CANDIDATE: MR ET TLHOTHAMAJE

COURT FOR WHICH CANDIDATE APPLIES: LABOUR COURT

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

1.1. The candidate has the following qualifications:

1.1.1. BA (University of the Witwatersrand);

1.1.2. LLB (University of the Witwatersrand); and

1.1.3. LLM (University of Johannesburg (formerly Rand Afrikaans University)).

1.2. The candidate is appropriately qualified.

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

2.1. There is nothing in the application or judgments that would suggest that the candidate is not 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 man.

3.2. The Labour Court presently comprises of 9 members: 4 white men, 2 black men, 1 black woman and 2 white women.

3.3. The appointment of another black man would enhance the race composition of the Court. However, it may be preferable that a black or coloured woman be appointed to balance both the racial and gender

composition of the court, although there is no competing black or coloured woman candidate.

3.4. This must be considered together with the other possible contributions the candidate would make if appointed.

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

4.1. We have considered the judgments attached to the candidate's application form, as well as some of the other reported judgments referred to in the application. The judgments are well reasoned and thoroughly researched, and there are no glaring errors of law in the judgments reviewed.

4.2. We highlight the following:

4.3. *Ngobeni v Minister of Communications and Another* (J08/14) [2014] ZALCJHB 14:

4.3.1. The case involves both important and complex issues. The case deals with the Protected Disclosures Act 26 of 2000 ("PDA") and the right of the employer to institute disciplinary proceedings against a whistle-blower employee. The case is of public importance as it re-asserts the objectives and aims of the PDA, to protect and encourage whistle-blowers to report malfeasance and corruption in all spheres of society. The candidate was alive to the importance and purpose of the PDA in the current socio-economic and labour system. The candidate also fairly reflected how South Africa fares compared to other international countries on the

implementation of PDA. The candidate referred to six authorities in this judgment.

4.4. *Modibedi and 205 Others v Medupi Fabrication (Pty)* Ltd Case No JS 742/10 (attached to application):

4.4.1. The case does not involve complex issues: it deals with the procedural and substantive fairness of the dismissal of employees who embarked on unprotected industrial action. However, the candidate provides a comprehensive and careful analysis of the facts, and provides a sound legal analysis.

4.4.2. Although the judgment is neither particularly long nor complex, the candidate took a long time to hand it down. The trial was completed on 3 September 2013 and judgment handed down on 6 May 2014, a period of just over eight months.

4.5. *Xstrata South Africa (Pty) Ltd v Association of Mineworkers and Construction Union, National Union of Mineworkers, Min of Police, National Commissioner of SAPS J1239/13* (attached to application):

4.5.1. The case involves complex issues, and deals with the confirmation of 2 interim orders (one interdicting an unprotected strike and the other confirming a contempt order). The candidate referred to twelve authorities in his judgment and the analysis by the candidate is comprehensive and thorough.

4.6. *Rural Maintenance (PTY) LTD and Another v Maluti-A-Phofung Local Municipality* (J 859/14) (attached to application):

4.6.1. The case involves relatively complex issues concerning the application of section 197 of the LRA, and in particular whether the transfer of a business under this provision requires the transfer of all business assets. The candidate interrogates issues with depth and critical analysis, and considers academic commentary and the latest Constitutional Court authorities on point.

4.7. In the application form, section 2 paragraph 6.2.1, the candidate indicates that his litigation experience includes administrative, criminal, constitutional and labour law.

4.8. The candidate is clearly well-grounded in labour law. His entire career has focused mainly, if not only, in the field of labour law. Except for labour law, there is little evidence of the candidate's exposure to the other fields of law, although his judgments do traverse constitutional and administrative law (for instance, *Rural Maintenance* attached to the application).

4.9. Members of the Bar who have appeared in front of the candidate have commented with approval on his ability. One member of the Bar who specialises in labour law and is familiar with both candidates for the Labour Court said the following:

"I support fully the appointment of both of these persons to the LC bench. I have read a number of their judgements. They are highly competent and experienced labour practitioners and have always displayed the utmost professional and courteous conduct towards me."

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

5.1. There is nothing to indicate that the candidate is not committed to the values of the Constitution.

5.2. The candidate has not practised as an attorney or advocate. He was a legal officer of the National Union of Mineworkers ("NUM") and thereafter became a Presiding Officer at the Industrial Court ("IC") and the Commission for Conciliation Mediation and Arbitration ("CCMA").

5.3. There is no specific mention in the candidate's curriculum vitae as to whether the candidate has been involved in any human rights cases.

6. Whether any judgments have been overturned on appeal

6.1. In section 2 paragraph 9.4 of his application form, the candidate states that "the Applications are pending before the Labour Appeal Court". It would seem that he is referring to the two occasions mentioned in his previous application in 2014 where he refused parties leave to appeal and in both cases the Labour Appeal Court (LAC) has been petitioned for leave to appeal. The outcome of the applications is seemingly still pending.

6.2. Our analysis of the candidate's judgments indicates that in 13 (11.2%) of his judgments an application for Leave to Appeal was lodged. He granted 2 (15.38%) of these applications and dismissed the rest. The 2 matters where leave was granted have not been finalised.

6.3. Some arbitration awards (not judgments) of the candidate, in cases where he served in the position of CCMA commissioner or as arbitrator, have

been reviewed and set aside. The candidate's legal reasoning was criticised in these judgments. It is respectfully submitted that the Judicial Services Commission should take up with the candidate how he has dealt with these criticisms when acting as a judge. It may well be that his time served as an acting judge has given him the opportunity to address these criticisms.

6.3.1. *Primedia Outdoor (Pty) Ltd v E Tlhotlhalemaje N.O.*, The Commission for Conciliation, Mediation and Arbitration and Adrianne Damos Case No JR 2166/11. The court found as follows:

> *"1.1 The first respondent committed a reviewable irregularity in taking account of the restraint provisions of clause 7 of the contract between the applicant and Adelmo CC dated 9 February 2009 without giving the parties an opportunity to lead evidence or make submissions on its relevance.*
>
> *1.2 The first respondent committed misconduct in relation to his duties in failing to evaluate the relevance of the letter from the third respondent's former attorneys dated 22 September 2010.*
>
> *1.3 The first respondent failed to give consideration to differences between the 2003 and 2009 contracts between Adelmo CC and the applicant, which were relevant to his decision."*

6.3.2. In *G4S Cash Services SA (Pty) Ltd and the National Bargaining Council for the Road Freight Industry, Commissioner* E. Ttlhotlhalemaje, Giyani Timothy Baloyi (Case No JR 2551/10) the court found in 2013 as follows:

> *"21 An extract from the arbitrator's award reveals the following:*
>
> > *'The investigation report in this regard was not present nor made available in these proceedings. The investigator, one Oosthuizen was not called to testify on the nature of and conclusions of his investigations. The said Thandi was not called upon at any stage to testify, nor were attempts made to secure her testimony. If ever there were attempts made to secure her testimony, they were not revealed in these proceedings....Both Mazibuko and Reddy relied upon hearsay evidence, more particularly about what Thandi and Oosthuizen allegedly said. Such evidence should be rejected out-rightly as there was no justification for it to be admitted as contemplated by any grounds under section 3(1) of the Law of Evidence Amendment Act 45 of 1988'*

22 It seems other than making a sweeping statement that the hearsay evidence led stands to be rejected in terms of the LEAA, the arbitrator does not mention the considerations he took into account when coming to such a conclusion, more particularly those contained in section 3(1)(c), in ascertaining whether or not it would have been in the interest of justice to admit the hearsay evidence. When dealing with these considerations the arbitrator was duty bound to enquire why Oosthuizen or the investigation report was not led at arbitration, similarly why Thandi was not present. If there was a plausible reason for their absence then the arbitrator should have taken this into account when deciding whether or not to reject the testimony of Reddy and Mazibuko. Section 3(1)(c), in particular subsection (vii) obliged the arbitrator to consider the fact that not only did Oosthuizen, at the internal enquiry, testify to what Thandi said, Mazibuko also testified that the employee informed him that Thandi did indeed advise him of the missing bags and further this was confirmed by Thandi in a conversation with Mazibuko. Furthermore Oosthuizen's testimony was never challenged by the employee. These are all critical factors the arbitrator should have taken into account when

ascertaining whether or not to accept or reject the hearsay evidence.

23. In the absence of the arbitrator making any mention of these factors or what transpired at the internal enquiry and why, on those facts he rejected the hearsay evidence, one can infer that he failed to take such factors into account. On this point in Maepe v Commission For Conciliation, Mediation & Arbitration & another[3] the Court said the following:

24. While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account.'

6.3.3. These factors were critical for the arbitrator to assess when making his finding on the admissibility of the hearsay evidence. Even if the employer's representative did not raise these issues at arbitration, the arbitrator, as mentioned, was duty bound to consider same when relying on section 3.

6.3.4. In the 2011 judgment in *Reizell Lechet and Red Alert (Pty) Ltd v Commission for Conciliation Mediation and*

Arbitration E Tlhotlhalemaje (Case Number (JR589/2010) the court found as follows:

> "*[23] In dealing with Section 146 (b) the Commissioner states that:*
>
> > "*In my view, this is not an ordinary case where the Commission can willy-nilly assume jurisdiction over this matter as there is more to it than merely an issue of whether the Applicant was an employee or not. The relationship between the parties emanated from the Shareholders' Agreement which also curiously contains a dispute (arbitration) clause which is an exact replica of the arbitration clause found in the Service Agreement."*
>
> *[24] In conclusion, I am persuaded that the Commissioner did not apply his mind to the issues raised in the Respondent's point in limine. He went off at a tangent and dealt with an issue that was not raised in the Respondent's papers and/or in oral argument at the arbitration.*"

6.3.5. In the 2006 case of *The MEC for Health, Gauteng and Public Service Co-ordinating Association of South Africa, E. Tlhotlhalemaje NO, Public Servants Association of South Africa obo members* (Case Number JR 705/05), the court ruled as follows:

"… In my view the arbitrator was to enquire whether the applicant in not having awarded notch increments, did so contrary to the behest of the collective agreement, that is, Resolution 3 of 1996 and that the applicant's conduct was arbitrary, and grossly unreasonable having regard to the provisions of the resolution.

See Pretoria Liquor Licensing Board v Made 1944 TPD 419 at 437.

[22] In my view the arbitrator's finding that nowhere in Annexure G does it give the employer the power, prerogative or discretion to completely do away with the merit award system is flawed. The arbitrator misconceives the factual reality, there is no evidence that the applicant abandoned the merit award system. The applicant states that it has not been able to execute its managerial prerogative to assess and implement the granting of merit awards because it was visited by budgetary constraints. This evidence was not controverted.

[23] The arbitrator's finding that the current dispensation refers to the old Public Service Staff Code which dealt with the terms and conditions of employment is the premise that validates the basis of all his conclusions. In my view the arbitrator's raison d etre [sic] renders his reasoning and the justification of his conclusions

defective. The arbitrator in making this finding misconstrued the behest of the applicable managerial prerogative and committed a gross irregularity.

[24] The applicant's prerogative in assessing which of the third respondent's members merit notch increments is unfettered, the old regime - the Public Service Staff Code - is no longer extant, it was abolished by Resolution 3 of 1996.

[25] Clause XXXV of Resolution 3 of 1996 does not contain a discretion, but rather contains a prerogative. Clause XXXV contains the mechanism of implementing notch increments.

[26] Critically the arbitrator found that, to determine whether the applicant exercised its discretion in good faith in not considering notch increments for the period in question, is a matter that required oral evidence, yet startlingly the arbitrator finds that prima facie he is of the view that, the decision to completely cease to consider notch increments without consultations can only imply mala fides on the part of the applicant. This conclusion is not supported by evidence.

[27] The arbitrator's award in ordering the parties to renegotiate is flawed. Clause XXXV of Resolution 3 of 1996 does not make provision for negotiations or

consultations. There is no evidence supporting the finding that the applicant should consult with the third respondent in the exercise of its managerial prerogative.

[28] The arbitrator in considering whether the merit awards have to be granted, correctly had regard to the provisions of the PFMA and Treasury Regulations then startlingly finds without contrary evidence, that it is however doubted whether the applicant's failure to implement same during the period in question was not solely due to financial constraints.

[29] Clause XXXV of Resolution 3 of 1996 does not contain a clause obliging the parties to consult, yet the arbitrator found that the right to consult is derived from the agreement (Resolution) that the applicant had no authority on its own, to vary or refuse to implement the provisions of the Resolution 3 of 1996.

[30] The arbitrator misconstrued the terms of reference and has committed a gross irregularity because he misconceived the concept of managerial prerogative as obliging the applicant to discuss financial constraints with the PSA. There is no evidence supporting his finding that, he is however of the view that the financial constraints is a red herring, and an attempt at concealing the applicant's administrative and bureaucratic ineptitude, and that the applicant was mala fides."

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

7.1. The candidate has not practised as an attorney or an advocate.

7.2. The candidate was a legal Officer of NUM and then became a Presiding Officer at the IC and the CCMA.

7.3. The candidate acted as a judge in the Labour Court from January 2012 to 2015.

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

8.1. The candidate's judgments are well written.

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

9.1. In section 2 paragraph 9.5, the candidate lists 7 reserved judgments (5 in the 2014 application) as follows:

9.1.1.	JR 1060/13	15/04/2015
9.1.2.	JR 297/14	16/04/2015
9.1.3.	JR 3030/11	16/04/2015
9.1.4.	JS 62/12	24/04/2015
9.1.5.	JS 49/12	01/06/2015
9.1.6.	JR 969/15	11/06/2015
9.1.7.	J 1117/2015	11/06/2015

9.2. The average time the candidate takes to produce a judgment is 121 days, which is in excess of three months. The longest time taken to write a judgment was 435 days. 22% of his judgments took longer than 6 months to produce.

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

10.1. From a review of the candidate's judgments, he appears to be fair in his handling of cases.

10.2. The candidate ruled in favour of the employer in 66% of the matters before him and 30% in favour of employees.

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

11.1. No adverse comments were received. From a review of the judgments referred to by the candidate as well as the judgments sourced by the review panel it seems that the candidate is fair and independent.

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

12.1. No concerns appear from the available judgments. Some concerns appear from the review judgments in respect of his awards as a Commissioner/arbitrator. It may be that these concerns have been addressed.

12.2. No adverse comments were received.

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

13.1. There is nothing in the CV that would shed light on the candidate's administrative ability.

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

14.1. In section 4 paragraph 2 of the application form, the candidate says he was arrested for driving a vehicle whilst under the influence of alcohol in November 1992 and received a fairly heavy sentence, namely a fine of R2000.00 as well as a suspended sentence. He gives no further details of how this sentence came about. He mentions that he accepted the penalty and deeply regretted the transgression. It is still maintained that the candidate should make a full disclosure in this regard dealing with the events leading to his arrest and the fate of the matter.

14.2. The allegations of partiality mentioned in the previous review seem to have fallen by the wayside and are apparently no longer relevant.

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

15.1. No adverse comments were 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 only exposure in human rights is seemingly when he was the Legal Officer of the NUM and Commissioner or Presiding Officer in the CCMA and IC respectively.

16.2. We have no indication whether the candidate is involved in any community-related activities.

17. **The candidate's potential**

17.1. The time taken to produce judgments, which has deteriorated since the 2014 application, is a matter of concern. The candidate would appear to have good potential to develop further as a judge. It is suggested that if appointed, the candidate must be taken through Judicial Officers' Training to enhance his skills.

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

18.1. The candidate is a black man who has made it to the bench as an acting judge without having practiced as a lawyer. While his appointment would improve the racial composition of the Labour Court bench, there is a shortage of women at the Labour Court at present which would not be addressed by the candidate's appointment.

18.2. The candidate has acted in the Labour Court for an extended period. The views of the Judge President of the Labour Court and LAC ought to

carry significant weight in assessing the candidate's suitability for permanent appointment to the Labour Court bench at this stage.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Motaung v Wits University (School of Education) (2014) 35 ILJ 1329

Ngobeni v Minister of Communications and Another (J08/14) [2014]

Rural Maintenance (Pty) Ltd and Maluti-A-Phofung Local Municipality and Others (JR859/14) [2014] ZALCJHB 254 (17 July 2014)

Unreported decisions

Mkhulisi and Another v Hire All (Pty) Ltd (JS755/12) [2014] ZALCJHB 54

Ntele v Anglo Platinum Limited and Another (JS399/12) [2014] ZALCJHB 50

Maqubela v South African Graduates Development Association and Others (J285/14) [2014] ZALCJHB 38

IMATU v Johannesburg Metropolitan Municipality and Others (J1522/14) [2012] ZALCJHB 189

Airports Company of South Africa Ltd v Mthembu and Others (D1193/11) [2014] ZALCD 8

South African Municipal Workers Union Obo Nkuna v Enhlanzeni District Municipality and Another (J 272/14) [2014] ZALCJHB 28

Hospersa and Others v Public Service Co-ordinating Bargaining Council and Others (53) [2013] ZALCCT 53

Metsimaholo Local Municipality v South African Municipal workers Union and Others (J1561/2014) [2014] ZALCJHB 227

National Union Of Metal Workers Of South Africa and Others v Crabtree Electrical Accessories SA: A Division Of Powertech Industries (Pty) Ltd (JS1327/09) [2014] ZALCJHB 139

National Union of Democratic and Progressive Workers (NUDPW) v Minister of Labour and Another (J2362/13) [2013] ZALCJHB 311

Ismail v B & B t/a Harvey World Travel Northcliff (JS 547/10) [2013] ZALCJHB 168; (2014) 35 ILJ 696 (LC)

South African Transport and Allied Workers Union and Others v K.B Tsotetsi Logistics CC (JS 459/09) [2012] ZALCJHB 12

National Union of Metal Workers of SA and Another v Metal & Engineering Industries Bargaining Council and Others (JR 2176/09) [2014] ZALCJHB 252

Swanepoel and Others v Leica Geosystems AG and Others (J2454/13) [2014] ZALCJHB 316

Titancor sixteen (Pty) Ltd v South African Equity Workers Association and Others (JS1068/11) [2014] ZALC 2

Feni v PAN South African Language Board and Another (J892/2014) [2014] ZALCJHB 133

Tshidziambi v University Of Venda (JS1145/12) [2014] ZALCJHB 125

South African Recycling Equipment (Pty) Ltd v Leleux and Another (D519/13) [2013] ZALCD 34

Ngcobo v Standard Bank of South Africa and Others (D439/12) [2013] ZALCD 33

Popcru Group of Companies (Pty) Ltd v Mahlase and Another (J432/12) [2014] ZALCJHB 332

Protectors Workers Union v Registrar of Labour Relations and Another (J1028/13) [2014] ZALCJHB 289

City Of Tshwane Metropolitan Municipality v South African Local Government Bargaining Council ('SALGBC') and Others (JR2387/2011) [2014] ZALCJHB 204

Cummins Emissions Solutions (Pty) Ltd v Matji and Others (JR32/13) [2014] ZALCJHB 297

Gumede v Engineering & Projects Company Limited (J139/12) [2014] ZALCJHB 241

Modibedi and Others v Medupi Fabrication (Pty) Ltd (JS742/10) [2014] ZALCJHB 154

Xstrata South Africa (Pty) Ltd v Association of Mineworkers And Construction Union and Others (J1239/13) [2014] ZALCJHB 58

Mosikele v Mass Cash (Pty) Ltd t/a Qwaqwa Cash & Carry and Others (JR1045/2011) [2014] ZALCJHB 325

South African Transport And Allied Workers Union and Another v Scopeful 21 t/a Maluti Bus Service (JR1487/12) [2014] ZALCJHB 290

Ngobese v South African Chemical Workers Union (JS50/11) [2014] ZALCJHB 255

Liquor Runners Johannesburg CC v Smit (J 456/12) [2014] ZALCJHB 253

Mahlangu and Another v Qualiprod (Pty) Ltd (JS 233/14) [2014] ZALCJHB 245

Waltons (Pty) Ltd v Botha and Another (J 1216/2014) [2014] ZALCJHB 234

IMATU v Johannesburg Metropolitan Municipality and Others (J1522/14) [2014] ZALCJHB 232

Africon (Pty) Ltd v Khumalo and Others (D514/2012) [2014] ZALCD 9

NUMSA obo Members v Murray and Roberts Projects and Another (J1982/2013) [2014] ZALCJHB 183

Pan South African Language Board v Feni and Others (J2486/2012) [2014] ZALCJHB 127

Zwane v Sasol Technology and Another (JS419/10) [2014] ZALCJHB 299

Olivier v University of the North (J535/03) [2014] ZALCJHB 287

Erasmus v Mthethwa and Another (JR1122/09) [2014] ZALCJHB 308

Mautitious and Others v Maquassi Hills Local Municipality and Others (J816/2014) [2014] ZALCJHB 171

Khauoe and Others v Maquassi Hills Local Municipality and Others (J816/2014) [2014] ZALCJHB 165

SATAWU and Others v Country Meat Market CC (JS71/12) [2014] ZALCJHB 49

African Bank v Magashima and Others (JR2419/12) [2014] ZALCJHB 298

King Edward VII School v Jackson (JS739/13) [2014] ZALCJHB 198

Schauenburg Systems Proprietary Ltd v Grobler and Another (J2908/13) [2014] ZALCJHB 102

Shoprite Checkers v Pillay NO and Others (D636/2009) [2014] ZALCD 33

Q-Pet (Pty) Ltd v Malan and Others (D1026/12, D978/12) [2014] ZALCD 10

Job Creations v Meko and Another (J989/14) [2014] ZALCJHB 201

Rural Maintenance (Pty) Ltd and Another v Maluti-A-Phofung Local Municipality and Others (J859/14) [2014] ZALCJHB 180

Solidarity obo Members v South African Police Services and Others (J2145/14) [2014] ZALCJHB 462

KwaZulu-Natal Tourism Authority v Wasa and Others (D1204/2014) [2014] ZALCJHB 499

IT Knowledge and Expertise CC v Verwey and Another (J2650/14) [2015] ZALCJHB 109

Judgments upheld on appeal

None

Judgments overturned on appeal

Primedia Outdoor (Pty) Ltd v E Tlhotlhalemaje N.O., The Commission for Concilliation, Mediation and Arbitration and Adrianne Damos Case No JR 2166/11