

CANDIDATE : JUDGE IRMA SCHOEMAN

APPLICANT: IRMA SCHOEMAN

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 BA (Law) and LLB Degrees from the University of Pretoria obtained in 1973 and 1975 respectively.

1.2 The candidate is appropriately qualified.

1.3 The candidate was a junior lecturer at UNISA in 1975 and a public prosecutor in 1976.

1.4 From 1977 and 1979 the candidate was an articled clerk at Schoeman Kellerman and Kotze. Following that and at the same law firm from 1979 to 1982, the candidate was a professional assistant and from 1982 to 1990 was a partner.

1.5 For nine years from 1991 to 2000 the candidate was an advocate.

1.6 In 2000, the candidate was elevated to the bench and has sat as a High Court judge in the Eastern Cape for 18 years. The candidate has since then also acted as a judge of Labour Court for one term in

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2003 and as a judge of appeal at the Supreme Court of Appeal for a total of seven terms between 2013 and 2016.

2 Whether the candidate is a fit and proper person

2.1 The candidate has had a long career as a legal practitioner and judicial officer and numerous acting appointments.

2.2 There is no basis to conclude that she is not a fit and proper person for judicial appointment.

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 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 white woman. Her appointment would help reflect the gender composition of the South African bench.

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

4.1 The candidate's judgments display a sound knowledge of the law.

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4.2 In the *S v Thunzi and Another*, the candidate called, *mero motu*, for argument in terms of Rule 16A on the “*constitutionality of the provisions of section 4 of the Dangerous Weapons Act 71 of 1968*”. She held that the “*applicability*” of section 4 of the DWA (Tk) was unconstitutional on the basis that it unfairly discriminated against perpetrators of crime in the erstwhile Transkei who are subject to its harsher sentencing regime. In doing so, she applied the test developed by the Constitutional Court in *Harksen v Lane*. She limited the order of invalidity to cases where the accused had not yet pleaded.

4.3 In the Constitutional Court, there was some uncertainty regarding the procedural basis upon which Schoeman and Miller JJ were seized of the review in the *Thunzi* matter (see paragraph 16). However, for the purposes of the case, the Court held that it was unnecessary to reach a firm conclusion on this issue.

4.4 The majority judgment commented that:

“[43] Having regard to the judgment of the High Court and its order, read as a whole, the High Court found that the continued application of section 4 in the erstwhile Transkei unfairly discriminates against perpetrators of violent crime in that region. In the light of this finding, the High Court should have set aside the 1975 Notice which triggered the application of section 4, but it failed to do so. What is also clear from the judgment is that the High Court did not in fact declare the provisions of section 4 to be unconstitutional. The order made by the High Court is therefore not subject to confirmation. In

the result, neither the provisions of section 4 of the DWA (Tk), nor the 1975 Notice have been invalidated. The High Court's order therefore falls outside the terms of sections 167(5) and 172(2)(a) of the Constitution, and should not have been referred to this Court for confirmation.

[44] The question remains whether this Court has the power to amend the High Court's order despite the fact that it was mistakenly referred to us for confirmation. This question arises because leaving the High Court's order intact will perpetuate an injustice. The ineffectiveness of the High Court's order means that section 4 of the DWA (Tk) continues to apply in the erstwhile Transkei, and the discriminatory sentencing regime remains operative in the erstwhile Transkei.

[45] Even if the order of the High Court is treated as effective by courts in the erstwhile Transkei, the High Court unjustly limits the effect of its declaration of invalidity to cases where the accused has not yet pleaded to charges under section 4 of the DWA (Tk). The High Court's order leaves out of account accused persons who have pleaded but who have not yet been convicted; accused persons who have been convicted but have not been sentenced; accused persons whose cases have been finalised; and those whose cases are on appeal. The order as it stands unfairly excludes persons who fall in these categories. It is apparent that the attention of the High Court was not drawn to our jurisprudence in this regard.”

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- 4.5 The Constitutional Court then set aside and replaced the order made by Schoeman J in the High Court. However, in doing so, it took for granted the fact that the provisions in question were discriminatory and that the *Harksen v Lane* test had been correctly applied.
- 4.6 In her application, the candidates states that the judgment in *Eskom Holdings Ltd v Halstead-Cleak* 2017 (1) SA 333 (SCA) is significant because “*there are no reported judgments on the Consumer Protection Act*”. We note, however, that the following reported judgments dealt with aspects of the Consumer Protection Act and were handed down before the judgment written by Schoeman J:
- 4.6.1 *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government & others* [2016] 3 All SA 794 (FB);
- 4.6.2 *Ketler Investments CC t/a Ketler Presentations v Internet Service Providers’ Association* [2014] 1 All SA 566 (GSJ);
and
- 4.6.3 *Vousvoukis v Queen Ace CC trading as Ace Motors* 2016 (3) SA 188 (ECG).

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

- 5.1 Based on at least three of the judgments analysed and mentioned below, the candidate displays a commitment to the values of the Constitution. The candidate also states that she is committed to those values. There is no reason to doubt the statement.

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

6.1 Three judgments written by the candidate have been overturned on appeal, they are:

6.1.1 *EH v SH* 2012 (4) SA 164 (SCA)

In this appeal, the SCA overturned a decision that had been made by Schoeman J which is not reported. It is clear from the SCA judgment that Schoeman J reached a decision in the High Court that a former spouse is responsible for the maintenance of their former spouse. The SCA concluded that this decision was incorrect as it party claiming the maintenance had not proved their need for the same. It, therefore, replaced Schoeman J's order with its own.

6.1.2 *MEC for Safety and Security, Easter Cape v Mtokwana* 2010 (4) SA 628 (SCA)

In this appeal, the SCA overturned a decision by Schoeman J (with Dawood AJ sitting as court of appeal). In the Magistrates' Court, the respondent had instituted action regarding harm that was negligently caused to him by a policeman, for which it held the appellant vicariously liable. The appellant filed a special plea and contended that there had been a misjoinder and a non-joinder of a necessary and interested party. Further to this the appellant contended that the national Minister was the correct party to cite in the legal proceedings. The Magistrate upheld the special plea and dismissed the respondent's claim. The respondent appealed to the Eastern Cape High Court, which held that the Magistrate had erred, upheld the appeal and referred the matter back to

the Magistrate. In scrutinising the reasoning of the High Court, the SCA held that the reasoning by the High Court was “*inherently flawed*” and that the case relied on by the High Court in coming to its conclusion was a “*far cry*” from the facts of the present case. Finally, the SCA concluded that for the reasons it had set out “*the Magistrate was correct in his conclusion about the wholly inappropriate manner in which the respondent had sought to introduce the Minister as a party*”, that the Magistrate was right in dismissing the respondent’s claim, and finally that “*the High Court was wrong in overturning that decision.*”

6.1.3

Minister of Safety and Security v Folo JDR 0725 (SCA)

In this appeal, the SCA overturned a decision by Schoeman J (with Nepgen J and Sangoni J sitting as the court of appeal). The main issue in this appeal pertained to the interpretation of sections 49(1) and 49(2) of the Criminal Procedure Act 51 of 1977 relating to the use of force in effecting arrest. Making reference to two authorities, the SCA considered whether section 49(2) was to be given its ordinary (and unconstitutional) meaning when applied in the circumstances of the case before the court or whether the section was to be given meaning consistent with the construction placed on section 49 (1) by the SCA in previous matters. The SCA found that the court below had erred in reading the requirements for lawful injury during arrest as laid down by the SCA in *Govender* as applicable to section 49(1) of the Act, into the

provisions of section 49(2). It held that the court below ought to have upheld the appeal and set aside the finding of liability in favour of the respondent.

6.2 Finally, the reviewers draw attention to the decision of *S v Fatyi* 2001 (1) SACR 485 (SCA). Although the SCA upheld the candidate's judgment in the court *a quo*, the SCA nonetheless, identified a number of misdirections on the part of the candidate. This matter dealt with an appeal to the SCA against the decision of Schoeman J. The appellant was convicted in the Eastern Cape High Court for the indecent assault of a 6-year old girl and sentenced to 10 years' imprisonment in accordance with section 51(2)(b)(i) of the Criminal Law Amendment Act 105 of 1997 which, read with Part III of Schedule 2, obliged a High Court to sentence a first offender to imprisonment of a period not less than 10 years where the accused is convicted of indecent assault on a child under the age of 16 years. The SCA held that Schoeman J erred in holding that the injuries sustained by the complainant were "*the same as one would expect if she [had been] raped*" in that the finding was not supported by evidence. The SCA further held that Schoeman J had erred in holding that the age of the appellant was irrelevant for the purposes of determining whether substantial and compelling circumstances were present. However, in coming to its ultimate conclusion the SCA held that "*despite the trial judge's misdirections*" the prescribed minimum sentence was an appropriate one and that "*the trial court was correct in holding that there were no substantial and compelling circumstances which would justify the imposition of a lesser sentence*".

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

7.1 Before being elevated to the bench, the candidate was a legal practitioner for a period of 25 years. Following that, the candidate has been a judicial officer for 18 years. For over four decades, the candidate has engaged either with the practice of or the adjudication on the law.

7.2 The candidate indicates that as a legal practitioner she “*worked with and on behalf of people that have suffered*”. Practicing during Apartheid under unjust laws, the candidate indicates that “*she could assist [disadvantaged individuals] in pursuing justice under difficult circumstances*”.

7.3 As a Judge, the matters adjudicated and decided by the candidate have spanned a wide spectrum from public law to private law from constitutional law to family law.

7.4 The candidate has produced well-structured and clearly written judgments in English. The candidate is proficient in English and Afrikaans.

8 The candidate's linguistic and communication skills

8.1 There is no indication, from the judgments analysed, that the candidate has failed to deliver any judgment within a few months.

9 The candidate's ability to produce judgments promptly

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

- 9.2 The candidate appears to be particularly mindful of the gendered societal norms that adversely affect the experiences of women and has been conscious of these as appears in the articulation of her judgments and their result (see in this regard the candidate's unreported judgment in *SH v EH* and *S v Thunzi*).

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

- 10.1 Based on the judgments analysed, the candidate appears to be independent minded.

11 **The candidate's independent mindedness**

- 11.1 The candidate's lengthy tenure as a Judge, suggests that she is experienced in conducting court proceedings.
- 11.2 No adverse comments were received.

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

- 12.1 The candidate's lengthy tenure as a Judge, suggests that she is experienced in conducting court proceedings.
- 12.2 No adverse comments were received.

13 **The candidate's administrative ability**

- 13.1 The candidate appears to have promptly delivered her judgments. This suggests that she has a good administrative ability.

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

- 14.1 No adverse comments were received.

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14.2 There is no basis to doubt the candidate's integrity.

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 The candidate indicates that she aims "*to serve with justice, compassion and respect, all members of the community without fear or favour*".

16.2 There is no indication that this is not the case or that the candidate is not committed to human rights.

17 **The candidate's potential**

17.1 The candidate has heard matters in many different areas of law. She has also been a judge for 18 years. This suggests that she has broad experience.

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

18.1 The candidate appears to be committed to promoting the rights and interests of women, in particular those affected by gender-based violence. Her appointment would show support for this stance. Her appointment would also improve the gender representation on the bench of the Supreme Court of Appeal.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Melville v Busane and Another 2012 (1) SA 233 (ECP)

Eskom Holdings Ltd v Halstead-Cleak 2017 (1) SA 333 (SCA)

Absa Bank Ltd v Naude N.O. 2016 (6) SA 540 (SCA)

Firststrand Bank Ltd v KJ Foods CC 2017 (5) SA 40 (SCA)

S v Tshonga 2017 (1) SACR 420 (SCA)

Van Deventer v Ivory Sun Trading 77 (Pty) Ltd 2015 (3) SA 532 (SCA)

S v Machaba & another 2016 (1) SACR 1 (SCA)

Unreported decisions

Woji v Minister of Police, Eastern Cape Division, Port Elizabeth, Case No.758/2010

Judgments upheld on appeal

Majomatic 115 (Pty) Ltd v Kouga Municipality 2009 JDR 0680 (ECP)

S v Thunzi 2009 JDR 0748.

S v PN 2010 (2) SACR 187 (ECG)

Trumper Trading v Kouga Municipality 2015 JDR 0539 (SCA)

S v PB 2013 (2) SACR 533 (SCA)

S v Fatyi 2001 (1) SACR 485 (SCA)

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Judgments overturned on appeal

EH v SH 2012 (4) SA 164 (SCA)

MEC for Safety and Security, Eastern Cape v Mtokwana 2010 (4) SA 628 (SCA)

Minister of Safety and Security v Folo JDR 0725 (SCA)

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