

CANDIDATE: ADVOCATE AMELIA MARISSA DA SILVA

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EASTERN CAPE DIVISION OF THE HIGH COURT, GRAHAMSTOWN

1. The candidate's appropriate qualifications:

- 1.1. BA (University of Natal 1996);
- 1.2. LLB (University of Natal 1999);
- 1.3. The candidate is appropriately qualified.

2. Whether the candidate is a fit and proper person:

- 2.1. The candidate was a practising attorney from 2000 to 2003 and a practicing advocate from 2005 to date.
- 2.2. The candidate appears to be a fit and proper person. The candidate is not a South African citizen, although the candidate's application reflects that she has "*commenced the process of applying for South African citizenship*" and is in "*the first step of the process*".
- 2.3. It is not disclosed on what basis the candidate has applied for South African citizenship or when this process was instituted. It would appear from section 174 (1) of the Constitution, 1996, that judges other than Constitutional Court judges need not necessarily be South African citizens.

3. Whether the candidate's appointment would help to reflect the racial and gender composition of South Africa:

3.1. The candidate is a woman.

3.2. While her appointment will therefore contribute to gender representivity.

4. The candidate's commitment to the values of the constitution:

4.1. The nomination by NADEL indicates that the candidate is a committed human rights lawyer and seeks to transform our law in accordance with the Constitution.

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

5.1. It is noted, from the 10 judgments disclosed by the candidate in paragraph 10, of the questionnaire dealing with cases which the candidate regards as being most significant:

5.1.1. in 8 of the matters the candidate appeared as junior counsel lead by senior counsel;

5.1.2. In **Totolo v The Minister of Home Affairs** the candidate appeared on behalf of all the Respondents, including the Department of Home Affairs. The Applicant had applied to rectify his birth date in the population register and the Department had failed to make a decision. The candidate submitted that the Applicant should pay costs of the application

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as his baptismal certificate was “suspect” and the Replying Affidavit was lengthy. A punitive costs order was awarded against the Department, provided that the Applicant is only entitled to a quarter of the costs of the drawing of the Replying Affidavit. The Court commented at paragraphs [13] and [14] that it was a pity that the application was argued at all, and the conduct of the Respondents was criticised.

- 5.2. It appears that the candidate has acted as a judge on 4 occasions for a period of 5 months in total. (It is uncertain whether the candidate acted in 2009 as the candidate states that she was appointed as a mentor in the pupillage programme in 2009). The candidate acted for one month in the years 2010, 2011 and 2017 and 2 months in the year 2018. The candidate did not act from 2012 to 2016.
- 5.3. During the candidate’s time as an acting judge she appears to have written a total of 14 judgments (paragraph 9.3 of the questionnaire and page 4 of her CV).
 - 5.3.1. In *Arries v Road Accident Fund* the issue to be decided was general damages and loss of income. The candidate awarded general damages of R375 000 without referring to any case law.
 - 5.3.2. In *Nozewu and others v Sani and others* Despite there having been a order of court consolidating 5 matters on the date of hearing the candidate was called upon to “adjudicate on each matter individually”. There was no indication in the judgment of

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what occurred with the other 4 matters and, if judgments were produced, such judgments were not disclosed.

5.3.3. The candidate only appears to have presided in 3 criminal matters (2 judgments of which have been attached to the application).

5.4. From the judgments provided from when the candidate acted as a judge, no Constitutional law issues appeared to arise.

6. Whether any judgments have been overturned on appeal:

6.1. The candidate has stated in paragraph 9.4 of her acceptance that one of her judgments has been taken on appeal and it was overturned.

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

7.1. The candidate has had extensive professional experience. In this regard, she has been involved in most aspects of the law. She was initially admitted as an attorney, during which period she specialised in criminal law. At the bar the candidate was exposed to administrative law, constitutional law and other areas of civil law such as personal injury claims, contractual disputes and civil human rights claims.

7.2. She has also been involved in a number of organisations such as:

7.2.1. National Association of Democratic Lawyers;

7.2.2. Cape Law Society;

7.2.3. Transkei and Bhisho Association of Advocates;

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7.2.4. She has acted as a Judge on a number of occasions;

7.2.5. She has been involved in pupil training.

8. The candidate's linguistic and communication skills:

8.1. The candidate has excellent linguistic and communication skills.

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

9.1. The candidate has produced 14 judgments as an acting judge which appear to have been promptly delivered. From the judgments provided:

9.1.1. **Nozewu:** heard 4 June 2009 and delivered 12 June 2009;

9.1.2. **Arries v Road Accident Fund:** heard 28 July 2010 delivered 29 July 2010;

9.1.3. **State v Matwa & Dyongwana** (conviction): last day heard 10 November 2017 delivered 1 December 2017

9.1.4. **State v Matwa & Dyongwana** (sentence): heard 19 January 2018 delivered 26 January 2018

9.1.5. **State v Mafongo & others** (conviction): last day heard 28 September 2018 delivered 18 December 2018

9.1.6. **State v Mafongo & others** (sentence): last day heard 11 January 2019 delivered 14 January 2019

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9.1.7. **State v Mafongo & others** (leave to appeal: heard 14 January 2019 delivered 18 January 2019).

9.2. The Applicant has accordingly produced Judgments promptly.

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

10.1. The candidate has displayed fairness and impartiality in presiding over matters as well as in Judgments delivered.

11. **The candidate's independent mindedness:**

11.1. There is nothing to suggest that the candidate is not fair and impartial.

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

12.1. The candidate is well able to conduct Court proceedings and has a thorough knowledge of Court procedure.

13. **The candidate's administrative ability:**

13.1. We believe that the candidate has good administrative skills for the reasons stated above. More specifically, that she practiced as an attorney (professional assistant) before joining the bar, for a period of 3 years in a medium size practice in Mthatha.

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

14.1. We are unaware of any circumstances to doubt the candidate's integrity and ethical behaviour.

14.2. The candidate has provided certificates of good standing from the Mthatha and Bhisho Society of Advocates which indicate no disciplinary proceedings have ever been instituted against her and that the candidate has a clean and exemplary disciplinary record.

15. The candidate's judicial temperament

15.1. The candidate has good judicial temperament and conducts herself in a dignified manner.

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

16.1. The candidate has displayed commitment to human rights and has experience in various fields. This includes:

16.1.1. Being a member of the National Association of Democratic Lawyers, East London/Border branch;

16.1.2. Being an Advocate pupil trainer;

16.1.3. Being a member of the Transkei and Bhisho Association of Advocates

17. The candidate's potential:

17.1. The candidate does not have a lot of experience in writing Judgments, but we believe that she has potential to enjoy a successful career on the bench.

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

18.1. The candidate is a woman and her appointment will send a positive message to the community at large.

18.2. The candidate's appointment would fulfil the expectations of the community at large in that:

18.2.1. Although she was born outside the country, she is a product of the Eastern Cape in that she did all her education in Mthatha and started working in Mthatha where she is still practising as an advocate.

18.2.2. She has engaged herself in numerous activities in furtherance of the struggle for human rights as a member of the National Association of Democratic Lawyers.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

The candidate has no reported decisions as an acting judge.

Unreported decisions

The judgments provided by the candidate have been dealt with above.

The other unreported judgments (paragraph 9.3 of the questionnaire) were not able to be obtained for consideration, despite an extensive search online (including SAFLII).

Judgments upheld on appeal

None.

Judgments overturned on appeal

The Supreme Court of Appeal overturned one judgment of the candidate.