CANDIDATE: JUDGE TR GORVEN

COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL

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

1.1. The candidate holds the following degrees:

1.1.1. BA (1976);

1.1.2. LLB (1978);

1.1.3. BTh (1986);

1.1.4. Certificate in Labour Law (1991); and

1.1.5. Certificate in Constitutional Litigation (1994).

1.2. The candidate is a Judge in the KwaZulu-Natal Division of the High Court.

1.3. The candidate is appropriately qualified.

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

2.1. The candidate was a prosecutor for two years and a member of the Pietermaritzburg Bar (admitted in 1988) for twenty years, before being appointed to the Bench in 2008. He was a member of NADEL, and was active in Bar affairs, including serving as chairman. He has since been involved in advocacy training. The candidate's judgments show a commitment to the interests

of justice.

2.2. No adverse comments have been received.

2.3. 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 white man.

3.2. Currently, the Supreme Court of Appeal comprises of twenty-one permanent Judges. Five are black women, ten are black men, one is a white woman, and five are white men. It is apparent, therefore, that while strides have been taken to address racial representivity, gender representivity still lags behind.

3.3. Given the current composition of the bench, the appointment of a white man will not advance the transformation of the judiciary from a race or gender perspective.

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

4.1. The candidate has 29 reported judgments, of which 16 were written as a single Judge, seven in a two-Judge bench, three in a Full Bench appeal, and three sitting in the Supreme Court of Appeal.

4.2. The judgments demonstrate a wide-ranging legal knowledge, including knowledge of labour law, company law, criminal law and constitutional law, and a commitment to constitutional

values.

4.3. The candidate listed the following reported judgments as among his most significant judgments:

4.3.1. *Standard Bank of South Africa Ltd v Hales & Another* 2009 (3) SA 315 (D);

4.3.2. *State v QN* 2012 (1) SACR 380 (KZP);

4.3.3. *Ex parte Arntzen (Nedbank Ltd as Intervening Creditor)* 2013 (1) SA 49 (KZP);

4.3.4. *Wishart & others v Blieden NO & others* 2013 (6) SA 59 (KZP);

4.3.5. *DH Brothers Industries (Pty) Ltd v Gribnitz NO & others* 2014 (1) SA 103 (KZP); and

4.3.6. *S v Mathe* 2014 (2) SACR 298 (KZD).

4.4. The candidate also lists another matter in which the names of the parties are not disclosed, in which he was instrumental in the resolution of the matter without a judgment. The matter demonstrates the candidate's commitment to access to justice and awareness that form should not trump substance.

4.5. *Standard Bank of South Africa Ltd v Hales & Another* concerned a court's discretion to refer an over-indebted consumer to a debt counsellor in terms of section 85(a) of the National Credit Act. At the time of this decision, there was much uncertainty over the meaning and effect of this provision. The candidate presented a detailed analysis of this provision,

clarifying the requirements that trigger this discretion, the nature of the discretion, and the considerations and evidence that ought to be taken into account.

4.6. In *S v QN* the candidate considered an appeal against the conviction and sentence of the appellant for the rape of a five-year-old girl. The girl testified at the trial with the assistance of an intermediary. In dismissing the appeal, the candidate clarified the test for establishing a child's competence to testify and also explained the role of intermediaries in assisting vulnerable witnesses. In doing so, he distinguished intermediaries from interpreters, holding that an intermediary, unlike an interpreter, does not need to be sworn in.

4.7. In *Ex parte Arntzen* the candidate called for a stricter approach to applications for the voluntary surrender of debtor's estates. The candidate noted the growing risk that these applications will be abused, to the detriment of creditors. To counteract this risk, he proposed and applied a stricter burden of proof and engaged in close scrutiny of the evidence supplied.

4.8. *Wishart & others v Blieden NO & others* concerns an issue in our law on which there is relatively little reported case law. It is therefore an important and useful addition. The issue was the circumstances in which a legal representative may be interdicted from acting for a client on the basis of a previous professional relationship with another party. The applicants sought to interdict the respondents (an attorney and two counsel) from examining them in an enquiry in terms of section 417 of the old Companies Act (61 of 1973). The candidate

thoroughly and carefully set out the relevant facts as well as the existing domestic case law. The candidate also set out in considerable detail foreign case law; in particular that of England, the United States, Canada and Australia. The reference to foreign case law was not superfluous or unnecessary. The candidate was being asked by the applicants, amongst other things, to develop the common law principles in light of the Constitution to embrace the "inherent jurisdiction" approach to the issue under Australian law. In this context, the candidate properly explained the need to have regard to the approach of foreign courts to the issue. In the case under consideration, the candidate declined to develop the common law. The candidate properly and rigorously explained his refusal to do so. The invitation to develop the common law did not meet the established requirements for such development. The applicants had failed adequately to demonstrate how the existing common law rule conflicts with the Constitution, or how it falls short of the spirit, purpose or objects of the Bill of Rights. Accordingly, the applicants had not shown why the existing common law required development. The candidate therefore applied the existing principles of the common law and refused the interdict. The primary basis upon which the interdict was refused was that of standing. In the present case, the legal representatives concerned had previously had a relationship with certain companies. Those asserting the right however were not the companies themselves but certain individuals who had previously represented the companies and who were seeking to protect their own interests. The judgment

is logically structured, carefully-reasoned and based on facts and law that are fully articulated. A further interesting feature of the judgment is that it followed on an application, by the applicant, for the candidate to recuse himself. The alleged basis was that the candidate had apparently, while at the Bar, previously had a professional interaction with one of the respondents. The candidate clearly set out the law relating to judicial recusal and properly and fully disclosed the facts pertaining to the previous interaction. The applicant declined to recuse himself. On the basis of the facts set out in the judgment, there does not appear to have been any proper basis for such recusal and it appears that the candidate therefore properly refused the recusal application. Neither the recusal application nor the judgment appear to have been taken on appeal. The judgment was referred to with approval in *Netcare Hospitals (Pty) Ltd v KPMG Services (Pty) Ltd and Another* [2014] 4 All SA 241 (GJ).

4.9. *DH Brothers Industries (Pty) Ltd v Gribnitz NO & others* addressed the proper interpretation of various business rescue provisions in the new Companies Act. Most significantly, the candidate offered a detailed analysis of the meaning and effect of a "binding offer" where a creditor seeks to buy out the voting shares of other creditors who oppose a business rescue plan. A judgment of the Gauteng Division held that a "binding offer" is one that binds the offeror and the offeree as soon as it is made, giving the offeror immediate control over the offeree's voting rights. The candidate presented a detailed critique of this interpretation, holding that a binding offer is only binding on

the offeror. As a result, creditors' voting rights only transfer to the offeror where the offer is accepted. Commentators have praised this interpretation and it is widely expected that the SCA will endorse the candidate's approach in future decisions.[1]

4.10. In *S v Mathe* the candidate considered the sentencing of a man who admitted to murdering his partner and to the attempted murder of a colleague. The probation officer recommended a non-custodial sentence, and the Court was also obliged to consider whether any circumstances existed which would justify the imposition of less than the prescribed minimum sentence. The candidate found that a non-custodial sentence was not appropriate, relying, *inter-alia*, on the fact that the accused treated a woman like chattel and did not accord her the right to decide for herself whom she would be with, and that the failure of women to be accorded their full rights by their partners has serious proportions in our society. The accused did not display a change in attitude and had to be deterred from behaving dangerously to other women, and a custodial sentence may have a deterrent effect on other men. This required that the crime be severely punished. Nevertheless, the candidate found that there were substantial and compelling circumstances not to impose the prescribed minimum sentence of fifteen years, as the accused had been highly emotional when the incident occurred, had been a productive member of society, and was found to be a candidate for rehabilitation. A sentence of ten years was imposed for the murder conviction.

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1 See, for example, M Marquard, "What does a 'binding offer' bind?" (2014) *Without Prejudice* 12-13.

4.11. In addition to the judgments identified as most significant, the candidate annexed to his application the judgment in *Thomas v Minister of Defence and Military Veterans* 2015 (1) SA 253 (SCA). The candidate sat together with Judges of Appeal Mpati, Lewis, Cachalia and Mbha and was responsible for the unanimous decision of the court. The matter concerned the interpretation of section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA). The candidate was required to consider the validity of a special plea raised by the Minister of Defence that the state should be regarded as a single employer for purposes of COIDA. In the judgment, the candidate comprehensively deals with the substantive law, discusses the legal positions held by the parties, and then grapples with complex issues of interpretation before concluding that the state cannot be a single overarching employer and dismissing the special plea. The judgment indicates the candidate's knowledge of the substantive law, the principles applicable to the interpretation of statutes and demonstrates the candidate's ability to develop the law so as to ensure a just and fair outcome in the circumstances. This judgment demonstrates the candidate's independence of thought and his ability to grapple with complex issues and contribute to the development of the law.

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

5.1. The candidate's commitment to the values of the Constitution was evident even before he was appointed to the Bench, in his membership of NADEL and in the fact that he represented

members of UDF-aligned communities. Similarly his commitment is demonstrated by his involvement in advocacy training.

5.2. The candidate's judgments similarly reflect a commitment to the values of the Constitution, as does the candidate's narration of a matter in which he assisted the parties to resolve the issue without a judgment having to be given.

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

6.1. The candidate lists four judgments that have been overturned on appeal, two of which he did not author, all of them in the area of criminal law. We have identified one further judgment. Of these, we have looked at four.

6.2. *S v Ngcamu* was an appeal from the regional court (Durban) to the KZN High Court, Pietermaritzburg. The candidate was one of two Judges (with Pillay AJ) to hear the appeal. The candidate lists this as one of his judgments which was overturned on appeal. However, only part of the High Court judgment was overturned. The SCA upheld the essence of the conviction as well as the grounds of conviction in respect of one count of attempted murder and one count of robbery with aggravating circumstances. In doing so, the SCA stated that the High Court's rejection of the appellant's version was unassailable and that the conclusion reached by both courts below (the regional court and the High Court appeal in which the Candidate participated) in rejecting the appellant's version and accepting the evidence of the primary witness, could not be

faulted. The SCA however did allow the appeal in respect of one of the convictions and sentences of attempted murder. It did so on the basis that that conviction was contrary to the evidence. In particular, there had been no evidence that the accused had fired at one of the alleged victims and therefore there could be no evidential basis for a conviction of attempted murder in respect of that victim. This is significant in view of the requirements for interference with a finding of fact. However, it must be emphasised that the SCA did not interfere with the primary findings of the High Court and did not interfere with any finding of law. Importantly, the High Court on appeal had itself correctly overturned a conviction on one count of a statutory firearms offence on grounds of law which was evidently correct. The conviction had been obtained under a statute that came into effect only after the facts giving rise to the conviction.

6.3. *S v Mchunu* was an appeal against sentence. The SCA had granted the appellants special leave to appeal to a Full Bench of the High Court (on which the candidate participated). The candidate was not the author of the judgment. The High Court in increasing the sentence of the trial court on two counts of murder, also fixed a non-parole period. The power to fix a non-parole period had been introduced in the Parole and Correctional Supervision Amendment Act. However, on appeal, the SCA found that the amendment had come into force only after the date on which the crime was committed. There was no basis to depart from the presumption against retrospectivity. Accordingly, the Amendment Act ought not to

have been applied. This was clearly an error on the part of the High Court. The SCA also did not interfere with any other aspect of sentence.

6.4. In *Scott v S*, the SCA overturned the second and third appellants' convictions for murder on the basis of common purpose. The SCA held that there was insufficient evidence to establish a common purpose.

6.5. In *S v Dlamini*, the SCA upheld an appeal against a sentence of 43 years imprisonment imposed for three counts of armed robbery and one count of theft. The SCA set aside this sentence on the basis that the Magistrate and the High Court "*seem[ed] to have laboured under the same misapprehension ... that the minimum sentence regime required these sentences to be served consecutively*." (para 36)

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

7.1. The candidate's experience, save for an eight-year stint at the YMCA, is exclusively in his capacity as prosecutor, advocate and Judge. Having said that, the candidate's practical experience is substantial, spanning 20 years as counsel and more than 7 years on the Bench. The candidate has many reported judgments to his name (of which he was the principal or sole author), which is a considerable achievement.

8. The candidate's linguistic and communication skills

8.1. From the candidate's judgments it is clear that he has excellent

English language skills. The candidate uses plain language in his judgments, making them easily understandable.

8.2. His proficiency in other languages is unknown.

8.3. No adverse comments have been raised about the candidate's communication skills.

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

9.1. The candidate appears to take an average of 20 days to produce a judgment. The candidate displays an exceptional ability to produce clear, reasoned judgments on complex legal issues within a short space of time.

9.2. The candidate indicates that, at the time of making his application, he had no reserved judgments. The reviewers regard this as an important point in the candidate's favour as the interests of justice are best served by the prompt and efficient delivery of judgments.

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

10.1. No adverse comments have been received.

10.2. The analysis of the candidate's judgments set out above indicates that the candidate carries out his role with the fairness and impartiality it requires.

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

11.1. No adverse comments have been received.

11.2. The analysis of the candidate's judgments set out above

indicates that the candidate has an independent mind.

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

12.1. There is nothing to indicate that the candidate is unable to conduct court proceedings efficiently. No adverse comments have been received.

12.2. Having been a Judge since 2008, the candidate can be expected to have developed the skills to conduct court proceedings.

12.3. Members of the Bar have reported that the candidate handles his court well and with proper courtesy to both the legal practitioners and the litigants appearing before him.

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

13.1. No adverse comments have been received regarding the candidate's administrative ability.

13.2. The candidate's employment in an administrative capacity at the YMCA can be expected to have developed his administrative ability.

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

14.1. No adverse comments have been received.

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

15.1. Favourable reports have been received of the candidate's conduct of himself in the Supreme Court of Appeal.

15.2. No unfavourable 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 has been the Pupillage Co-Ordinator (Pietermaritzburg) since 2002.

16.2. The candidate has been extensively involved in national and international trial advocacy training since 2005.

16.3. In August 2007 he was a member of the faculty at the Advanced International Advocacy Course run by the South Eastern Circuit Bar Mess Foundation at Keble College, Oxford.

16.4. In January 2011, 2012, 2014 and 2015 he was a member of the faculty at the Advanced Advocacy Course run by the General Council of the Bar of South Africa at the Wallenberg Centre, Stellenbosch.

16.5. The candidate was an active member of NADEL since 1988 and was instrumental in the support and advancement of black practitioners, especially junior black women practitioners. He has mentored a number of black practitioners.

16.6. The candidate is known for his foresight and transformation agenda and made considerable in-roads in promoting and training black women advocates whilst at the Bar and continued to do so once elevated to the Bench. The candidate continues to provide support and advice whilst on the Bench to many women members during acting appointments.

16.7. The candidate is widely known for his commitment to transformation. His actions portray a commitment to South

Africa and the values enshrined in the Constitution.

17. **The candidate's potential**

17.1. The candidate would, if appointed, strengthen the SCA not only with the breadth of his legal knowledge and experience, but also with his commitment to constitutional values.

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 to the community that white male Judges who show commitment to the values of the Constitution and to substantive justice are valued.

18.2. We have addressed the aspect of the representivity of the court above.

18.3. The candidate's appointment would constitute an acknowledgment that the SCA, despite no longer being the apex court in all matters other than constitutional matters, continues to shape the law as the *de facto* last court of appeal in many matters. The candidate's obvious ability as a jurist, his civic minded participation in the legal profession and administration of justice, his commitment to the values of the Constitution, his breadth and depth of legal knowledge and his industry in producing reportable judgements of substance would constitute significant assets to the SCA if he is appointed to that bench.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Standard Bank of South Africa Ltd v Hales & Another 2009 (3) SA 315 (D)

State v QN 2012 (1) SACR 380 (KZP)

Ex parte Arntzen (Nedbank Ltd as Intervening Creditor) 2013 (1) SA 49 (KZP)

Wishart & others v Blieden NO & others 2013 (6) SA 59 (KZP)

DH Brothers Industries (Pty) Ltd v Gribnitz NO & others 2014 (1) SA 103 (KZP)

S v Mathe 2014 (2) SACR 298 (KZD)

Thomas v Minister of Defence and Military Veterans 2015 (1) SA 253 (SCA)

S v Ngcamu & another 2011 (1) SACR 1 (SCA)

S v Dlamini 2012 (2) SACR 1 (SCA)

Unreported decisions

Scott v S [2011] ZASCA 121 (31 August 2011)

S v Mchunu 2013 JDR 2103 (SCA)

Judgments upheld on appeal

Wishart & others v Blieden NO & others 2013 (6) SA 59 (KZP)

Judgments overturned on appeal

S v Mchunu 2013 JDR 2103 (SCA)

S v Ngcamu & another 2011 (1) SACR 1 (SCA)

S v Dlamini 2012 (2) SACR 1 (SCA)

Scott v S [2011] ZASCA 121 (31 August 2011)