

# Voices AND CAREERS



**Whites can be blacks**

▶3



**Mx it like a Jenner**

▶5

One of the judges below will be appointed by President Jacob Zuma to the Constitutional Court after the Judicial Service Commission concludes its interviews and the president consults with Chief Justice Mogoeng Mogoeng and opposition leaders in the National Assembly



**ZUKISA TSHIQI**

**Born: January 11 1961 in the Eastern Cape**  
Tshiqi has been a judge in the Supreme Court of Appeal (SCA) since November 2009. She was appointed a judge of the high court in 2005 and served in an acting capacity in the Competition Appeal Court and the SCA until her full-time appointment



**NONKOSI MHLANTLA**

**Born: May 2 1964 in Port Elizabeth**  
She has been an SCA judge since her appointment in 2009. Before that, Mhlantla, who was appointed a high court judge in 2002, acted as a judge in the Constitutional Court in 2012



**LEONA THERON**

**Born: November 7 1964 in Durban**  
Theron was appointed a judge of the KwaZulu-Natal High Court in November 1999 after acting for a year. Since then, she acted as a judge in the SCA in 2006 and 2010. She was appointed an SCA judge in 2010 and has been acting in the Constitutional Court



**DHAYA PILLAY**

Pillay, a known labour law expert, was appointed a judge of the KwaZulu-Natal High Court in 2010. Prior to her appointment, she was a labour court judge for 10 years and a part-time commissioner of the Commission for Conciliation, Mediation and Arbitration

**H**istory in the making? A coup for activists of gender transformation? An opportunity to see some of South Africa's finest jurists? These and many other questions will plague many of us when the Judicial Service Commission (JSC) interviews its four candidates, all women, for the Constitutional Court vacancy that was left by Justice Thembele Skweyiya when he retired in May last year. Judges Leona Theron, Zukisa Tshiqi and Nonkosi Mhlantla of the Supreme Court of Appeal (SCA), and Judge Dhaya Pillay of the KwaZulu-Natal High Court are vying for the position in the highest court in the land. Last year, Chief Justice Mogoeng Mogoeng was quoted as saying the JSC would take some time "before advertising the post left vacant ... This was so that the JSC would be spoiled for choice."

Admittedly, four candidates (the bare minimum required) for one Constitutional Court vacancy is not the long list he may have hoped for, but this is the first time the JSC will be presented with an all-female list for such a position. The last interviews for the same court in 2013 featured an all-male list and, before that, the 2012 interviews had only one woman on the four-person list in 2012.

In all the excitement and, perhaps, trepidation (for those who believe that a woman's place is not on the Bench), it is important that South Africa does not lose sight of three important issues.

● The first is that this interview line-up puts transformation critics in their place. Critics have argued that the merit aspect of section 174 of the Constitution has often been sacrificed at the altar of transformation. They claim that - in a bid to reflect the race and gender composition of society as reflected in the Constitution - the necessity for a judicial officer to be appropriately qualified, fit and proper, as per 174(i), has been sidelined. Yet the women being interviewed defeat these critics as they prove that black South Africans and women are as competent and capable as their white and male counterparts. With a diversity of experience and backgrounds that cover everything from expertise in labour law and human rights to mentoring young women and training judicial officers, these judges have been trailblazers in their own right.

● Secondly, the Constitutional Court is no longer limited to being only the final arbiter on constitutional matters. It now hears cases brought to it both as a court of first instance and directly on appeal if the matter is considered important enough and in the interests of justice. Therefore, the role of our Constitutional Court justices in shaping our future has expanded to more than constitutional matters alone.

All four women have served as judicial officers in varying courts for at least 10 years, so they are all adept at dispensing the law. Thus, this is an opportunity for the JSC to dig deeper into what the candidates represent. What are their judicial philosophies? How do they see their roles as transformative constitutionalists? What will they bring to the Constitutional Court? And how is this informed by their judicial journey?

● Thirdly, of the four candidates being interviewed for the vacancy, one has not acted in the court. Instead of viewing that as a negative, it would be helpful to bear in mind that there are currently no acting-appointment guidelines available, therefore the decision to choose judges to act is left to the discretion of the respective heads of each of our courts. In this instance, it is the chief justice. One cannot apply to act in the

## LADY JUSTICE AND THE ROAD TO equality

An all-female list of candidates means that the next judge to be appointed to the Constitutional Court will be **a woman** – a positive and symbolic step

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Constitutional Court, or any other. As Judge Dimphelethe Moshidi of the South Gauteng High Court pointed out in his SCA interview in April 2015: "You wait for the call and don't know why other colleagues are going there."

Moshidi was of the belief that his service and experience on the Bench should not be discounted simply because he had not acted in a higher role, and this is true. Mogoeng, with justices Johan Froneman and Sisi Khampepe, among others, never acted in the Constitutional Court before they were appointed.

The organisations and former Constitutional Court justice who nominated Pillay are convinced that she would make a worthy contribution to the Constitutional Court Bench and to South African jurisprudence as a whole. Is the prospect of such a contribution not worth more than acting stints in the court?

Unlike the outcome of other courts' interviews - where the JSC makes a recommendation to President Jacob Zuma for a particular candidate - a Constitutional Court appointment depends primarily on the president after consultation with the chief justice and opposition leaders in the National Assembly.

Regardless of who President Zuma appoints, the public and the JSC will have an opportunity to assess the quality, depth and expertise that is available among these female jurists. Perhaps it will speed up gender transformation of the judiciary by providing a taster of what sitting female judges (on the Bench for years) can offer (even though they should not have to prove themselves at all).

More importantly, it will be a symbolic aspect of our road to equality. It will show women still encountering discrimination and sexism in the legal profession, and young women in school, that their race or gender does not and should not determine how far they can go.

These interviews open the door for new discussions and debates, and may change preconceived notions of women and the law - and that is worth being excited about.

Masengu is a researcher at the democratic governance and rights unit based at the University of Cape Town

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