

CANDIDATE : ADV BRENDA NEUKIRCHER SC

APPLICANT: ADV B NEUKIRCHER SC

**COURT FOR WHICH APPLICANT APPLIES: GAUTENG DIVISION OF
THE HIGH COURT**

1 The candidate's appropriate qualifications

1.1 The candidate has a BLC LLB degree.

1.2 The candidate is appropriately qualified.

2 Whether the candidate is a fit and proper person

2.1 There is nothing in the candidate's application or to our knowledge that would suggest that she is not a fit and proper person.

2.2 A review of the candidate's judgments and other information in the public domain provided no indication that she is unfit to be a judicial officer.

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 woman.

3.2 The Gauteng Division of the High Court comprises approximately 79 judges of which only 28 are woman (35%).

3.3 The appointment of the candidate would therefore advance the cause of gender representivity. Of the 28 female judges, 11 (39%) are white women.

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

4.1 The candidate's practice seems to be balanced between commercial law (contract, company and insolvency law) and family law.

4.2 She lists no criminal law experience but has penned some criminal appeal judgments.

4.3 The candidate has not listed any constitutional law experience.

4.4 As the co-author of various publications on civil procedure the candidate has a good grasp of procedural law.

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

5.1 The candidate in her application does not make any specific reference to her commitment to the values of the constitution. There is however no reason to question her commitment. Her practice is not one of administrative law (although the applicant has some experience in this filed) or constitutional law.

5.2 As the candidate practices in the field of family law which more often than not involves children she would constantly be obliged to uphold and protect the constitutional rights of children.

- 5.3 Sadly, one is not able to discern what line the candidate took in the case of *Fraser v Children’s Court, Pretoria North* 1997 (2) SA 218 (T) where the applicant was the *amicus curiae* for the adoptive parents and the *curator ad litem* for the minor child. It is curious that one person could perform both these roles without a conflict arising and is thus highlighted as something to take up with the applicant. The court in its judgment did thank the candidate for her contribution to the matter and did not seem to believe that there was a conflict.
- 5.4 The case of *Ex Parte WH and others* 2011 (6) SA 514 (GNP) involved constitutional issues arising from an application to confirm a surrogacy application. Whilst it is impossible to discern from the judgment exactly what constitutional arguments were proffered by the candidate the matter certainly hinged on many constitutional considerations and the court thanked the candidate as *amicus* for her “invaluable” contribution.
- 5.5 In *Magadze v ADCAP; Ndlovu v Koekemoer* [2016] ZAGPPHC 1115 the candidate gave an order expunging a debtor’s record of over-indebtedness based on the fact that it would be untenable were s71 of the National Credit Act to carry more weight than an order issued by the High Court. Binns-Ward in *Phaladi v Lamara* 2018 (3) SA 265 (WCC) criticised the candidate’s approach for encroaching on the legislative function of parliament and a wrongful use of s172 of the Constitution.
- 5.6 However, in the case of *Kungwini Estate (Pty) Ltd & Another v Kungwini Manor Homeowners Association*, the candidate penned the

judgment for the unanimous full court, in an appeal pertaining to the interpretation of section 34 of the Constitution. The candidate decisively interpreted and applied s34 of the Constitution finding that it encompasses, even in civil matters, a right to fair trials and access to justice.

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

6.1 The two judgments listed by the applicant in section 2 point 9.4.

6.2 In *Jonker v Brooks and another* [2007] ZAGPHC 92 Southwood J on appeal found that the principle in *Plascon Evans* properly applied should have resulted in the application being dismissed, with costs, and thus upheld the appeal.

6.3 *P U Injection Manufacturing (Pty) Ltd v Nedbank Limited and Another* [2006] ZAGPHC 184 was originally upheld on appeal to the full court and ultimately overturned by the Supreme Court of Appeal.

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

7.1 The candidate has 28 years of experience at the bar on which to draw.

7.2 She has acted on numerous occasions since 2002 and has extensive quasi - judicial experience having chaired a hearing of the Pharmacy Appeal Board, acting as vice chairperson of the Independent Regulatory Board of Auditors Disciplinary Committee for 5 years and chairing various arbitrations.

7.3 The candidate, by means of her experience as counsel and as acting judge, has dealt with many areas of the law and has knowledge of the legal profession, procedural and substantive law.

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

8.1 Her communication and linguistic skills in English and Afrikaans are of an acceptable standard.

8.2 In our opinion the candidate generally strives to give well-reasoned judgments. There are, however, some gaps in setting out her logic in matters of greater complexity.

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

9.1 It would appear that the candidate mostly served in unopposed court and criminal appeal court with limited trial and opposed motion court experience. This notwithstanding, from what we could glean from dates provided on Juta and Safflii about hearing dates and judgment dates, the candidate has an impeccable record of delivering judgments promptly.

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

10.1 There is no bias to be detected from the candidate's judgments. What is detectable however is that she provides parties with ample opportunity to ventilate issues and pays attention to the proceedings as she is able to deal with the points thoroughly in her judgments.

11 The candidate's independent mindedness

11.1 The candidate undoubtedly has independent mindedness.

12 The candidate's ability to conduct court proceedings

12.1 There are indications that the candidate leans more towards equity than strictly applying the letter of the law to the facts before her. In this regard reference is made to the following cases:

12.1.1 *Jonker v Brooks and another* [2007] ZAGPHC 92 in which Southwood J on appeal overturned the decision of the candidate. In this case the applicant sought declaratory relief that a contract for the sale and purchase of immovable property was valid and binding despite the applicant not having complied a suspensive condition to obtain a mortgage bond to finance the purchase. The applicant decided not to obtain a bond for the property as he managed to sell the property to another purchaser for a higher amount and would simply use the proceeds of that sale to settle the purchase price. The respondent, wanting to sell the property itself to another purchaser for a higher price elected to cancel the agreement due to nonfulfillment of the suspensive condition. The candidate's decision on equity would appear to be the correct decision but Southwood J in overturning the decision on appeal highlighted that on a proper application of the Plascon Evans principle the applicant failed to make out his case for final relief and was thus not entitled to the relief sought.

- 12.1.2 *Magadze v ADCAP; Ndlovu v Koekemoer* [2016] ZAGPPHC 1115 in which case the candidate gave an order expunging a debtor's record of over-indebtedness based on the fact that it would be untenable were s71 of the National Credit Act to carry more weight than an order issued by the High Court. As mentioned above, *Binns-Ward in Phaladi v Lamara* 2018 (3) SA 265 (WCC) criticised the candidate's approach for encroaching on the legislative function of the executive.
- 12.2 In the case of *Van Den Berg v Sayers NO*. 2018 JDR 0968 (GP) the applicant sought a mandatory interdict for the return of monies attached in terms of a writ of execution issued and executed in terms of a default judgment which was subsequently rescinded. The respondent refused to pay the monies and launched a counterclaim relying on the same facts as in the summons and particulars of claim (the action – which was still alive after the default judgment was set aside). The applicants raised a defence of *lis pendens* against the counter application. The candidate instead of upholding the defence of *lis pendens* referred the counter application to trial and ordered that the monies be paid into one of the parties' interest - bearing trust account pending the finalisation of the matter. On the facts it would seem that the candidate should rather have dismissed the counterclaim in light of the pending action and should have dealt with the return of the funds.
- 12.3 *Absa Technologies Finance Solutions (Pty) Ltd v ICT Globe Management (Pty) Ltd* 2018 JDR 0969 (GP) was a matter in which both sides seemingly lost objectivity and launched interlocutory applications

which were unnecessary had the parties acted professionally. The applicant launched a Rule 30(1) irregular step proceeding against the respondent for failing to attach the contract on which it relied in its counterclaim in the main action to said counterclaim. The respondent refused to rectify the error despite being in possession of the contract and took the stance that the contract was in the possession of the applicant as the applicant gave it to the respondent in response to a previous Rule 35(12) notice. The respondent then launched a counter application complaining that the applicant had not complied properly with its Rule 35(12) notice in that it did not allow the respondent the opportunity to inspect the documents. The applicant took the stance that it had provided the respondent with copies of the documents requested in its Rule 35(12) notice and as such did not have to provide it an opportunity to inspect the documents. Both sides requested costs de bonis against the other. The candidate clearly heard argument from both parties and then reserved judgment from 5 June 2018 to 12 June 2018 to prepare a written judgment. A very stern warning from a judge should have put the matter to bed and resulted in a settlement, the matter should not have taken up time on a busy interlocutory roll, how much time the parties were allowed to rob the court of cannot be discerned from the judgment. Considering the candidate's strong procedural background, it is strange that she reserved judgment. Whilst no costs order de bonis propriis was made the candidate did strongly reprimand both litigating parties for not acting as officers of the court should with the requisite decorum and collegiality.

13 The candidate's administrative ability

13.1 We have no information at our disposal to comment on this aspect.

14 The candidate's reputation for integrity and ethical behaviour

14.1 We searched the cases (reported and unreported) in which the candidate appeared as counsel and could find no complaint against her.

15 The candidate's judicial temperament

15.1 There is no reason to believe that the candidate does not have an even judicial temperament. As stated above, the candidate appears from her judgments to give both sides ample opportunity to present their cases and treats all parties fairly.

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

16.1 The candidate's commitment to fairness and finding justice for the party she feels has been wronged is clear from her judgments.

16.2 It would appear that the candidate makes every effort to be a role model and mentor for younger women at the bar and brings them in on matters where she can. She thus shows a clear commitment to education, transferring skills and knowledge to those that are progressing up the ranks.

17 The candidate's potential

17.1 The candidate has the requisite academic credentials, legal experience, passion for the profession and temperament to become a judge, which will give timely judgments and be committed to serving the public and the profession if given the chance.

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

18.1 The appointment of the candidate would send a message that the judiciary is serious about gender transformation and appointing candidates who are capable of being public servants and dedicated to performing their functions in a timely and courteous manner whilst striving for excellence.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED**Reported decisions**

None.

Unreported decisions

All the cases listed in items 7.1 to 7.7 of the candidate's application.

Gihwala and Another v Seoloane and Others 2002 JDR 0407 (T)

Van Den Berg v Sayers NO. 2018 JDR 0968 (GP)

Absa Technologies Finance Solutions (Pty) Ltd v ICT Globe Management (Pty) Ltd
2018 JDR 0969 (GP)

Kortekaas v Nedbank Limited 2016 JDR 0507 (GP)

Petuniah v Road Accident Fund 2015 JDR 0976 (GP)

Nonzinyana v Road Accident Fund 2015 JDR 0977 (GP)

Rametsi v Absa Bank Limited 2014 JDR 2210 (GP)

Rapholo v National Director of Public Prosecutions and Others (73576/2016)
[2016] ZAGPPHC 1108

S v Kuyper 2013 JDR 0507 (GNP)

S v Moyo 2013 JDR 0515 (GNP)

Wiesenhof Management Services (Edms) Bpk v Wiesenhof Ellisras 2013 JDR 1441
(GNP)

S v Moselakgomo 2012 JDR 2507 (GNP)

S v Nkosi 2008 JDR 0032 (T)

Jonker v Brooks 2007 JDR 0531 (T)

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Group Five Construction (Pty) Ltd v Roscher Coetzee Nortje Mampeule Inc 2006 JDR 0532 (T)

King Civil Engineering Contractors (Pty) Ltd v The Tender Board (Mpumalanga) 2006 JDR 0417 (T)

P.U Injection Manufacturing (Pty) v Nedbank Ltd 2006 JDR 0403 (T)

S v Ngobeni 2008 JDR 0031 (T)

Rametsi v Absa Bank Limited 2013 JDR 2363 (GNP)

Naidoo and Another v Consolidated Steel Industries (Pty) Ltd, in re: Consolidated Steel Industries (Pty) Ltd v Naidoo and Another (50682/13) [2017] ZAGPPHC 806 (23 November 2017)

Judgments upheld on appeal

None.

Judgments overturned on appeal

Jonker v Brooks and another [2007] ZAGPHC 92

P U Injection Manufacturing (Pty) Ltd v Nedbank Limited and Another [2006] ZAGPHC 184