

CANDIDATE: ADVOCATE WILLEM HENDRIK GABRIEL VAN DER LINDE SC

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

1. The candidate's appropriate qualifications

1.1. The candidate has the following qualifications:

1.1.1. B.Juris (Port Elizabeth) 1977;

1.1.2. LL.B (Port Elizabeth) 1979;

1.1.3. Certificate in Advanced Corporate Law and Securities Law (with distinction) (UNISA) 2008; and

1.1.4. H.Dip (Tax) (cum laude) (UJ) 2011.

1.2. The candidate possesses the requisite qualifications for the position applied for.

2. Whether the candidate is a fit and proper person

2.1. The candidate is a senior member of the Johannesburg Society of Advocates. He is a member in good standing and there are no disciplinary or other proceedings pending or anticipated against him.

2.2. There is nothing in the application or judgments considered by the reviewers that would suggest that the candidate is not a fit and proper person.

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2.3. To the best of the reviewers' knowledge, no complaints of any type have been lodged with the JSC in respect of this candidate concerning his tenure as acting judge.

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. The Gauteng Division of the High Court currently has 54 permanent judges, of whom 41 are men (35 black and 16 white) and 13 are women (9 black and 4 white). White men thus remain demographically over-represented on that bench.

3.3. The candidate's appointment to the bench would, accordingly, not help to reflect the racial and gender composition of South Africa on the bench.

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

4.1. The candidate has extensive experience as a commercial litigator, including in the specialist areas of insurance and construction-related litigation. He has been a practising advocate for 32 years, of which 19 years have been as Senior Counsel.

4.2. His vast commercial expertise would be an asset to the Bench.

4.3. The candidate has acted as judge in both the Johannesburg and Pretoria courts during 13 court terms over the years 1998 to 2015. Despite the frequency of his acting appointments there is only one reported judgment

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to be found bearing his name, in which he concurred, and none that he authored. The candidate states in his application that he has never marked any of his judgments as “reportable” as he believes this to be the prerogative of permanent judges.

- 4.4. A number of the candidate’s unreported judgments which we have reviewed demonstrate that the candidate is well able to grapple with complex factual matters and undertake substantial case law research in preparing judgments (see, for example, *James v Micor Holdings Ltd and Another*, at pp 13 to 51 of the candidate’s application; and *Duchen v Isaacson and Others*, at pp 52 to 86 of the application).
- 4.5. The candidate does not claim to have particular experience or expertise in constitutional law.
- 4.6. Nevertheless, a number of the matters that he has appeared in concerned constitutional issues. They dealt, for example, with the source of the President’s power to confer senior counsel status, the availability of class action proceedings for constitutional and non-constitutional claims, and the development of the common law to permit costs awards potentially to be awarded against third party litigation funders.
- 4.7. He has further appeared as lead counsel for a party in three matters before the Constitutional Court, namely *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC), *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC), and *Loureiro and Others v Invula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC). The latter two cases

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concerned, in part, complex questions regarding the effect and application of the Constitution to private conduct.

- 4.8. The candidate is clearly familiar with constitutional jurisprudence and the proper approach to it. The reviewers consider that should the candidate be appointed his constitutional experience will be of benefit to the judicial system as a whole, and in particular the High Court, a court which increasingly deals with any number of constitutional and public-law orientated matters.
- 4.9. None of the judgments penned by the candidate reviewed by us, however, concern constitutional matters.

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

- 5.1. The candidate, to the best of the reviewers' knowledge, has demonstrated a firm commitment to the values of the Constitution both in his practice as an advocate and as a leader of the organised advocates' profession.
- 5.2. We understand that the candidate appeared as lead counsel pro bono on behalf of the appellant in *Children's Resource Centre Trust v Pioneer Food* 2013 (2) SA 213 (SCA), which case involved the right of access to the courts by way of class actions. We believe that this demonstrates an admirable and selfless commitment to the advancement of a constitutional requirement.
- 5.3. The reviewers are aware that the candidate, as leader of the Johannesburg Society of Advocates (Chairman, 2000) and of the General Council of the Bar (Chairman, 2002-2004), took considerable steps to

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promote the racial and gender transformation of the Bar, and to facilitate access to the profession by black and women advocates.

5.4. During his tenure as chairman of the General Council of the Bar the candidate wrote several articles and reports that were published in “Advocate”, the journal of the South African Bar, which cogently reflect his views on questions of equality and transformation.

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

6.1. The candidate has disclosed that an appeal against his judgment in *Totalgaz Southern Africa (Pty) Ltd v Solgas (Pty) Ltd* was upheld by the Full Bench. The Full Bench found that the candidate erred by failing to distinguish between a trade usage “in the broad sense” and a tacit term that arises in a contract as a result of a trade usage. (See *Totalgaz Southern Africa v Solgas (Pty) Ltd & another; Easigas (Pty) Ltd v Solgas (Pty) Ltd & another* 2009 (4) SA 37 (W) para 27). His judgment was thus overturned on purely legal grounds.

6.2. The candidate records that an appeal was dismissed in respect of his judgment in *Marumo Nailane v Minister of Safety and Security*. We have been unable to find the appeal judgment.

6.3. We have found two further judgments upholding the candidate on appeal:

6.3.1. *Eldacc (Pty) Ltd v Bidvest Properties (Pty) Ltd* (682/10) [2011] ZASCA 144 (26 September 2011)

6.3.2. *Makaleni v S* [2010] JOL 24878 (ECG)

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6.4. We have found no further judgments that have been overturned on appeal.

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

7.1. The candidate's experience, save for periods when he has acted as judge, arbitrator or adjudicator, is exclusively in his capacity as advocate. The candidate has broad experience as a commercial litigator, and is widely regarded as one of the country's top commercial lawyers. The reviewers have sourced 61 reported judgments in which the candidate has appeared as counsel, 31 of which were before the then Appellate Division or the Supreme Court of Appeal, and 3 before the Constitutional Court.

7.2. As indicated above, the candidate also has considerable judicial experience. He also has substantial experience sitting as an arbitrator in commercial disputes, and has been the Chair of the Independent Regulatory Board for auditors, and of the Dispute Adjudication Board in certain disputes arising out of the construction of the Kusile and Medupi Power Stations.

7.3. The candidate has also participated in a range of Bar Council structures since 2000. We refer to our comments above concerning the candidate's tenure as Chair of the Johannesburg Bar and the General Council of the Bar.

8. The candidate's linguistic and communication skills

8.1. From the candidate's judgments, it is clear that he has excellent linguistic skills in English. He is also fully proficient in Afrikaans, his

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mother tongue. His proficiency in any other language is unknown to the reviewers.

8.2. 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 displays an exceptional ability to produce clearly reasoned judgments on complex legal issues within a minimal space of time.

9.2. The candidate's application indicates that he has 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.

11. The candidate's independent mindedness

11.1. No adverse comments have been received.

12. The candidate's ability to conduct court proceedings

12.1. No adverse comments have been received.

12.2. The reviewers have received an email from an experienced senior-junior member of the Johannesburg Bar who has appeared before the candidate on three occasions recently. It records that –

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“In two of the matters he handed down a written judgment at the end of the week and in the third matter he handed down a written judgment at the end of the following week. The judgments dealt crisply and effectively with the issues. He was firm but courteous.”

- 12.3. A senior member of the Johannesburg Bar informed the reviewers that he had appeared before the candidate in an opposed motion matter in late 2014 and commented that

“In the matter in which I appeared before him, he was well-prepared and delivered an articulate judgment within a week. He listened patiently and politely, but also dealt decisively with counsel on both sides appearing before him. He has a commanding judicial presence and demonstrates an acute grasp of the issues.”

13. The candidate’s administrative ability

- 13.1. No adverse comments received.
- 13.2. In the course of his tenure as Chair of the Johannesburg Bar, the GCB and leader of Advocates Group 621, the candidate has demonstrated his considerable administrative and management skills.

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

- 14.1. No adverse comments have been received.

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15. The candidate's judicial temperament

- 15.1. No adverse comments have been received.
- 15.2. We refer to the comments in paragraph 12 above.

16. The candidate's commitment to human rights, and experience with regard to the values and needs of the community

- 16.1. The application itself does not disclose any extra-mural basis from which the reviewers can comment upon this issue.
- 16.2. The reviewers refer to their comments at paragraph 5 above relating to the candidate's commitment to the values of the Constitution.

17. The candidate's potential

- 17.1. In our view, the candidate is well qualified for permanent appointment to the High Court, regard being had to his extensive experience as an advocate and an acting judge. We note that the candidate has 10 years prior to mandatory retirement from the Bench (assuming an appointment). The reviewers are strongly of the view that those years would be well served in the High Court. The candidate's manifest skills will be a valuable addition to the Gauteng Division. We also believe that the candidate has the potential to be appointed in the future to higher courts.
- 17.2. The reviewers are of the firm view that the candidate is a very strong contender for appointment. He has a wealth of experience, both as an advocate and as acting judge, in the full breadth of the law and is widely

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recognised as a leader in his profession and as one of its foremost practitioners.

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

- 18.1. The candidate has disclosed in his application that he joined the Ruiterswag as a student and remained a member until his membership was terminated at the age of 32 (in 1988). He discloses that he declined an invitation made at that stage to join the Broederbond. The candidate should be afforded an opportunity to explain his reasons for joining and remaining in the Ruiterswag as well as his reasons for declining the Broederbond's invitation.
- 18.2. The reviewers suggest, however, that the candidate's public record as an advocate and as a leader of the bar demonstrates that he has long since transcended the affiliations of his youth and has firmly embraced the values of our democracy.
- 18.3. We respectfully suggest that the candidate's elevation to the bench will send out the message that the bench is always open to skilled and experienced lawyers who wish to serve the cause of justice.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Smouse v AJ Diesel Services CC [2001] 2 All SA 281 (E)

Unreported decisions

Luther v Aero Rebuild Centre CC, case no 97/30269

James v Micor Holdings Ltd and Another, case no 87/23279 (sic)

Duchen v Isaacson and Others, case no 97/17422

S v Goniwe [2005] JOL 13798 (E)

Mfama v S [2005] JOL 13820 (E)

Hasmukh v International Bank of Southern Africa and Others; In Re: International Bank of Southern Africa and Others v Hasumukh (2001/17748) [2014] ZAGPJHC 325 (28 October 2014)

Nyathi and Others v Tenitor Properties (Pty) Ltd, In re: Tenitor Properties (Pty) Ltd v Nyathi and Others (06579/2015) [2015] ZAGPJHC 115 (9 June 2015)

Judgments upheld on appeal

Marumo and Another v Minister of Safety and Security, case no 2801/98

(Other judgments could not be sourced.)

Judgments overturned on appeal

Totalgaz Southern Africa v Solgas (Pty) Ltd & another; Easigas (Pty) Ltd v Solgas (Pty) Ltd & another 2009 (4) SA 37 (W)