

CANDIDATE: JUDGE CAROLINE ELIZABETH HEATON NICHOLLS

APPLICANT: JUDGE CAROLINE ELIZABETH HEATON NICHOLLS

COURT FOR WHICH APPLICANT APPLIES: SUPREME COURT OF APPEAL

1 The candidate's appropriate qualifications

1.1 The candidate has the following degrees and qualifications:

1.1.1 BA (University of Cape Town 1977); and

1.1.2 LLB (University of Cape Town 1978).

1.2 The candidate is appropriately qualified.

2 Whether the candidate is a fit and proper person

2.1 The candidate is already a sitting judge. No adverse comments were received. There is therefore no reason to conclude that she 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 The candidate is a White woman.

3.2 The Supreme Court of Appeal bench currently composes 22 Justices of Appeal, of whom 15 are men (5 white, 6 black, 3 Indian and 1 coloured) and 7 are women (5 black, 1 white and 1 Indian).

3.3 The appointment of female candidates to senior positions in the judiciary currently lags behind the goal of equal gender representivity, and the candidate's appointment would therefore further this end.

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

4.1 While the candidate's experience in the law prior to her elevation to the bench concentrated on the area of human rights, her knowledge of the law as reflected in her judgments shows a maturity and deepening understanding of all areas of the law over the course of her 10 year tenure as a judge. Her knowledge of constitutional law is interwoven in her dispensing of justice as is clearly illustrated in the decision of *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ), where she interpreted the provisions of a contract within the context of the Constitution.

4.2 Her judgments reflect an understanding of both the procedural and substantive law. This extends to areas outside her field of expertise. This is illustrated in the matter of *Cochrane Steel Products (Pty) Ltd v M-Systems Group (Pty) Ltd and Another* [2015] 2 All SA, relating to a passing off arising from the use of a third party trademark (Google AdWords) which was at the time *de res nova*. The decision was upheld on appeal. [See *Cochrane Steel Products (Pty) Ltd v M-Systems Group (Pty) Ltd and Another* 2016 (6) SA 1 (SCA).]

4.3 Similarly, in *National Airways (Pty) Ltd (In Liquidation) v South African Airways* 2016 (6) SA 19 (GJ), a matter dealing with the quantification of damages arising out of anti - competitive conduct, the candidate executed a well-reasoned judgment in a novel and complex area of the law, generally retained for the specialist competition tribunal.

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- 4.4 In *Gold Reef City Theme Park v Electronic Media* 2011 (3) SA 208, the candidate analyses the competing rights between freedom of the press and the right to reputation and engages the writer in the story telling and the necessary but not overt examination of the relevant case law. While finding that a trading corporation could suffer damages to its reputation, she held that the common law did not require further development to bring it into harmony with the spirit, purpose and objects of the Bill of Rights. This judgment shows not only her understanding of the law but her commitment to the Constitution, with reasoning that is readily apparent and a judgment that is easy to follow.
- 4.5 Judgments of the candidate, when sitting as an appellate Judge, show an understanding of when the appeal court can and should interfere with the trial Court findings (see *Road Accident Fund v CK* [2019 (1) All SA 92(SCA) relating to the discretion of the appeal in determining contingencies deductions).
- 4.6 In *De Bruyn No v Karsten* [2018] ZASCA 143 in pending the majority decision, showed an appreciation and knowledge of the difficulties associated with the shortcomings and deficiencies of the National Credit Act. In interpreting the NCA, the candidate examined earlier authorities, but the SCA in the constitutional court, to arrive at a correct interpretation of section 40(1). While this was an important aspect of the act, the candidate did not seek to go beyond the judicial confines in the interpretation of the provision.
- 4.7 In *Dombo Community v Tshakhuma Community Trust* [2018] ZASCA 190 the candidate wrote a separate concurring judgement that the rescission fell

to be dismissed, clearly expressing that the reason for dissent was that in the candidate view to differentiate between the validity of the land claim and the requirement to show that the claim is certified compliant is artificial.

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

5.1 In her application, the candidate records her legal background and experience prior to her appointment, which was almost exclusively in the area of human rights. This reflects her commitment to the values of the Constitution.

5.2 Her judgments refer to the Constitution and the principles enshrined therein. The Constitution is a prism through which the candidate interprets and applies the law.

5.3 The candidate has been involved in assisting in the training of aspirant judges and aspirant advocates during her time as a judge. The candidate's participation in the Judicial Institute for Africa on human rights shows her commitment to the Constitution, not only in her capacity as a judge but as part of her personal ethos.

6 Whether any judgments have been overturned on appeal

6.1 The candidate's judgments are rarely overturned on appeal.

6.2 The only judgment overturned on appeal was the decision relating to the determination of a serious injury in road accident fund matters. The candidate followed the precedent in the South Gauteng Division.

6.3 In the matter of *The Road Accident Fund v Duma; Road Accident Fund v Kubeka; Road Accident Fund v Mokoena* 2013 (6) SA 9 (SCA), the Supreme Court held that the precedent of the Gauteng South High Court was an incorrect interpretation of the prevailing legislation.

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

7.1 The candidate has, by virtue of her experience as an attorney for 23 years and an acting Judge and a Judge of the Gauteng Local Division of the High Court Johannesburg for the past 10 years, intimate knowledge of the legal profession, procedure and the law.

7.2 The candidate's judgments reflect that she has dealt with a wide range of areas of the law, including delicts, contractual matters, criminal law, civil and criminal procedure, prescription, constitutional law, property law, insolvency and competition law. Her judgements reflect an understanding of the areas of law.

8 The candidate's linguistic and communication skills

8.1 The candidate writes clear, concise, well-written and reasoned judgments. She has the ability to distil complex legal issues into relatively simple and easily understandable terms. She engages the reader with a chronological narrative and a clear outlining of the material facts

8.2 The candidate gives a clear exposition of her interpretation of the facts, the issues in dispute and the law, allowing the reader to follow the reasoning arrived at the by the candidate. The candidate distils the facts and the law in a manner which shows the candidate's understanding of all the issues

placed before her. The clearly crafted judgments show a parity and even-handedness in the dispensing of justice.

8.3 The candidate fluently speaks isiZulu. She is well known to use this linguistic ability in the course of court proceedings to communicate with both unrepresented isiZulu speaking litigants and to follow evidence in the vernacular.

8.4 The candidate will be able to bring to the Supreme Court a deep understanding of a diverse society.

9 The candidate's ability to produce judgments promptly

9.1 The candidate is known to produce well-written judgments quickly. All judgments reviewed, were produced in a reasonable period of time.

10 The candidate's fairness and impartiality

10.1 The candidate's judgments show that she has a sound sense of fairness and acts impartially. Her reasoning in arriving at her decisions reflects her impartiality, in particular when dealing with criminal appeals where the right to a fair hearing is invoked. The candidate has a clear understanding of the procedural and evidential standards to give voice to the constitutional right.

11 The candidate's independent mindedness

11.1 The candidate independent mindedness is reflected in her ability to grapple with novel areas of the law placed before her for adjudication and in her delivering dissenting judgments as a judge of appeal. The candidate does not shy away from dealing with contentious issues in novel points raised,

but seeks to interpret them within the ambit of existing precedent, even foreign jurisdictions. The candidate is confident to express her view, in dissent, in her clear and concise manner.

12 The candidate's ability to conduct court proceedings

12.1 The candidate has 10 years' experience as a permanent judgment of the High Court and has practised as an attorney of the High Court for a period of 23 years.

12.2 Her judgments reflect a good understanding of the Rules of Court, Rules of Evidence and a commitment to procedural fairness.

13 The candidate's administrative ability

13.1 There is no reason to believe that the candidate does not have the appropriate administrative ability.

13.2 The candidate has displayed her administrative ability by serving as a Nadel representative on the Council of the Law Society of Northern Provinces for a period of eight years and served on numerous committees of the Law Society regulating and administrating the (then) largest law society of attorneys in South Africa.

14 The candidate's reputation for integrity and ethical behaviour

14.1 The candidate is well-respected and has a reputation of being a person of integrity. Her judgments reflect a strong sense of judicial integrity.

15 The candidate's judicial temperament

15.1 The candidate is known to be a pleasant and respectful judge. She is consistently courteous with counsel.

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

16.1 The candidate clearly has a strong commitment to constitutional principles as evidenced by her judgments.

16.2 The candidate's commitment to fairness and justice is reflected in her judgments. All her judgments are overlaid by the prism of the Constitution.

16.3 The candidate's past experience as a practitioner demonstrated deep commitment to the pursuit of justice and democracy.

16.4 The candidate's commitment to participating in the training of aspirant judges and the training of aspirant advocates during her time as a judge reflect her commitment to transformation and to the transference of skills and knowledge.

17 The candidate's potential

17.1 The candidate's well-reasoned dissenting judgments, while acting in the Supreme Court of Appeal, show her ability to act independently and allow her voice to be heard even where she has been part of a bench of more senior, seasoned and permanent judges of appeal.

17.2 The candidate has the potential to acquit herself admirably as a Supreme Court of Appeal judge.

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

18.1 The candidate is a white woman with extensive legal experience. Currently, the demographics of the Supreme Court of Appeal are unevenly weighed in favour of men. The appointment of the candidate to the SCA would send a message to the community that elevation to the Supreme Court is not the preserve solely of men but that women have an equal opportunity to do so.

18.2 Her judgments reflect judicial maturity and her commitment to constitutional values and principles.

18.3 Her appointment would send a positive message to society at large.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Body Corporate of Empire Gardens v Sithole and Another 2017 (4) SA 161 (SCA)
(27 March 2017)

Brian Kahn Inc v Samsudin 2012 (3) SA 310 (GSJ)

Cliff v Electronic Media Network (Pty) Ltd [2016] 2 All SA 102 (GJ)

Cochrane Steel Products (Pty) Ltd v M-Systems Group (Pty) Ltd and Another [2016]
3 All SA 345 (SCA); 2016 (6) SA 1 (SCA)

Du Bruyn No and Others v Karsten 2019 (1) SA 403 (SCA)

First Rand Bank Ltd v Brera Investments CC 2013 (5) SA 556 (SCA)

Gold Reef City Theme Park (Pty) Ltd v Electronic Media Network and Another 2011
(3) SA 208 (GSJ)

Hohne v Super Stone Mining (Pty) Ltd 2017 (3) SA 45 (SCA)

Kaknis v Absa Bank Ltd And Another 2017 (4) SA 17 (SCA)

Naidoo v Birchwood Hotel 2012 (6) SA 170 (GSJ)

Nationwide Airlines (Pty) Ltd (In Liquidation) v SAA 2016 (6) SA 19 (GJ); [2016] 4
All SA 153 (GJ)

*New Adventure Shelf 122 (Pty) Ltd v Commissioner of the South African Revenue
Services* [2017] 2 All SA 784 (SCA); 2017 (5) SA 94 (SCA)

Page Automation (Pty) Ltd v Profusa Properties 2013 (4) SA 2013 (4) SA 37 (GSJ)

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Road Accident Fund v CK [2019] 1 All SA 92 (SCA)

S v Van der Linde 2016 (2) SACR 337 (GJ)

Tshoga v S (635/2016) [2016] ZASCA 205; 2017 (1) SACR 420 (SCA) (15 December 2016)

Unreported decisions

Brickhill v Copper Sunset Trading 223 (Pty) Ltd t/a Retail Crossing Superspar (2016/26230) [2012] ZAGPJHC 57 (23 January 2012)

Bucibo v S (A334/2010) [2014] ZAGPJHC 367

Central African Road Services (Pty) Ltd v The Cross Border Road Agency and Another (60113/2013) [2013] ZAGPPHC 550 (1 November 2013)

Chauke v S (A107/2014) [2018] ZAGPJHC 57

City of Johannesburg Metropolitan Council v Kirk (14967/2017) [2018] ZAGPJHC 439 (19 June 2018)

Dombo Community v Tshakuma Community Trust and Others (1078/2017) [2018] ZASCA 190 (19 December 2018)

Famanda v S (1930/2017) [2018] ZASCA 139

Goelst v MEC Safety and Security (2013/08028) [2014] ZAGPJHC 131 (10 June 2014)

Kekana v S (629/13) [2014] ZASCA 158 (1 October 2014)

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Matoto v Free State Gambling and Liquor Authority and Others (987/2017) [2018]
ZASCA 110 (12 September 2018)

MCQ Industries (Pty) Ltd v Chespak (Pty) Ltd (17527/10) [2013] ZAGPPHC 306
(22 October 2013)

Quispam CC and Others v The Johannesburg Stock Exchange Ltd (A5021/2015)
[2017] ZAGPJHC 441 (1 December 2017)

Sibanda and Another v Minister of Police and Another [2012] ZAGPJHC 200

Smalle and Another v Southern Palace Investments 440 (Pty) Limited and Another
(121/2016) [2016] ZASCA 189 (1 December 2016)

Sooklal v Thales South Africa (Pty) Ltd (866/2017) [2018] ZASCA 130 (27
September 2018)

Spar Group Ltd v Absa Bank Ltd (06584/2011) [2014] ZAGPJHC 365 (5 December
2014)

Transnet Soc Ltd v Innovent Retail and Asset Management Solutions (Pty) Ltd
(A5013/2017) [2018] ZAGPJHC 108

Van Zyl and Another v Kolsch (23207/2014) [2018] ZAGPJHC 115 (18 April 2018)

Judgments upheld on appeal reported as

Brookstein v Brookstein 2016(5) SA 210 (SCA)

Cochrane Steel Products (Pty) Ltd v M-Systems Group (Pty) Ltd and Another [2016]
3 All SA 345 (SCA); 2016 (6) SA 1 (SCA)

First Rand Bank Ltd v Brera Investments CC 2013 (5) SA 556 (SCA)

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*Home Talk Development (Pty) Ltd v Ekurhuleni Metropololitan Municipality 2018
(1) SA 391 (SCA)*

Meyer NO & others v Big Five Developments [2018] ZASCA 136

Judgments overturned on appeal

*The Road Accident Fund v Duma; Road Accident Fund v Kubeka; Road Accident
Fund v Mokoena 2013 (6) SA 9 (SCA)*