

CANDIDATE: JUDGE CHG VAN DER MERWE

COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL

1. The candidate's appropriate qualifications

1.1. The candidate holds the following degrees:

1.1.1. B.Iur (1976) – Free State University; and

1.1.2. LLB (1978) - Unisa.

1.2. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person

2.1. There is nothing to indicate that the candidate is not a fit and proper person.

2.2. The candidate's application is supported by recommendations by:

2.2.1. J P de Bruin SC, who has known the applicant and worked with and alongside the candidate since 1986, both as the silk (leader) to the candidate and as an opponent. De Bruin SC, describes the applicant as "*a man of integrity [who] is able to discern relevant issues and approach the solution thereof with particular judicial skill*";

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2.2.2. Professor J J Henning, Dean of the University of the Free State, who praises the candidate's "*high standard of jurisprudence*"; and

2.2.3. ten attorneys practising in different firms, predominately, it would appear, in the Free State.

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. Currently, the Supreme Court of Appeal comprises twenty members, consisting of five black women, nine black men, two white women and four white men. Fifteen members are men (four are white and eleven black) and seven are women (two white and five black).

3.3. All the shortlisted candidates for the Supreme Court of Appeal for the present JSC sitting are men. This may well be a reflection of the fact that women are relatively poorly represented on the benches of the various High Courts.

3.4. Whilst the appointment of a male candidate – which is unavoidable in the present round of appointments – will not advance the cause of gender representation, the reviewers do not, in the light of the current racial composition of the Supreme Court of Appeal, consider the candidate's race to be material.

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

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- 4.1. The candidate appears to have been engaged all of his working life in the legal fraternity. The candidate, whilst studying for his LLB degree, worked as public prosecutor. Thereafter he was a state advocate for two years before joining the Free State Bar in 1980, where he practised for twenty-three years before being elevated to the bench of the Free State Division in 2003. For a year, from 1 December 2012 to 30 November 2013, the candidate had an acting appointment in the Supreme Court of Appeal.
- 4.2. Over his legal career of some 37 years, the candidate appears to have gained experience in wide-ranging fields. This is reflected in the judgments that have been reviewed, which indicate a knowledge of and experience in the following fields, amongst others commercial litigation including company, insolvency and banking law; labour law; intellectual property law; tax law; family law; and criminal law.
- 4.3. The candidate also has a particular knowledge of administrative law, evidenced by several of the reviewed judgments.
- 4.4. The candidate appears to have an appreciation of constitutional law, evidenced by his detailed judgment in *National Association of Welfare Organisations and Non-Governmental Organisations and Others v MEC of Social Development, Free State and Others* [2010] ZAFSHC 73 (5 August 2010). The candidate found that the Free State's policy regulating funding of Non-Profit Organisations

(“NPOs”) was inconsistent with sections 26, 27 and 28 of the Constitution and other legislation for the protection of the rights of children, the elderly and vulnerable persons and granted a structural interdict requiring the Department of Social Development to address the situation.

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

- 5.1. As appears above, the candidate handed down an extensive judgment reviewing and setting aside provincial policy that infringed the rights of children, the elderly and other vulnerable persons.
- 5.2. The decision in *SH v GF* 2013 (6) SA 621 (SCA) may, however, be criticised, on several grounds. Particularly pertinent is the criticism that the candidate paid lip service to the constitutional rights afforded to children in terms of section 28 of the Constitution and effectively failed to uphold the dignity and equality of women.
- 5.3. The appellant, a divorced mother seeking to recover maintenance for her two minor children from the recalcitrant father, succeeded in the court *a quo* in demonstrating that the respondent was in breach of a maintenance order and obtained an order against the respondent for contempt of court together with a sanction against the respondent.
- 5.4. The appellant was dissatisfied with the appropriateness of the sanction as it did not effectively advance the on-going obligations of the respondent to pay maintenance.

- 5.5. The candidate, writing as an acting judge on the Supreme Court of Appeal, agreed that that the respondent was in contempt but declined to interfere in the court *a quo's* exercise of its discretion in determining the appropriate sanction. In doing so, the candidate effectively left the appellant (and accordingly her minor children) without an appropriate remedy. The candidate found that the appellant should pursue her remedy in the maintenance courts (largely because of what the candidate found were disputes of fact before it) and so declined to afford the appellant any substantive relief notwithstanding that it was clear that the respondent was recalcitrant.
- 5.6. The candidate took refuge in the well-known *Plascon-Evans* approach to disputes of fact and so declined to determine the extent of the respondent's maintenance obligations (indeed it appears that it was undisputed that at least a certain sum of maintenance was payable) rather than to adopt a proactive approach especially in circumstances where it was justifiable to dismiss as fanciful the factual version of the recalcitrant, contemptuous and *mala fide* respondent.
- 5.7. What is apparent from the criticism of the judgment is that the candidate may not have been sufficiently sensitive to the needs of women and children, which required appropriate relief to do justice to these needs. This criticism is, however, tempered by the fact that four appeal judges concurred with the candidate's judgment, including the Acting President of the SCA.

6. Whether any judgments have been overturned on appeal

- 6.1. Despite a fair number of the judgments being taken on appeal (the candidate lists eleven in total), the candidate indicated that only two of his judgments have been overturned on appeal. We have been unable to locate any more. This reflects favourably on the candidate, as the candidate is reasonably prolific in producing judgments.
- 6.2. We have been unable to locate the candidate's judgment in *SA Predator Breeders Association and Others v Minister of Environmental Affairs and Tourism* but have considered the appeal judgment.
- 6.3. In overturning the two judgments, the SCA did not express any particular criticism of the candidate.

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

- 7.1. It appears that the candidate has the necessary professional experience to be appointed as a judge of the Supreme Court of Appeal. The candidate has been a permanent judge for over eleven years, since 2003.
- 7.2. Particularly noteworthy is the candidate's judicial and prolonged experience in commercial litigation, which would be particularly useful in the Supreme Court of Appeal.

8. The candidate's linguistic and communication skills

- 8.1. The candidate is proficient in English and Afrikaans (a large number of his judgments are in Afrikaans) and has sound linguistic and communication skills.
- 8.2. The candidate describes as his most significant contribution to the law that as a judge for more than ten years he “*at all times endeavoured to give parties a fair hearing and an expeditious, impartial and reasoned judgment based on the facts, the law and the Constitution.*”
- 8.3. This is reflected in the applicant's judgments that we have reviewed. The judgments tend to be succinct, and while they do not always contain full and detailed reasoning, they appear nonetheless to be sufficiently reasoned. This is generally to the candidate's credit as the judgments we have considered involved issues that were largely not particularly complex and did not require unnecessary exposition. The judgments are also generally produced with admirable expedition
- 8.4. However, the candidate has been criticised on the paucity of his reasoning in *SH v GF* (discussed at paragraph 5 above) in various respects. This criticism is justifiable in our view.
- 8.5. There is a paucity of reasoning in other judgments we have considered, which appears to evidence a reluctance to develop the law when presented with an opportunity to do so. Whilst perhaps understandable in a High Court judge, a more proactive approach is expected of an Appeal Court judge.

8.6. Otherwise, from the judgments we have reviewed, it is clear that the candidate possesses the ability to grasp the central issues in each matter before him, and to determine those issues appropriately, both factually and legally.

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

9.1. Particularly admirable is the ability of the candidate to produce judgments promptly, both as a High Court judge and as an acting judge in the Supreme Court of Appeal.

9.2. On some occasions, the candidate took up to six weeks but typically the judgments were produced in no more than two or three weeks, especially in the High Court.

9.3. We have not found any *ex tempore* judgments but this is probably reflective of the workload in the Free State Division, which does allow some time for the court to deliberate on the matter before handing down judgment.

9.4. The longest period we have been able to trace is seven months in *SA Predator Breeders Association and Others v Minister of Environmental Affairs and Tourism*. This is a long period, but the judgment is extensive on a matter of considerable public interest and the candidate did not sit alone (being a review, there were two Judges). Such a lengthy period appears to be an isolated instance.

9.5. The candidate does not refer to any outstanding judgments.

10. The candidate's fairness and impartiality

10.1. There is nothing to suggest that the candidate is not fair and impartial to litigating parties before him. This is demonstrated by his even-handedness in his handling of the criminal appeals and administrative reviews that came before him.

11. The candidate's independent mindedness

11.1. The candidate appears to be independently minded. This quality is evident in judgment in *National Association of Welfare Organisations*, in which the candidate had no difficulty in setting aside the provincial policy relating to subsidies to NPOs caring for children, the elderly and the vulnerable. Another example is *Omumatu v Minister of Home Affairs* [2008] JOL 20183 (O) in which the candidate rejected the Minister's attempts to deprive the applicant of his temporary residence in the country.

11.2. The candidate also has no difficulty upholding provincial legislation and policy, as is apparent from his judgment in the *SA Predator Breeders Association and Others v Minister of Environmental Affairs and Tourism* (dealing with regulations for the hunting of captive-breed lions). Although overturned on appeal, no pointed criticism was made by the Supreme Court of Appeal on the candidate's reasoning.

12. The candidate's ability to conduct court proceedings

- 12.1. There is nothing to indicate that the candidate is unable to conduct court proceedings efficiently. No adverse comments have been received.
- 12.2. Having been a judge since 2003, the candidate can be expected to have developed the skills to conduct court proceedings.
- 12.3. Members of the Bar have reported that the candidate handled his court well and with proper courtesy to both legal practitioners appearing before him and the litigants.

13. The candidate's administrative ability

- 13.1. There is no reason to doubt the candidate's administrative ability. The candidate has been engaged for over 37 years in the legal field, including over ten years as a judge, and in the circumstances would have developed the appropriate administrative abilities.
- 13.2. The candidate's administrative ability is also reflected in his general promptness in producing judgments.

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

- 14.1. No adverse comments were received.
- 14.2. We also refer to the recommendations described above.

15. The candidate's judicial temperament

- 15.1. No adverse comments were received and consideration of the candidate's judgments reflects an appropriate judicial temperament.
- 15.2. As pointed out above, members of the Bar indicated that the candidate handled his court very well and with proper courtesy to both legal practitioners appearing before him and the litigants.
- 15.3. Other than in relation to the criticisms pertaining to *SH v GF*, members of the Bar also indicated that the candidate approached the matters before him with the appropriate practicality and level headedness that is necessary for a judge.

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

- 16.1. We refer to what has been set out above as to the candidate's experience in constitutional litigation and the criticism of his judgment in *SH v GF*.

17. The candidate's potential

- 17.1. The candidate has been a judge already for over ten years and has produced judgments on wide ranging topics, especially of a commercial nature. This experience would be particularly useful in the Supreme Court of Appeal.
- 17.2. The judgments of the candidate that we have reviewed do not demonstrate in-depth reasoning, or any engagement with

scholarly discourse. This may be understandable given that these judgments were handed down in the High Court.

17.3. An appointment to the Supreme Court of Appeal would provide the candidate with an opportunity to produce more closely reasoned judgments than he has done to date.

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

18.1. The candidate has a wide knowledge of the law, including constitutional, administrative and criminal law. The candidate is particularly well-grounded in commercial law, which could be useful in the Supreme Court of Appeal.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Rantho v Premier 2005 (5) SA 29 (O)

Oos-Vrystaat Kaap Bedryf Bpk v Van Aswegen 2005 (4) SA 417 (O)

JG v MG 2012 (3) SA 12 (FB)

Land Bank v Ryton Estates 2013 (6) SA 319 (SCA)

Steve Tshwete Municipality v Fedbond 2013 (3) SA 611 (SCA)

SH v GF 2013 (6) SA 621 (SCA)

Propspec Investments v Pacific Coast Investments 97 2013 (1) SA 542 (FB)

S v SB 2014 (1) SACR 66 (SCA)

Knipe v Kameelhoek 2014 (1) SA 52 (FB)

Unreported decisions

National Association of Welfare Organisations and Non-Governmental Organisations and Others c MEC of Social Development, Free State and Others [2010] ZAFSHC 73 (5 August 2010)

De Leeuw & andere v LUR, Vrystaatse Provinsiale Regering Belas met Plaaslike Regering & Behuising & andere [2008] JOL 21100 (O)

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Minister of Safety and Security v Lupacchini [2009] ZAFSHC 82 (3 September 2009)

Vukani Gaming Free State (Pty) Ltd v Chairperson of the Free State Gambling and Racing Board 2011 JDR 0209 (FB)

Odendaal v ABSA Brokers p/l 2011 JDR 0245 (FB)

Nedbank v Procprops [2013] ZASCA 153 (20 November 2013)

Central University v National Education [2008] JOL 21360 (O)

Citi Bank v Van Zyl NO [2008] JOL 21103 (O)

Maxim v Municipality of Maluti [2007] JOL 21121 (O)

Pienaar v Steenkamp [2008] JOL 21081 (O)

ABSA v Vrystaat Ontwikkelings [2008] JOL 21098 (O)

Huang v Prov Kommissaris [2007] JOL 21028 (O)

S v Karedi [2008] JOL 21113 (O)

Tax Case: 12158 [2007] JOL 20055 (TC)

Briedenhann v Peermont [2011] JOL 27882 (FB)

Tshilidzi v S [2013] JOL 30585 (SCA)

Taurus Stock Improvement v Dixon [2008] JOL 21112 (O)

SH v GF 2013 (6) SA 621 (SCA)

Alberts v Prokureursorder [2008] JOL 20191 (O)

JG v MG 2012 (3) SA 12 (FB)

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IO Tech Manufacturing v Gallagher Group [2014] JOL 31383 (SCA)

Omumatu v Minister of Home Affairs [2008] JOL 20183 (O)

Tsotetsi v Mohapi and Another [2008] JOL 20172 (O)

Padongelukkefonds v Oliphant (A161/06) [2007] ZAFSHC 108 (15 March 2007)

Judgments upheld on appeal

The candidate lists in annexure 16.3 nine judgments upheld on appeal, which judgments we have reviewed.

Judgments overturned on appeal

The candidate lists two judgments in paragraph 16.4 that have been overturned on appeal.

We have reviewed the candidate's judgment in *SA Predator Breeders Association and Others v Minister of Environmental Affairs and Tourism* [2009] ZAFSHC 68 (11 June 2009) but we have been unable to trace his judgment in the *Northern Free State District Municipality v Matshai* matter.

We have considered the appeal judgments in both of these matters. The Supreme Court of Appeal did not make any pointed criticism of the candidate in either of these judgments.