

CANDIDATE: JUDGE ZUKISA LAURA LUMKA TSHIQI

COURT FOR WHICH CANDIDATE APPLIES:

CONSTITUTIONAL COURT

1. The candidate's appropriate qualifications

1.1. The candidate has the following qualifications:

1.1.1. BProc Wits University 1989; and

1.1.2. Post Graduate Diploma in Labour Law University of Johannesburg 2001.

1.2. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

2.1. The candidate is currently serving as a judge of the Supreme Court of Appeal (SCA) since 2009 and has been serving as a permanent judge since 2005.

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

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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.

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

4.1. The candidate has heard cases in respect of a wide variety of legal areas. She was part of a unanimous SCA judgment in the Barnard matter that was heavily criticised by the Constitutional Court. Apart from serving as an acting judge in the Constitutional Court, she has not written any groundbreaking constitutional judgments.

4.2. The candidate has served on the SCA bench from 2009 until the present time. Prior to this she served on the bench of the South Gauteng High Court, Johannesburg from 2005 until her appointment to the SCA. Since 2003 the candidate has also held acting appointments to the South Gauteng High Court, the Labour Court, the Competition Appeal Court and the Constitutional Court (between November 2014 and May 2015). This review will focus predominantly on the candidate's experience in the SCA and in the Constitutional Court.

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- 4.3. A statistical analysis of a sample of judgments in which the candidate has been a member of the bench reveals that the candidate has been a Court member in 216 cases. She has concurred in 175 judgments (81.02%) and has written 41 judgments (18.98%). Of the 41 judgments written by the candidate, 34 were in the SCA. Of the full sample of judgments written, 11 were in civil matters and 18 were in criminal matters. A single judgment, or in some cases two judgments, were written in other fields.
- 4.4. The percentage of cases in which the candidate has written judgments for the SCA is considerably lower than would have been expected, having regard to her period on the SCA bench. Whilst the candidate has written a number of judgments in criminal matters, there is no clear evidence of development of a field, or fields, of expertise in a particular area of civil law. A review of the cases in which the candidate sat as a member of the SCA bench demonstrates that she has been exposed to a variety of topics within different areas of civil law. Whilst this exposure was inevitably beneficial, the relatively small number of judgments written by the candidate does not permit any empirical appraisal to be made of the range of her legal expertise.
- 4.5. The judgment referenced by the candidate, when acting on the Constitutional Court bench in *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd* (unreported judgment

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of 20 April 2015, neutral citation (CCT133/14) [2015] ZACC 8, concerned the application of section 197 of the Labour Relations Act to public entities. Both the Labour Court and the Labour Appeal Court had found that the section did apply. In dismissing the appeal to the Labour Appeal Court, Davis JA had raised, *en passant*, the question as to whether the applicability of this section to the situation where a municipality had assumed the obligation from a previous outsourcing agreement, imposed an unacceptable financial burden on the public entity. In the judgment written for the Court by the candidate it was found that City Power was a private company performing a public service (paragraph 22) and that it was an organ of state performing public functions akin to those of a municipality (paragraph 23). The judgment went on to find that the Labour Relations Act prevailed over the Municipal Systems Act in employment matters, and that section 197 was not in conflict with sections 152 and 160 of the Constitution (paragraphs 30 and 31). The judgment of the Constitutional Court, whilst providing further clarity on the interaction between national legislation, interpreted in accordance with the Constitutional principles, did not establish any new legal principle not previously traversed.

4.6. In *Coughlan NO v Road Accident Fund 2015* [ZACC] 10 the candidate wrote the unanimous judgment for the Constitutional Court. The SCA had found on appeal that foster child grants

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were not *res inter alios acta* in the case of a child's loss of support claim against the Road Accident Fund (RAF), and that these grants were consequence of the death of the parent, but for which the foster parents would not have claimed the grants (paragraph 19). The candidate's judgment pointed out that the Court's answer to the legal question would lay down a general principle applicable to children who had a claim for loss of support arising from the death of a parent, and who are placed under foster care including a foster child grant (paragraph 25). This general principle was not considered by the SCA.

4.7. The candidate commenced her analysis into whether double compensation would arise by addressing the state's constitutional obligation in terms of sections 27 and 28 of the Constitution to children in need of care, leading to an analysis of the nature and purpose of foster child grants (paragraph 33). After a careful analysis the candidate found that an award for damages for loss of support was no substitute for foster parenting and that there was no basis to deprive a child of compensation for loss of support because they are in foster care (paragraph 44). The judgment is a welcome addition to the Constitutional jurisprudence on this topic.

4.8. The judgment in *Coughlan* demonstrates that the candidate does have an appreciation for the constitutional grundnorms against which national legislation falls to be interpreted. But apart from the two Constitutional Court judgments referenced

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by the candidate, she has not written any judgments in the SCA which give any sense of a wider expertise in the application of constitutional principles.

- 4.9. It is, of course, noted that the newly expanded jurisdiction of the Constitutional Court provides that the Court sit as an apex court in relation to all matters of law of general public import. The Court's jurisdiction is thus no longer strictly limited to constitutional matters. It follows that the consideration of the candidate's appreciation of matters of a constitutional nature is not the only determining factor in her application to that Court.

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

- 5.1. No information is available to indicate that the candidate is not committed to the values of the Constitution.

6. Whether any judgments have been overturned on appeal

- 6.1. Seven judgments written by the candidate that has been taken on appeal were found. Of these seven, five have been overturned on appeal and two have been upheld on appeal. The candidate has also written one CCMA award that has been successfully reviewed by the Labour Court.

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

7.1. The candidate practised as an attorney specialising in Labour Law and has served as a commissioner at the CCMA. Since her appointment as a judge, she has served in the South Gauteng High Court, Johannesburg, the Competition Appeal Court and the Supreme Court of Appeal. She has furthermore served as an acting judge in the Constitutional Court. She has heard matters covering a wide spectrum of the law. She has primarily written judgments in Criminal Law matters (totalling 44% of the candidate's written judgments). She has written only two Constitutional Judgments.

8. The candidate's linguistic and communication skills

8.1. The judgments of the candidate are clearly written and well-reasoned. They evidence a command of the written language as well as an acceptable understanding of the applicable legal principles.

9. The candidate's ability to produce judgments promptly

9.1. The candidate produces judgments promptly; the evidence suggests a turnaround of approximately one month from the date of hearing.

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10. The candidate's fairness and impartiality

10.1. No negative remarks have been received in this regard.

11. The candidate's independent mindedness

11.1. In the sample of cases heard and judgments produced by the candidate, she has never written a minority judgment. She has, in 81% of the cases she has heard, concurred with the majority judgment. In 19% of the cases heard she has written a judgment.

12. The candidate's ability to conduct court proceedings

12.1. No negative comments have been received in this regard.

13. The candidate's administrative ability

13.1. The candidate's involvement in the organised profession as an attorney, as a senior partner and as a member of a number of community organisations indicates that she has sufficient administrative skills to suit the position for which she is applying.

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

14.1. No negative comments have been received in this regard.

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15. The candidate's judicial temperament

15.1. The candidate seems to be able to manage court proceedings well and treats all parties fairly. No negative comments have been received in this regard.

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 involved in numerous community organisations. Her judgments indicate sensitivity towards human rights and the importance thereof in a developing democracy.

17. The candidate's potential

17.1. The candidate has, at this stage, reached the height of her judicial career and has fulfilled her potential.

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

18.1. The appointment of the candidate will address the gender imbalance in the Constitutional Court. Her disinclination to write judgments is a concern and does not give an adequate indication of independent thinking and productive capacity, such as to deserve appointment to the highest court of the country.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions:

Booyesen v S 2011 (1) SACR 448 (SCA)

CEO of the South African Social Security Agency N.O and Other v Cash Paymaster Services (Pty) Ltd [2011] 3 All SA 233 (SCA)

Chretien and Another v Bell [2010] 2 All SA 428 (SCA)

Commissioner for the South African Revenue Services and Others v Moresport (Pty) Ltd and Others [2009] 4 All SA 198 (SCA)

Fletcher and Another v S [2010] 2 All SA 205 (SCA)

Minister of Safety and Security v Van Der Walt and Another [2015] 1 All SA 658 (SCA)

Porritt and Another v National Director of Public Prosecutions and Others [2015] 1 All SA 169 (SCA); 2015 (1) SACR 533 (SCA)

Van der Watt v S [2010] 3 All SA 434 (SCA)

Unreported decisions:

Aberdeen International Incorporated v Simmer and Jack Mines Ltd (273/09) [2010]

Biyela v S (859/10) [2011]

City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others (CCT133/14) [2015]

Commissioner for South African Revenue Service v Saira Essa Productions (Pty) Ltd and Others (162/10) [2010]

Grigor v S (607/11) [2012]

Grove v The Road Accident Fund (74/10) [2011]

Herman v S (948/12) [2013]

Mahlase v S (255/13) [2013]