Bazaars. She was appointed as a Judge of the High Court at the age of 32, making her one of the youngest judicial appointees and the first black woman to be appointed to the KwaZulu-Natal bench. The candidate is also a mother of four children.
- 3.6. The candidate's appointment would help to reflect the gender and racial composition of South Africa. Her life experiences would also contribute a unique perspective to the Constitutional Court's decision-making.
4. **The candidate's knowledge of the law, including constitutional law**
 - 4.1. We have found 23 reported judgments in mainstream law reports which were authored or co-authored by the candidate. Of these, 13 are judgments of the SCA and 10 are judgments of the High Court. We have located a further 23 unreported judgments which are available online. The candidate does not appear to have produced any reported judgments in her first five years on the bench. However, the number, frequency and

CANDIDATE: JUDGE LV THERON

quality of her reported decisions have increased significantly over the last decade.

- 4.2. The candidate's judgments cover a wide range of subjects, including commercial law, insolvency, civil procedure, criminal law, administrative law, and human rights.
- 4.3. The candidate lists the following reported judgments as her most significant to date:
 - 4.3.1. *Nkomo v S* [2007] 3 All SA 596 (SCA);
 - 4.3.2. *Gumede v President of RSA & others (Women's Legal Centre as amicus curiae)* [2008] JOL 21972 (D);
 - 4.3.3. *Occupiers, Shulana Court, 11 Hendon Road, Yeoville v Steele* 2010 (4) All SA 54 (SCA);
 - 4.3.4. *Moseme Road Construction CC & others v King Civil Engineering Contractors & another* 2010 (4) SA 359 (SCA);
 - 4.3.5. *Guardrisk Insurance Company v Kentz* [2014] 1 All SA 307 (SCA);
 - 4.3.6. *Quartermark Investments (Pty) Ltd v Mkwanazi & another* 2014 (3) SA 96 (SCA);
 - 4.3.7. *Gainsford & others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA);

CANDIDATE: JUDGE LV THERON

- 4.3.8. *Minister for Safety and Security v Scott & another* 2014 (6) SA 1 (SCA);
- 4.3.9. *Fischer & another v Ramahlele & others* 2014 (4) SA 614 (SCA);
- 4.3.10. *Royal Sechaba Holdings (Pty) Ltd v Coote* 2014 (5) SA 562 (SCA).
- 4.4. *Nkomo v S* [2007] 3 All SA 596 (SCA) concerned an appeal against a sentence of life imprisonment for rape and kidnapping. The appellant raped the complainant five times while he held her captive overnight. The High Court sentenced the appellant to life imprisonment, having found no substantial and compelling circumstances warranting a sentence less than the prescribed minimum of life imprisonment. On appeal in the SCA, the majority reduced the sentence to sixteen years, holding that the fact that the appellant was a first offender and had prospects of rehabilitation constituted substantial and compelling circumstances justifying a departure from the minimum sentence regime. The candidate dissented. Noting the brutality of the rape and the prevalence of sexual violence in South Africa, she concluded: “*I cannot agree ‘that the prospect of rehabilitation [of which there is no evidence] and the fact that the appellant is a first offender’ constitute substantial and compelling circumstances within the meaning of that*

CANDIDATE: JUDGE LV THERON

expression and are truly convincing reasons for departing from the minimum sentence ordained by the Legislature.”

- 4.5. In *Gumede v President of the Republic of South Africa & others (Women’s Legal Centre as amicus curiae)* [2008] JOL 21972 (D) the candidate declared legislation preserving the marital power of husbands in customary marriages concluded before the commencement of the Recognition of Customary Marriages Act to be unfairly discriminatory. Section 7(1) of the Recognition Act provided that the proprietary consequences of marriages concluded before the Act came into force were to be governed by customary law. Provincial legislation codifying Zulu customary law retained the marital power, providing that the husband was head of the family and the exclusive owner of all family property. The combined effect of this legislation was that women in pre-Recognition Act customary marriages, subject to Zulu customary law, would potentially have no share of the family property on divorce. The candidate held that the relevant provisions unfairly discriminated on the basis of gender and race. The declaration of invalidity was confirmed by the Constitutional Court in *Gumede v President of the Republic of South Africa & others* 2009 (3) SA 152 (CC).
- 4.6. In *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 (4) All SA 54 (SCA) the candidate affirmed that courts hearing eviction applications governed by PIE must be proactive in securing “*all relevant information*”

CANDIDATE: JUDGE LV THERON

required to make just and equitable decisions. The lower court granted an eviction order by default after the occupiers failed to appear in court. Their application for rescission of the default judgment was refused. In a unanimous judgment of the SCA, the candidate upheld the occupiers' appeal and granted them leave to oppose the eviction application. The candidate's judgment emphasised that, in the absence of the affected occupiers, the court still had a duty to satisfy itself that the eviction would be just and equitable. This required the court, at the very least, to determine whether vulnerable people would be affected by the eviction and whether there was alternative accommodation available.

- 4.7. In *Moseme Road Construction CC & others v King Civil Engineering Contractors & another* 2010 (4) SA 359 (SCA) the SCA upheld a decision of the Gauteng Department of Public Transport, Roads and Works to award a tender to the appellants. The candidate concurred with the main judgment on the merits, but did not agree with the costs order. She held that the Department should be ordered to pay the costs of both the respondents and the appellants as it was the Department's negligence and unjustified disqualification of the respondents that led to the respondents approaching the High Court in the first place.
- 4.8. The candidate's judgment in *Guardrisk Insurance Company v Kentz* [2014] 1 All SA 307 (SCA) clarified the nature and legal

CANDIDATE: JUDGE LV THERON

consequences of performance guarantees. Having regard to a long line of South African and English case law, the candidate held that a bank faced with a valid demand in respect of a performance guarantee is obliged to pay the beneficiary without investigation of the contractual position between the beneficiary and the principal debtor. The only exception is where fraud has been established. The very purpose of the guarantee is to ensure that the beneficiary can obtain payment without having to wait for the final determination of its rights in terms of accessory obligations. To find otherwise, the candidate held, would defeat the commercial purpose of performance guarantees.

- 4.9. *Quartermark Investments (Pty) Ltd v Mkwanazi & another* 2014 (3) SA 96 (SCA) addressed the legal principles and remedies applicable to fraudulent misrepresentation inducing the sale and transfer of immovable property. The first respondent instituted application proceedings against the appellant, a property investment company, claiming that it had fraudulently induced her into signing certain sale and lease agreements in respect of her immovable property. The lower court granted an order setting aside the transfer of the property; declaring the sale agreements that led to the transfer null and void; and directing that the second respondent (Registrar of Deeds) transfer the property back to the first respondent. In the SCA, the candidate dismissed the appeal with costs. In doing

CANDIDATE: JUDGE LV THERON

so, the candidate applied the relevant principles on fraudulent misrepresentation inducing a contract. She also held that the High Court's remedy was better characterised as vindicatory relief rather than restitution.

- 4.10. The candidate's decision in *Gainsford & others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA) provides guidance on the citation and standing of liquidators litigating on behalf of a company in liquidation. Lower courts had adopted two divergent approaches: some required litigation to be brought in the name of the company in liquidation while others permitted liquidators to sue in their capacity as liquidators. The candidate held that these approaches reflected "a distinction without a difference". Both are permissible and do not affect the liquidators' standing to sue on behalf of the company in liquidation.
- 4.11. *Minister for Safety and Security v Scott & another* 2014 (6) SA 1 (SCA) concerned a delictual claim for damages based on unlawful arrest and interference in a contractual relationship. The respondents entered into a lucrative contract with an American hunting and fishing magazine. After the first respondent's arrest on an unrelated charge, the magazine cancelled the contract. The respondents claimed general damages for the unlawful arrest and special damages for the loss of the contract. The High Court upheld these claims and awarded damages of R43 million. On appeal in the SCA, the

CANDIDATE: JUDGE LV THERON

candidate held that a claim based on interference with a contractual relationship has historically required proof of intent. The candidate indicated that even if negligence suffices for such a claim, the elements of wrongfulness and legal causation had not been established. As a result, the lower court's award of special damages was set aside. The candidate also set aside the award of general damages and replaced it with a reduced amount.

- 4.12. *Fischer & another v Ramahlele & others* 2014 (4) SA 614 (SCA) articulates the principles governing a court's power to raise and decide matters of its own accord. In January 2014, the City of Cape Town demolished certain structures erected on the property of Mrs Fischer. Mrs Fischer and the City launched an urgent application seeking an interdict restraining a group of persons from seeking to occupy or erect structures on the property. The return date was anticipated by Mr Ramahlele and 40 other people, who opposed the confirmation of the *rule nisi*. They in turn launched a counter-application against the City, in which they alleged that they had been in peaceful and undisturbed possession of the structures which they had erected on the property and that the demolished structures were their homes. The High Court granted declaratory relief and mandatory interdicts against the City in the counter-application, substantially in the form sought. In doing so, the court decided issues not identified by the parties as relevant to their dispute

CANDIDATE: JUDGE LV THERON

and did not hear evidence on the issues that the parties considered determinative of the matter. In the SCA, the candidate co-authored a unanimous judgment with Wallis JA, holding that the only dispute was a factual one of whether the structures were unoccupied and vacant on the dates in question. It was not open to the lower court to raise new issues and compel the parties to deal with them. The appeal was upheld.

4.13. In *Royal Sechaba Holdings (Pty) Ltd v Coote* 2014 (5) SA 562 (SCA) the parties had concluded arbitration proceedings. The appellant then sued the respondents for breach of fiduciary duty in the High Court. The respondents raised a special plea of issue estoppel, which was upheld by the High Court. In the SCA, the applicant, with the concurrence of four other judges, dismissed the appeal. The candidate's judgment offers a helpful restatement of the requirements for successful pleas of res judicata and issue estoppel.

4.14. In addition to the judgments considered above, the candidate's knowledge of constitutional law is further demonstrated in her decisions which have been substantially confirmed or upheld on appeal by the Constitutional Court. These judgments include:

4.14.1. *Gumede* (discussed above);

4.14.2. *Shinga v S* [2007] 1 All SA 113 (N);

CANDIDATE: JUDGE LV THERON

- 4.14.3. *eThekwini Municipality v Haffejee* [2010] 2 All SA 358 (KZD);
- 4.14.4. *Industrial Development Corporation of South Africa Ltd v PFE International & others* 2012 (2) SA 269 (SCA); and
- 4.14.5. *Head of Department, Department of Education, Free State Province v Welkom High School* 2012 (6) SA 525 (SCA).
- 4.15. The candidate's declarations of constitutional invalidity in *Shinga v S* [2007] 1 All SA 113 (N) were partially confirmed and partially set aside in the Constitutional Court's decision in *S v Shinga (Society of Advocates (Pietermaritzburg) as Amicus Curiae); S v O'Connell and Others* 2007 (2) SACR 28 (CC). At issue were various provisions of the Criminal Procedure Act regulating criminal appeals from magistrates' courts. The candidate, writing for a unanimous full bench, held that the provisions were unconstitutional in two respects: first, that they allowed appeals to be determined behind closed doors and, second, that there was no general, automatic right of appeal to the High Court. The Constitutional Court confirmed the first order of invalidity but set aside the second. The Court held that it was not unconstitutional to require convicted offenders to obtain leave to appeal from the trial court. Nevertheless, the Court held that some of the features of the appeals process were unconstitutional. While the candidate's judgment was only partially confirmed, her judgment demonstrates a strong

CANDIDATE: JUDGE LV THERON

commitment to principles of open justice and a sound understanding of the Constitutional Court's jurisprudence on fair trial rights.

- 4.16. *eThekwini Municipality & others v Haffejee NO & others* [2010] 2 All SA 358 (KZD) concerned, among other issues, whether section 25(2)(b) of the Constitution contains a strict requirement that compensation must be determined prior to the expropriation of property. The candidate, sitting as a single judge, held that on a plain and purposive reading of section 25(2)(b) it does not require prior determination of compensation. The Constitutional Court agreed with the candidate's interpretation and dismissed the appeal, albeit for different reasons. This decision is reported as *Haffejee NO & others v eThekwini Municipality & others* 2011 (6) SA 134 (CC).
- 4.17. *Industrial Development Corporation of South Africa Ltd v PFE International & others* 2012 (2) SA 269 (SCA) considered whether PAIA can be used to obtain information from a party for the purposes of ongoing litigation not involving that party. Section 7 of PAIA provides that its provisions do not apply where there is ongoing litigation and where "other law" provides for the production of or access to the information being sought. Writing for a unanimous court, the candidate held that Rule 38(1) of the Uniform Rules, which provides for a subpoena *duces tecum* to acquire information from parties not

CANDIDATE: JUDGE LV THERON

participating in the litigation, constitutes “other law”. As a result, PAIA was not applicable in these circumstances. In reaching this conclusion, the candidate clarified the meaning and scope of section 7 of PAIA and Rule 38(1). This judgment was upheld on appeal in the Constitutional Court, which endorsed the candidate’s reasoning.

- 4.18. The central question in *Head of Department, Department of Education, Free State Province v Welkom High School* 2012 (6) SA 525 (SCA) was whether a head of department (HOD) of a provincial department of education has the authority to instruct a school principal to disregard the requirements of a school pregnancy policy which the HOD considers to be unfairly discriminatory. The candidate wrote a unanimous judgment on behalf of four other judges of the SCA holding that the HOD is not legally empowered to do so. Instead, the HOD was required to approach a court to have the policies reviewed and set aside. The candidate held that it was not necessary or appropriate to determine whether the pregnancy policies were constitutional as the issue was not properly before the Court. The Constitutional Court upheld this decision on appeal in *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC). While the Constitutional Court agreed that it was not appropriate to decide the constitutionality of the pregnancy policies without proper argument, Khampepe J, writing for the

CANDIDATE: JUDGE LV THERON

majority, held that the pregnancy policies were prima facie unconstitutional and necessitated a just and equitable order. As a consequence, the Constitutional Court ordered the schools to review their pregnancy policies and to report back to the Court.

4.19. These judgments demonstrate good knowledge of constitutional law and an ability to negotiate difficult constitutional issues. Having said that, the Welkom High case is an example of a case where the candidate chose to avoid dealing with the effect of a policy on the rights of pregnant teenage learners where it was undisputed that the policy operated unduly harshly on female learners and impacted on their ability to receive and often complete their education.

4.20. While the Constitutional Court has not always adopted the reasoning in the candidate's judgments, her reasoning is clear and well explained, providing a helpful guide to the Constitutional Court in deciding these matters.

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

5.1. The candidate's judgments demonstrate a strong commitment to constitutional values.

5.2. In particular, the candidate has a proven commitment to promoting gender equality. All three nominations refer to the candidate's decisions in *Nkomo* and *Gumede* as evidence of this commitment. In *Nkomo*, the candidate showed acute sensitivity

CANDIDATE: JUDGE LV THERON

to the need to address sexual violence in society. The candidate's decision in *Gumede* reflects a firm grasp of the Constitutional Court's unfair discrimination jurisprudence. Her decision is also notable for its engagement with the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

- 5.3. The candidate's article, 'Gender Equality: A South African Perspective' (2007) 17 *Commonwealth Judicial Journal* 4-9, reflects her understanding of the patterns of disadvantage experienced by women in South Africa. The candidate offers a moving account of her own experiences of gender and racial inequality and relates these experiences to the broader challenges of transforming the legal profession in South Africa.
- 5.4. The candidate's commitment to constitutional values is evident in her roles in various professional bodies. As an advocate, she was an active member of AFT and NADEL. She is a founding member of the South African Chapter of the International Association of Women Judges (SAC-IAWJ). The President of the SAC-IAWJ remarks that the candidate has played an active role in mentoring other women judicial officers.
- 5.5. In *SH v GF* 2013 (6) SA 621 (SCA), the candidate concurred in a unanimous judgment of the Supreme Court of Appeal concerning maintenance. The appellant, a divorced mother seeking to recover maintenance for her two minor children

CANDIDATE: JUDGE LV THERON

from the recalcitrant father, succeeded in the court *a quo* in demonstrating that the respondent was in breach of a maintenance order and obtained an order against the respondent for contempt of court together with a sanction against the respondent. The appellant was dissatisfied with the appropriateness of the sanction as it did not effectively advance the on-going obligations of the respondent to pay maintenance.

5.6. The SCA agreed that that the respondent was in contempt but declined to interfere in the Court *a quo*'s exercise of its discretion in determining the appropriate sanction. The effect of the judgment was to require the appellant to approach the Maintenance Court for a determination for appropriate remedies. A criticism of the judgment has been that the SCA ought to have fashioned such remedies itself, in the interests of assisting women and children effectively.

5.7. We suggest that these concerns be raised with the candidate, perhaps as part of a broader line of questioning on the duties of appellate courts to take a proactive approach to fashioning remedies that address issues of gender. The candidate's judgments in the *Welkom High* case, discussed above, would be relevant to this line of questioning as that decision also indicates some reluctance to take a proactive approach in formulating innovative and effective remedies.

CANDIDATE: JUDGE LV THERON

6. Whether any judgments have been overturned on appeal

- 6.1. The candidate lists three judgments which were overturned on appeal. One of these is cited in her application simply as “*Durban Bus Company*”. We have been unable to find a judgment matching this description. We have identified a further four judgments which were subsequently overturned on appeal and are not mentioned in the candidate’s application.
- 6.2. In *S v Cameron* 2005 (2) SACR 179 (SCA) the SCA overturned a decision reached by the candidate and another judge in a criminal review. It is unclear whether the candidate was the author of the judgment. The magistrate’s court found the appellant guilty of possessing undersized crayfish, an offence under marine protection regulations. On review, the lower court upheld the conviction but reduced the sentence. The SCA held that the offence of possession included the requirement that the accused must have intended to control the crayfish for personal gain or benefit. This intention had not been proved.
- 6.3. *BOE Bank Ltd t/a BOE Corporate v The Grange Timber Farming Co (Pty) Ltd & others* [2006] JOL 17279 (N) turned on the interpretation of a clause in a loan agreement. The candidate, sitting as a single judge, interpreted the clause in favour of the respondent. The SCA disagreed with this

CANDIDATE: JUDGE LV THERON

interpretation and upheld the appeal. No adverse comments were made about the candidate or her reasoning.

- 6.4. In *Inventive Labour Structuring (Pty) Ltd v Corfe* 2006 (3) SA 107 (SCA) the SCA overturned the candidate's decision as a single judge in the High Court. The candidate had dismissed an application for the rectification of a suretyship agreement and default judgment on the basis of the agreement. We have not been able to locate the candidate's judgment. On appeal, the SCA held that a proper case had been made for the rectification of the agreement and it consequently awarded default judgment. No adverse comments were made about the candidate's reasoning or conduct.
- 6.5. *De Gree v Webb (Centre for Child Law as Amicus Curiae)* 2007 (5) SA 184 (SCA) considered the procedures and legal principles governing inter-country adoptions. The applicants, US citizens, applied to the High Court for an order granting them sole custody and guardianship over an abandoned baby, with a view to launching adoption proceedings in the US. The High Court refused the application on the ground that only the Children's Court is empowered to grant adoption orders. The SCA split three to two, with the majority dismissing the appeal. The candidate wrote the majority judgment, holding that the Children's Court has exclusive jurisdiction to consider the application. She further held that the principle of "subsidiarity" under the UN Convention on the Rights of the Child must be

CANDIDATE: JUDGE LV THERON

strictly applied, requiring that inter-country adoptions can only be allowed if the child cannot be adequately cared for in her country of origin. The candidate held that the applicants had not presented evidence to show that the subsidiarity principle had been satisfied and dismissed their application. On appeal, the Constitutional Court overturned the candidate's decision in part. While it ultimately referred the matter back to the Children's Court, it held that the High Court does have jurisdiction in exceptional cases to grant orders of sole custody and guardianship even where this is intended to facilitate inter-country adoptions. Furthermore, the Court held that the principle of subsidiarity did not bar the applicants from obtaining an adoption order. The Court held that the best interests of the child remain the primary concern. The Constitutional Court's decision is reported as *AD & Another v DW & Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC). While the candidate's decision was overturned in part, this does not reflect a lack of commitment to constitutional values. The issues were difficult and contested, as evident in the split in the SCA. The candidate's judgment was reasoned and showed clear appreciation of the best interests of the child. Moreover, circumstances had changed considerably by the time that the matter was decided on appeal in the Constitutional Court, as the parties had concluded a settlement agreement.

CANDIDATE: JUDGE LV THERON

- 6.6. In *S v Dube & others* 2010 (1) SACR 65 (KZP) a full bench overturned convictions and sentences handed down by the candidate, sitting with two assessors. A criminal gang's attempt to break into a bank had been foiled by the police and one of the gang members was shot and killed by a policeman in the attempted escape. The deceased gang member had threatened the policeman with a crowbar. The candidate found the surviving gang members guilty of the murder of their fellow gang member and the attempted murder of the policeman on the basis of common purpose. On appeal, the full bench criticised the candidate for conflating subjective foresight of the risk of apprehension with foresight that one of the gang members would threaten the police and be killed as a result. The full bench held that the evidence did not support the inference that the gang members had the subjective foresight required to establish common purpose. The full bench also lowered the sentences on the remaining conviction of housebreaking and attempted theft to take into account the two and half years that the appellants had spent awaiting trial.
- 6.7. In *S v Xaba* 2011 (2) SACR 1 (KZP), a full bench overturned the sentences imposed by the candidate in a case of rape and murder. The appellant, who was 17 years old at the time of the offence, was found guilty of four counts of rape and one count of murder. The candidate considered herself bound by the minimum sentence regime and sentenced the appellant to life

CANDIDATE: JUDGE LV THERON

imprisonment on each count. In light of the Constitutional Court's decision in *Centre for Child Law v Minister of Justice and Constitutional Development*, the full bench held that the candidate erred in finding that minimum sentences applied to offenders under the age of 18 at the time of the offence. The appeal against the sentence succeeded and the term of imprisonment was reduced.

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

7.1. The candidate has significant judicial experience, having served as a judge for more than 15 years. Prior to her judicial appointment, the candidate was an Advocate of the High Court from 1991 to 1999.

7.2. The breadth of the candidate's professional experience is evident in the range of roles she performed before and during her time at the Bar, including:

7.2.1. Part-time cashier at OK Bazaars for a period of eight years;

7.2.2. Part-time lecturer at UKZN and Mangosuthu Technikon in the late 1980s and early 1990s;

7.2.3. Intern at the ILO and the Occupational Safety and Health Law Centre in the United States;

CANDIDATE: JUDGE LV THERON

7.2.4. Provincial Adjudication Secretary of the IEC in 1994; and

7.2.5. Commissioner of the Judge White Commission from 1995 to 1997.

8. The candidate's linguistic and communication skills

8.1. The candidate's judgments are in English and she is clearly proficient in the language. Her judgments are generally concise and well written.

8.2. Her proficiency in other languages is unknown.

9. The candidate's ability to produce judgments promptly

9.1. In the sample of judgments that we have considered, the candidate has averaged approximately two to three months to produce a judgment.

9.2. As a Judge of the High Court, it appears that the candidate produced at least five judgments more than six months after the hearing. These judgments include:

9.2.1. *Shinga v S*: 230 days to produce a 17 page judgment.

9.2.2. *Gumede*: 190 days to produce a judgment of 17 paragraphs.

9.2.3. *Legal Aid Board & Others v Singh* 2009 (1) SA 184 (N): 203 days to produce a judgment of 11 paragraphs.

CANDIDATE: JUDGE LV THERON

- 9.2.4. *TWK Agriculture Ltd v NCT Forestry Co-operative & others* 2006 (6) SA 20 (N): 193 days.
- 9.2.5. *Mostert v S* [2006] 4 All SA 83 (N): 194 days.
- 9.3. The candidate's record in producing judgments promptly has improved considerably in her time on the SCA. It appears that she has averaged approximately two to three weeks between the date of hearing and the date of judgment.

10. The candidate's fairness and impartiality

- 10.1. Our review of the candidate's judgments gives no reason to doubt her fairness and impartiality.
- 10.2. The candidate's judgment in *Occupiers, Shulana Court* – affirming the duty of courts to be proactive in protecting the interests of vulnerable people in eviction applications – demonstrates this commitment to fairness.
- 10.3. No adverse comments have been received.

11. The candidate's independent mindedness

- 11.1. The candidate's independent mindedness is evident in her dissenting judgments in the SCA:
- 11.2. In *Nkomo*, discussed above, the candidate strongly disagreed with the majority's approach to the sentencing of a convicted rapist, as she held that his status as a first time offender and

CANDIDATE: JUDGE LV THERON

speculation about his capacity for rehabilitation did not warrant a departure from the minimum sentence of life imprisonment.

- 11.3. In *Moseme*, the candidate disagreed with the costs order awarded by the majority in a tender dispute, holding that the state ought to have paid the parties' costs.
- 11.4. The candidate's majority SCA decision in *De Gree v Webb*, in a narrow three-to-two split, also shows an ability to produce majority decisions in the face of forceful dissenting views.
- 11.5. No adverse comments have been received.

12. The candidate's ability to conduct court proceedings

- 12.1. The candidate has served as a judge for more than 15 years, presiding over judicial proceedings in a number of different courts.
- 12.2. There is no reason to doubt her ability to conduct court proceedings.

13. The candidate's administrative ability

- 13.1. The candidate's administrative ability is evident from the positions of responsibility that she has held and continues to hold in various organisations.
- 13.2. In addition to her extensive professional experience described above, the candidate sits on a number of civil society and

CANDIDATE: JUDGE LV THERON

professional committees and boards. These include the board of trustees of the Commonwealth Judicial Education Institute and African Monitor; various positions of responsibility in the Anglican Church of South Africa, including her current position as Deputy Provincial Chancellor of the Church; and her role as Chairperson of the High Court Sub-Committee of the Rules Board.

13.3. No adverse comments have been received.

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

14.1. There is nothing on record that gives reason to doubt the candidate's integrity and ethical behaviour.

14.2. No adverse comments have been received.

15. The candidate's judicial temperament

15.1. No concerns appear from the judgments we have considered.

15.2. No adverse comments have been received.

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

16.1. The candidate's commitment to human rights is evident from the judgments discussed above.

16.2. The candidate's work with various civil society and legal organisations is further indication of this commitment. As a

CANDIDATE: JUDGE LV THERON

student she served as secretary of her university's Law Clinic, offering free legal services to the indigent. Her work for the Community Law Centre involved providing human rights education to members of vulnerable communities. She was also exposed to international human rights law through her LLM at Georgetown and her work for the International Labour Organisation.

- 16.3. Notably, in her role as Vice-President of Programmes for the SAC-IAWJ the candidate succeeded in having World Aids Day commemorated for the first time on the steps of the High Court in Durban and Pietermaritzburg.
- 16.4. The candidate has received numerous awards for her contributions to the legal profession and the community, including the Department of Justice Woman Achiever of the Year Award in 2000 and the KZN SAC-IAWJ Award for Contributions to Society and Achievements in the Legal Profession.
- 16.5. Her life experience suggests a strong appreciation of the values and needs of the community. In her article, 'Gender Equality: A South African perspective', the candidate relates these experiences:

“Under the apartheid regime I was classified as ‘coloured’ ... I went to a school with other coloured children. I lived in a coloured township. I was born to a

CANDIDATE: JUDGE LV THERON

poor coloured family. Both my parents had not completed high school. Not many black people from my parents' era completed high school. That was not because they were poor academically; it was forced upon them through economic circumstances, as their parents could not afford to keep them at school. Once they reached the age of 16, they had to leave school and find employment to help support the family financially. ... Growing up as a young child, I didn't know what it was to have running water or a bathroom in our house until I was about 13. ... I was fortunate to receive a bursary as well as a loan from the bank to help towards my studies. From the age of 16, I worked every school and university holiday in order to pay for my university expenses. When I got to university, I had three part-time jobs. Over the weekends I worked as a cashier with my mother. In the evenings I worked at the law library at the university and during my free time in the day I would tutor other students. And I can tell you I have not stopped working. I found that I always had to work twice as hard as my male counterparts, by reason of my youth, my gender and my race.” (pp 5 - 6)

17. The candidate's potential

- 17.1. The candidate has potential to contribute valuable experience, both professional and personal, to the Constitutional Court.

CANDIDATE: JUDGE LV THERON

- 17.2. Her fifteen years' experience as a judge and her proven ability in different areas of law would make a helpful contribution to the Court, particularly in light of its expanded jurisdiction and increased workload.
- 17.3. The improvements in the speed and quality of the candidate's judgments during her time on the SCA are further indication of her potential.
18. **The message that the candidate's appointment would send to the community at large**
 - 18.1. The candidate's appointment would demonstrate a commitment to improving gender representation on the Constitutional Court and in the judiciary as a whole.
 - 18.2. The candidate's unquestionable experience would also send the clear message that gender transformation and merit are not in tension.

CANDIDATE: JUDGE LV THERON

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

TWK Agriculture Ltd v NCT Forestry Co-operative & others 2006 (6) SA 20 (N)

Mostert v S [2006] 4 All SA 83 (N)

Shinga v S [2007] 1 All SA 113 (N)

Nkomo v S [2007] 3 All SA 596 (SCA)

De Gree v Webb (Centre for Child Law as Amicus Curiae) 2007 (5) SA 184 (SCA)

Legal Aid Board & Others v Singh 2009 (1) SA 184 (N)

eThekwini Municipality & others v Haffejee NO & others [2010] 2 All SA 358 (KZD)

Occupiers, Shulana Court, 11 Hendon Road, Yeoville v Steele 2010 (4) All SA 54 (SCA)

Moseme Road Construction CC & others v King Civil Engineering Contractors & another 2010 (4) SA 359 (SCA)

eThekwini Municipality v Haffejee [2010] 2 All SA 358 (KZD)

Head of Department, Department of Education, Free State Province v Welkom High School 2012 (6) SA 525 (SCA)

Industrial Development Corporation v PFE International 2012 (2) SA 269 (SCA)

Guardrisk Insurance Company v Kentz [2014] 1 All SA 307 (SCA)

Quartermark Investments (Pty) Ltd v Mkwanazi & another 2014 (3) SA 96 (SCA)

Gainsford & others NNO v Tanzer Transport (Pty) Ltd 2014 (3) SA 468 (SCA)

Minister for Safety and Security v Scott & another 2014 (6) SA 1 (SCA)

Fischer & another v Ramahlele & others 2014 (4) SA 614 (SCA)

Royal Sechaba Holdings (Pty) Ltd v Coote 2014 (5) SA 562 (SCA)

CANDIDATE: JUDGE LV THERON

SH v GF 2013 (6) SA 621 (SCA)

Unreported decisions

BOE Bank Ltd t/a BOE Corporate v The Grange Timber Farming Co (Pty) Ltd & others [2006] JOL 17279 (N)

Gumede v President of RSA & others (Women's Legal Centre as amicus curiae) [2008] JOL 21972 (D)

Judgments upheld on appeal

S v Shinga (Society of Advocates (Pietermaritzburg) as Amicus Curiae); S v O'Connell and Others 2007 (2) SACR 28 (CC)

Gumede v President of the Republic of South Africa & others 2009 (3) SA 152 (CC)

Haffejee NO & others v eThekweni Municipality & others 2011 (6) SA 134 (CC)

PFE International & others v Industrial Development Corporation of South Africa Ltd 2013 (1) SA 1 (CC)

Head of Department, Department of Education, Free State Province v Welkom High School 2014 (2) SA 228 (CC)

Judgments overturned on appeal

S v Cameron 2005 (2) SACR 179 (SCA)

Inventive Labour Structuring (Pty) Ltd v Corfe 2006 (3) SA 107 (SCA)

BOE Bank v Grange Timber Farming Co (Pty) Ltd [2007] ZASCA 4 (Unreported)

AD & Another v DW & Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party) 2008 (3) SA 183 (CC)

S v Dube & others 2010 (1) SACR 65 (KZP)

S v Xaba 2011 (2) SACR 1 (KZP)