

CANDIDATE: MS LT MODIBA

**COURT FOR WHICH CANDIDATE APPLIES: HIGH COURT GAUTENG
– NORTH AND SOUTH DIVISIONS**

1. The candidate's appropriate qualifications

- 1.1. The candidate holds a BProc degree from the University of the Witwatersrand, which she obtained in 1994.
- 1.2. The candidate also holds a Master of Laws (LLM) degree in Human Rights and Constitutional Practice from the University of Pretoria which she obtained in 1997.
- 1.3. The candidate completed the Attorneys' Admission Examinations and was admitted as an Attorney on 29 May 1997.
- 1.4. The candidate holds a Master of Public Administration degree from Harvard University, which she obtained in 2005. The candidate completed the Edward Mason Programme in Public Policy at the same institution in 2005.

2. Whether the candidate is a fit and proper person

- 2.1. The Law Society of the Northern Provinces has indicated that the candidate is in good standing with the law society, has never been suspended from the roll of Attorneys, and that there are no proceedings to suspend the candidate or strike her from the roll.
- 2.2. There is no information to hand suggesting that the candidate is not a fit and proper person.

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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 who was born in the township of Alexandra. As such her elevation to the bench would be a step towards ensuring a more diverse judiciary that reflects the demographic profile of the Republic.

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

4.1. Twenty-two unreported judgments authored by the candidate were considered for the purposes of understanding the candidate's grasp of the law.

4.2. A brief synopsis of some of the judgments is set out below.

4.3. *Life Healthcare Group (Pty) Ltd v JMS* 2014 JDR 2391 was an urgent application brought on notice of motion, unsupported by affidavits. The Court allowed oral evidence to be given under oath.

4.4. Briefly, the background to the matter is that the second applicant, a paediatric lung specialist, was treating an infant child, three weeks old at the time the matter was heard, who presented with respiratory distress. The infant responded poorly to treatment and complications arose from the infant's poor response to the treatment. The second applicant was of the view that the infant was facing imminent respiratory and cardiac failure and was in urgent need of blood transfusion.

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- 4.5. The parents of the infant objected to blood transfusion on religious grounds.
- 4.6. The applicants sought an order authorising the second applicant to administer blood transfusion as determined by the second respondent, notwithstanding the parents' objections.
- 4.7. Only the second applicant gave evidence.
- 4.8. The candidate therefore had to decide the issue of whether to grant the order sought and consider the competing rights and obligations of the parties as well as the relevant statutory provisions.
- 4.9. The candidate displayed decisiveness and a clear understanding of the relevant jurisprudence, including the Constitution, case law and statutory law, ultimately finding that section 129(10) of the *Children's Act* 38 of 2005 was applicable and empowered the candidate to find in the applicants' favour, which she did.
- 4.10. In *Bukula v Nkosi* 2014 JDR 2392 (GJ) the candidate dealt with an urgent interdict which had to do with a dispute between two "spouses" as to who had the right to bury their deceased husband. The judgment demonstrates a sound appreciation of the law, relating not only to the subject matter, but also as it relates to urgent applications, interdicts and costs.
- 4.11. The candidate found that the matter was not urgent, but continued to give a comprehensive judgment on the facts determining, for example, that one of the women could not have been the spouse of the deceased.

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- 4.12. Her finding on urgency was thorough and well reasoned.
- 4.13. The candidate was dissatisfied with the conduct of the applicant's attorney and counsel in this matter. She ordered costs *de bonis propriis* against the attorney and disallowed counsel his costs of the application. It is clear from the approach taken by the candidate that she has a keen appreciation of the standards that should be lived up to by members of the profession.
- 4.14. In *Govan Mbeki Municipality v Ngomane* 2014 JDR 2043 (GP), which concerned the eviction of apparently impecunious individuals from State owned land, the candidate dealt with constitutional matters relating specifically to the right to adequate housing as set out in section 26 of the Constitution as read with section 7(2).
- 4.15. The candidate also had to deal with various legislative provisions relating to evictions as contained in the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 ("PIE") and the *Extension of Security of Tenure Act* 62 of 1997 ("ESTA").
- 4.16. In addition the candidate was required to consider the common law relating to eviction and specifically the application of the *rei vindicatio* principle.
- 4.17. The facts and law in this matter were by no means simple and the candidate addressed all of the relevant issues in a clear and thoughtful manner. The candidate found that the applicable legislation was PIE,

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that ESTA did not apply and that the common law remedy was inappropriate in the face of the PIE remedy.

- 4.18. The candidate also found that interdict proceedings were not appropriate for proceedings in terms of PIE.
- 4.19. The candidate was required to balance the interests of the various stakeholders, the constitutional rights of the respondents, and the obligations of the State in terms of the constitution.
- 4.20. The order the candidate made demonstrated a keen sense of justice. It provided for meaningful service of process in terms of the relevant provisions of PIE and compelled the applicant municipality to deliver a report setting out measures taken in accordance with the government's housing policy to provide temporary housing in emergency situations, as well as measures taken to reduce the backlog on the applicant's housing waiting list.
- 4.21. In *S v Sibeko* 2014 JDR 1760 GP the candidate was called upon to consider an appeal against conviction and sentence in a rape matter. The candidate demonstrated a proper understanding of criminal law principles and dealt with the evidence in a thorough and careful manner.
- 4.22. The facts of the matter were, to put it at its lowest, horrendous: a kidnapping, assault and rape of a fourteen-year old girl by a thirty-year old man.

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- 4.23. These facts were aggravated by a drawn out process, which saw twenty-five court appearances and the complainant's cross-examination spanning a period of twelve months.
- 4.24. The candidate, in her judgment, cited research to the effect that such inefficiencies contribute to the victimization of child complainants in sexual offence cases.
- 4.25. Apart from her analysis of the matter, the candidate firmly expressed her opinion about the inefficiencies of the criminal justice system and once again showed herself to be principled in her approach to the legal system and willing to express those principles in her judgments. Her commitment to, and deep concern about the manner in which children and women are treated, even by the justice system itself, is evident in this judgment.
- 4.26. In *Scholtz v Marloth Park Client and Business Accommodation CC* 2014 JDR 260, a full-bench civil appeal, the candidate delivered the judgment of the court.
- 4.27. In the judgment the candidate had to deal with contractual issues concerning an agreement to transfer a property and whether an order of specific performance was competent in the circumstances of the matter.
- 4.28. The candidate considered the validity of the agreement and the purported cancellation thereof.
- 4.29. In respect of the cancellation of the agreement the candidate found that an owner of an undivided share in a property may not unilaterally deal

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with the property, but may unilaterally deal with his undivided share in the property. The appellant, a part owner of the property, purported to cancel the agreement in respect of the whole property, and not only his undivided share. On this basis the candidate found that a valid cancellation did not take place.

- 4.30. The candidate also dealt in detail with the question of specific performance and the court's discretion in regard to making an order for specific performance.
- 4.31. This judgment indicates that the candidate has a more than adequate mastery of the law of contract.
- 4.32. In light of the above we are of the view that the candidate has a good knowledge of the law and a good knowledge of constitutional law.

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

- 5.1. The candidate has displayed in both her judgments, as referred to above, and her professional life a commitment to the values of the Constitution.
- 5.2. She has especially shown a commitment towards advancing the cause of women and children in our society.
- 5.3. Her application demonstrates a consistent, ongoing and significant endeavour on her part to advance aspects of the law, which are rooted in the values of the Constitution. She has published works in relation to *inter alia*, the law relating to abuse of women, domestic violence and Child Law.

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6. Whether any judgments have been overturned on appeal

6.1. The candidate has written the majority of her judgments in the last two years and we have been unable to find any that have been taken on appeal.

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

7.1. The candidate has been an Attorney for eighteen years and during that time she has also played a role in public policy, the drafting of legislation, and participated in key committees on the Law Reform Commission dealing with important legislation related to Women and Children.

7.2. The applicant has extensive experience, brief examples of which are:

7.2.1. providing legal support to the Department of Justice and Constitutional Development to finalise the National Policy Framework on Sexual Offences;

7.2.2. preparing a parliamentary report on the implementation of the Criminal Law Amendment Act (Sexual Offences and Related Matters); and

7.2.3. being the instructing attorney for the amicus curiae in *Van der Merwe v Road Accident Fund* (2006) 4 SA 230 (CC) which dealt with the prohibition of patrimonial damages claims between spouses married in community of property. This case resulted in section 18 of the Matrimonial Property Act being declared

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unconstitutional and made it possible for victims of domestic violence to sue their abusive spouses for patrimonial damages resulting from injuries sustained at their hands.

8. The candidate's linguistic and communication skills

8.1. The candidate has produced well-structured and clearly written judgments.

9. The candidate's ability to produce judgments promptly

9.1. There is no indication that the candidate has failed to deliver her judgment timeously.

10. The candidate's fairness and impartiality

10.1. Based on the judgments analysed it appears that the candidate is fair and impartial and applies the law without fear or favour.

11. The candidate's independent mindedness

11.1. The candidate appears to be independent minded and does not hesitate to speak out on unethical behaviour as set out above.

12. The candidate's ability to conduct court proceedings

12.1. No adverse comments have been received.

13. The candidate's administrative ability

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13.1. The candidate is a successful attorney and given the multitude of activities she has involved herself in, her numerous publications and achievements, it seems reasonable to assume that she has strong administrative ability.

13.2. She has furthermore served as a Director in a government department and has a Master's Degree in Public Administration from Harvard University.

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. 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 has shown a commitment to serve by filling various leadership roles within her Church and community. We refer also to what is set out above in relation to the candidate's commitment in relation to the values enshrined in the Constitution.

17. The candidate's potential

17.1. In a relatively short time the candidate has demonstrated her knowledge and ability in a variety of legal fields as set out above. With her background, clear commitment and principled approach to the legal

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profession, we are of the view that she has significant potential as a judge.

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

- 18.1. The candidate was raised in Alexandra, and represents a demographic that was historically not privileged or well-educated, and certainly not represented within the judiciary.
- 18.2. Her appointment would demonstrate the sea changes that have occurred in our society and convey the message that, with effort and commitment, achievements such as an appointment to the bench are now within reach of all South Africans, regardless of gender or race.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Unreported decisions

Kloberie v Absa Bank Limited 2013 JDR 1915 (GSJ) (Condonation, Rescission)

JSS Industrial Coatings CC v Inyatsi Construction (South Africa) (Pty) 2013 JDR 1902 (GSJ) (Exceptions, Amendment of Pleadings)

Veolia v Water Solutions and Technologies (Pty) Ltd 2013 JDR 1810 (GSJ) (Rule 33(4 Separation)

Logwin Air and Ocean Simesonke v JNB Ceramica CC 2013 JDR 1734 (GSJ) (Contract Formation)

Mabeta v Medshield Medical Scheme 2014 JDR 2626 (GP) (Exceptions)

L V M 2014 JDR 2603 (GP)

Scholtz v Marloth Park Client and Business Accommodation CC 2014 JDR 2601 (GP)

Bukula v Nkosi 2014 JDR 2392 (GJ)

Life Healthcare Group (Pty) Ltd v JMS 2014 JDR 2391 (GJ)

Yeni v De Kock 2014 JDR 2391 (GJ)

Ndola v Road Accident Fund 2014 JDR 2390 (GP)

Picota v Road Accident Fund 2014 JDR 2072 (GP)

Govern Mbeki Municipality v Ngomane 2014 JDR 2043 (GP)

Land and Agricultural Development Bank of SA v Flippen Beste Boerdery CC 2014 JDR 2010 (GP)

Guess NO v Pretoria Magistrate 2014 JDR 1983 (GP)

Kareeberg Home Owners Association v Donkerport Ontwikkelaars CC 2014 JDR 1977 (GP)

S v Sibeko 2014 JDR 1760 (GP)

Absa Bank Limited v Rabele 2014 JDR 1759 (GP)

Nedbank Limited v Finin 2014 JDR 1758 (GP)

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Marumo V Minister Police 2014 JDR 1713 (GP)

Brightlight Co (Pty) Ltd v Sub Saharan Distributors (Pty) Ltd

State v Charles Thabane Case number SS36/2013 Gauteng Local Division. Date of judgment 2 September 2013

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