

**APPLICANT: JUDGE ELIZABETH DOROTHY BAARTMAN**

**COURT FOR WHICH APPLICANT APPLIES: SUPREME COURT OF APPEAL**

**1 The candidate's appropriate qualifications**

1.1 The candidate holds the following academic qualifications:

1.1.1 B.Juris: 1986 (University of the Western Cape); and

1.1.2 LLB: 1994 (University of the Western Cape).

1.2 These are appropriate formal qualifications.

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

2.1 There is nothing contained in the application 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 Currently, the SCA comprises of twenty-two permanent Judges. Five are black women, eleven are black men, one is a white woman and five are white men.

3.2 It is apparent, therefore, that while strides have been taken to address racial representivity, the Court is not representative of either the racial or gender composition of South Africa. In particular, gender representivity still lags behind. While a positive step was taken in

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the appointment of a black woman as the President of the SCA, there remains a significant gender imbalance in the ranks of permanent Judges of the SCA.

- 3.3 The candidate is a black woman of “coloured” descent and her appointment would therefore assist in reflecting the gender and racial demographics of the Republic.

#### 4 **The candidate’s knowledge of the law, including constitutional law**

- 4.1 The judgments reviewed demonstrate that the candidate has a broad knowledge of the law, but lacks a jurisprudential history indicative of a substantive ability to develop the law, whether under the precepts of the Bill of Rights or general common law principles.

- 4.2 Her experience prior to elevation to the bench relates mostly to criminal law (her years as a prosecutor) and family law (her years as a Presiding Officer in divorce court and as a director at the People’s Family Law Centre).

- 4.3 The candidate does not appear to have direct experience in constitutional law. The manner in which the candidate dealt with the *Helman* matter (below) raises concerns in this regard which ought to be raised with the candidate.

#### 5 **The candidate’s commitment to the values of the Constitution**

- 5.1 In *Claire Joanne Helman v The Kingsbury Foetal Assessment Centre (Pty) Ltd 4872/2013* (“*Helman*”), the plaintiff was born with Down’s Syndrome. The plaintiff’s mother sued the defendant for

alleged damages negligently sustained while *in utero*. The particulars of claim were excepted to on the basis that they contravened the common law delictual rule that no duty is owed to a foetus *in utero*.

- 5.2 Relying on established precedent (and a 2012 SCA decision which had concluded that the common law rule was not constitutionally susceptible), Baartman J upheld the exception and also dismissed the claim without affording the plaintiff the usual opportunity to amend her claim in light of the successful exception.
- 5.3 The Constitutional Court granted leave to appeal and remitted the claim back to the lower court to trial. In so doing, the Constitutional Court expressed some disquiet at the manner in which the court *a quo* handled the matter. The court restated the constitutional injunction, namely, that the best interests of the child are paramount in any matter involving a child. According to the court, there were important factual, legal and policy issues that needed to be determined which could impact on whether the common law should be developed to allow the child's claim to be accommodated on the particular circumstances of this case and the exception procedure was not the appropriate mechanism for doing so. The court was also critical of Baartman J's decision to dismiss the entire claim together with upholding the exception.
- 5.4 In *Helman*, the candidate missed an opportunity to deal with substantive constitutional issues: she simply concluded that there was no need to consider the issues raised any further as the legal convictions of the community had not changed since the above SCA

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decision. In addition we consider that the judgment displayed a lack of judicial imagination which precluded an engagement with substantial constitutional issues pertaining to the rights of children.

5.5 The *Helman* judgment also illustrates the candidate's inability or unwillingness to engage with the inherent tension between constitutional imperative of developing the common law in accordance with the spirit and purport of the Bill of Rights and the doctrine of *stare decisis*.

5.6 In *Chevron SA (Pty) Ltd v Dennis Edwin Wilson T/A Wilsons and Others* (5244/2013), Chevron challenged the constitutional validity of certain provisions of the National Credit Act 34 of 2005 on the basis that it allowed for arbitrary deprivation of its property. The respondents did not oppose the challenge. Baartman J declared the section constitutionally invalid because the obligatory nature of the refund was both substantively and procedurally unfair.

5.7 The Constitutional Court confirmed the candidate's judgment. In its judgment, however, the Constitutional Court gave no indication of Baartman J's ability to engage with and develop legal issues of some constitutional and commercial import. The candidate's judgment provides no insight into the quality of her jurisprudential ability; this is largely because the candidate dealt with the substantive constitutional issue tersely and in a perfunctory

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manner.<sup>1</sup> The judgment thus neither broke new ground nor attempted to consolidate the existing jurisprudence.

## 6 Whether any judgments have been overturned on appeal

6.1 The candidate has indicated that her judgments in the following matters were overturned on appeal:

6.1.1 *Helman* (discussed above);

6.1.2 *Imperial Marine Company v The Motor Vessel "Filippo Lembo" Deiulemar Compangnia Di Navigazione Spa* AC8/2009 and AC 20/90; and

6.1.3 *Prince Mangosuthu Gatsha Buthelezi, MP and Another v Minister of Home Affairs and Another* 22071/2011 ("*Buthelezi*").

6.2 In *Buthelezi* (before a two Judge bench *a quo*), the applicants contended that the failure to timeously take a decision in respect of

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<sup>1</sup> This is apparent from the following brief extract of the Judgment which indicates the brevity of the reasoning in the court *a quo*

*... counsel for the third respondent, submitted that the deprivation is arbitrary both on a substantive and procedural level. I agree. The court is denied any discretion to decide on a just and equitable order. This is problematic and leads to procedural unfairness. Similarly, on a substantive level the obligatory nature compels a court to order the refund whether or not there is sufficient reason for a deprivation.*

*The third respondent has not advanced any basis for a limitation of rights in terms of section 36 ...*

*I am persuaded that section 89(5)(b) is inconsistent with the Constitution and invalid.*

the visa application of the Dalai Lama rendered the conduct of the government departments subject to review in terms of the Promotion of Administrative Justice Act 3 of 2000. The applicants sought to review and set aside what they contended amounted to a decision to refuse the visa application.

- 6.3 Baartman J (on the basis that the Dalai Lama had, subsequent to the commencement the litigation, withdrawn his application for the visa) held that there was no existing or live controversy before the court that required adjudication. The application was thus effectively dismissed on an *in limine* point.
- 6.4 In coming to her conclusion, Baartman J considered the principles set out by the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality* as regards a court's discretion to hear a matter notwithstanding its mootness. These factors included the practical effect of an order on the parties or on others and the importance of the issue and its complexity.
- 6.5 In applying these principles, Baartman J found that the Dalai Lama's withdrawal of his application, his absence as a party to court proceedings, the fact that the events he had been invited to had already taken place and his lack of response to the new invitations, were factors that must influence a court's discretion in deciding whether or not to hear the matter despite it being moot.
- 6.6 Nugent JA, writing for a full bench of the SCA, overturned the judgment *a quo*. The SCA considered that the question of whether

or not the authorities had acted lawfully was and remained a live issue.

6.7 The judgment in the Court *a quo* appears to be indicative of the candidate's tendency to apply the law somewhat mechanistically. In this case, it appears from both the result and the reasoning in the appellate court, that the candidate dismissed the matter by incorrectly applying the test for mootness and then, by incorrectly applying the test set out by the Constitutional Court on the issue of mootness. This judgment, in our view, displayed a lack of appreciation of the issues.

6.8 In her application, the candidate indicated that the appeals against her judgments in the following matters were unsuccessful:

6.8.1 *Shirley Searle v Mossel Bay Municipality and Others* (9573/09);

6.8.2 *City of Cape Town v Andile Lily and Others* (3945/2001); and

6.8.3 *The Commissioner of South African Revenue Services v Fastmould Specialist CC* (A642/2010).

6.9 None of the judgments so upheld involved complex legal principles.

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

7.1 The candidate was permanently appointed to the bench in 2009. She was assigned to the Western Cape High Court where she has

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presided to date save for the period June 2015 to May 2016 when she sat as an acting appellate judge at the Supreme Court of Appeal.

- 7.2 From 1986 to 1991 the candidate occupied the position of Prosecutor with the Department of Justice.
- 7.3 The candidate was appointed as a Magistrate (District Court) between 1991 and October 1998 and thereafter, from November 1998 to September 2001, sat as Presiding Officer in the Divorce Court.
- 7.4 In December 2001, the candidate was appointed as a Director at the Peoples Family Law Centre where she served until June 2003.
- 7.5 Between 2003 and September 2008, the candidate served as Senior State Advocate and Deputy Director at the National Prosecuting Authority.
- 7.6 The candidate was appointed as an acting judge in October 2008.
- 7.7 The candidate has, to date, not contributed to any publications in the legal field. In 2002, the candidate addressed a Family Law Conference in Australia on aspects of South African Family Law.
- 7.8 The candidate states in her application that she assisted in setting up the Divorce Court and has acted as a trainer and facilitator of workshops through the Law, Race and Gender Unit. The nomination letter from the Centre for Law and Society, which was previously the Law, Race and Gender Unit, states that the candidate has been

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involved in various initiatives which have enhanced access to justice, particularly for women and children.

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

8.1 Whilst the candidate has not written any legal publications, a review of judgments, which are written in English, demonstrates that she is a proficient and able communicator. Her judgments are clearly drafted. Her grammar and use of the English language cannot be faulted.

8.2 There is nothing contained in the candidate's application, or the judgments reviewed, that would suggest that the candidate is not able to communicate effectively in the English language. However we do note that it is somewhat surprising that in a decade of being on the bench the candidate has according to her application, only delivered two reported judgments. This again indicates that candidate does not appear to have a record of developing the law.

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

9.1 There is nothing to indicate that the candidate is unable to produce judgments promptly.

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

10.1 No adverse comments were received.

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

11.1 No adverse comments were received.

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

12.1 No adverse comments were received.

**13 The candidate's administrative ability**

13.1 The candidate's experience as a sitting judge for close to 10 years suggests that she is an experienced administrator. Comments received from colleagues who appear in her division also indicate that she runs her court in a prompt and efficient manner.

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

14.1 No adverse comments were received.

**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 Reference is made to what is stated above (at paragraphs 5 and 6) about the candidate not having used the opportunity on the facts applicable in certain case before her to develop the common law in accordance with the precepts of the Constitution enjoining her to do so. This is a disappointing feature of her candidacy. As appears from her application, the candidate has, throughout her career, played a significant role in the development and advancement of family law in South Africa and yet, when faced with facts that potentially could advance substantive constitutional jurisprudence,

the candidate instead followed past, somewhat limiting, precedent or adopted a procedurally limiting approach.

**17 The candidate's potential**

17.1 The impression created after reviewing the candidate's judgments is that the candidate is an able hard working High Court judge; further the contents of the candidate's application indicate that she is loyally committed to both the legal profession and the values of an independent judiciary.

17.2 Notwithstanding the above, the candidate's failure to engage substantively on constitutional issues or develop the common law, suggests that the candidate lacks the sort of jurisprudential record indicative of an aptitude for appellate level jurisprudence.

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

18.1 The appointment of the candidate would undoubtedly contribute to the transformation of the judiciary in regard to gender and race.

18.2 However, against this imperative, it needs to be considered that in almost a decade on the bench, the candidate has not in any way developed the common law and if anything has shown a propensity to readily defer to existing precedent (where such precedent might be susceptible to constitutional challenge).

The judgments the candidate wrote during her tenure as an acting appellate court judge at the SCA are brief or did not traverse legal or factual issues of any complexity and so were not, in the opinion

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of the team, particularly helpful in assessing the candidate's suitability.

**ANNEXURE: LIST OF JUDGMENTS CONSIDERED**

*Radzilane v S* [2016] ZASCA 64 (16 May 2016)

*Mndebele v S* (173/2015) [2016] ZASCA (3 March 2016)

*KWV South Africa (Proprietary) Limited v Johannes Matthys Annendale and Others* (Case No. 4765/2016 'B') 24 October 2016

*Primedia Broadcasting, a Division of Primedia (Pty) Ltd and Others v Speaker of the National Assembly and Others* (2749/2015) [2015] ZAWCHC 24 (10 March 2015)

*Desmond Etienne Doman v Kgabo Gabriel Selomo* (20455/2014) [2015]

*Piet Saal v The State* (Case No.A119/2014)

*Zandile Ellen Tshabalala v The Speaker of The National Assembly and Others* (18871/2014 12 November 2014)

*Claire Joanne Helman v The Kingsbury Foetal Assessment Centre (Pty) Ltd* 4872/2013

*AECI Ltd and Others v Dreyer* (A559/2011) [2012] ZAWCHC 289 (13 August 2012)

*Joint Owners, Erf 5216 Hartenbos v Minister for Local Government Affairs and Development Planning, Western Cape and Another* 2011(1) SA 128 (WCC)

*Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (Pty) and Another* (No2) 4610/20112012 (6) SA 110 (WCC) (1 June 2011)

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*Prince Mangosuthu Gatsha Buthelezi, MP and Another v Minister of Home  
Affairs and Another 22071/201*

