

CANDIDATE: ADV AVRIELLE MAIER-FRAWLEY

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COURT FOR WHICH APPLICANT APPLIES: GAUTENG DIVISION OF HIGH COURT

1. The candidate's appropriate qualifications:

1.1 The candidate holds BA and LLB degrees.

1.2 Both degrees were obtained from the University of the Witwatersrand.

1.3 The candidate also holds a Higher Dip. In ADR (summa cum laude) including accreditation in Mediation (Commercial and Divorce), Facilitation and Negotiation.

1.4 The aforesaid diploma was obtained from AFSA (JHB) in conjunction with the University of Pretoria (H Dip. ADR).

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

2.1 There is nothing in the application or judgments that would suggest that the candidate is not a fit and proper person.

2.2 The candidate has not been convicted of an offence involving dishonesty, violence or any other disreputable or dishonourable conduct.

2.3 The candidate has not been found guilty by any legal professional body of any unprofessional or disgraceful conduct.

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 While her appointment will contribute to gender representivity, it will not contribute to the racial transformation of the judiciary.

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

4.1 The candidate practiced as a Public Prosecutor for the Department of Justice for the period 1985 to 1986.

4.2 After completing her Articles at Deneys Reitz Attorneys during 1987 to 1988, the candidate practiced as an attorney for approximately one year at Deneys Reitz Attorneys, whereafter she practiced as an Advocate and Member of the Johannesburg Society of Advocates from 1990 to date.

4.3 The candidate is also a member of the Arbitration Foundation of Southern Africa (AFSA) and has been since 2013.

4.4 The candidate has acted as a Judge periodically from 2016 to date.

4.5 The candidate has extensive knowledge of the law and lists the following as her principal areas of legal interest:

4.5.1 Law of Contract;

4.5.2 Property Law;

4.5.3 Labour Law;

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4.5.4 Law of Delict; and

4.5.5 Criminal Law.

4.6 In her capacity as an Acting Judge, the candidate lists the following cases as being the most significant, and for the following reasons:

4.6.1 **Lombard Insurance Co Ltd v Schoeman and Others** 2018 (1) SA 240 (GJ)

The judgment was discussed in the March 2018 edition of *De Rebus* and attracted interest from the legal fraternity. The candidate's judgment was also upheld by the SCA on appeal – **Schoeman & Others v Lombard Insurance Co Ltd** (1299/2017) [2019] ZASCA 66 (29 May 2019).

4.6.2 **Radovan Krecjir v Minister of Justice and Correctional Services and Others** (combined special motion under case numbers 30573/2017 and 47927/2017)

During his address to Court on 27 May 2019, the candidate, appearing in person, placed on record that he was in agreement with what had been stated in the candidate's judgment and reiterated that the presiding Judge had been consistently fair, objective and reasonable in the conduct and adjudication of the matter on each occasion that it served before Court. The case is somewhat unique in the sense that it is rare for a losing litigant to offer gratuitous and unsolicited commendations immediately

after the delivery of a judgment in open court, especially one in which an order is made against the litigant.

4.6.3 **SABC v SABC Pension Fund and Hlaudi Motsoeneng 2019 JDR 0402 (GJ)**

The judgment dealt with the observance of substance over formalism in motion proceedings and involved a consideration of section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956 read with Rule 15.2 of the Fund's Rules. The matter was of substantial public interest, given its value in the fight against corruption in our country, and was widely reported on in the press.

4.6.4 **Oakhurst Insurance Company Limited v B-Sure Africa Insurance Brokers (Pty) Ltd JDR 2127 (GJ)**

The judgment dealt with a novel set of facts which had not previously arisen for determination in any reported or unreported cases, viz. an agreement between competing employers to respect certain employees' respective restraint of trade agreements. The judgment found that it would be against public policy for competing employers to bypass established legal principles that govern the enforceability of restraints by concluding agreements that would have the effect of depriving employees of the right to challenge the reasonableness of the restraints in a court of law.

4.7 In her capacity as counsel, the candidate lists the following cases as being the most significant, and for the following reasons:

4.7.1 **S v Tsepo Lengwati**

The case was reported on by Amnesty International and involved a bail application during the Apartheid era. The matter was of significant personal and public interest because of the enormity of the breach of human rights that occurred at the hands of public officials.

4.7.2 **S v Bamjee** 1993 (1) SACR 627 (W)

The case made inroads in the existing law of evidence, holding, as it did, that submissions made by counsel during the course of a plea explanation did not constitute evidence.

4.7.3 **Tafibra SA (Pty) Ltd v CEPPAWAWU and Others** (JA 78/05)
[2008] ZALAC 19 (31 July 2008)

The matter went to trial in the Labour Court concerning issues of alleged discrimination in the workplace based on race. The matter then went on appeal to the Labour Appeal Court. The matter is of significance in that it involved constitutionally protected rights.

4.7.4 **South African National Tuberculosis Association (SANTA) v E Mokoena & 14 Others** (case number 44005/2011)

An urgent application was brought to declare the rights of the true SANRA to administer and control the affairs and assets of SANTA and to interdict further unlawful dealings with the assets and affairs of SANTA by a body purporting to be the true

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SANTA. The matter is significant for rooting out corruption and the theft of assets employed for the public benefit.

4.7.5 **Blue Chip Consultants (Pty) Ltd v Shamrock 2002 (3) SA 231 (W)**

The matter involved a trial in the Gauteng Local Division, traversing the law of suretyship and attorney and client privilege. The case was of general significance to legal practitioners.

4.8 The candidate has not been briefed in the field of constitutional law but has had occasion to present argument in cases where fundamental rights enshrined in the Bill of Rights were of import.

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

5.1 As appears from the content of the aforementioned judgments, and those referred to further below, the candidate demonstrates a firm commitment to the values of the Constitution and to the rule of law.

6. Whether any judgments have been overturned on appeal:

6.1 Disc Express (Pty) Ltd v Weitzer (case number 22192/2015)

Judgment overturned on appeal by Full Court of Gauteng Local Division.

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

7.1 As appears above, and from the judgments referred to further below, the candidate has extensive experience as counsel and as an Acting Judge.

8. The candidate's linguistic and communication skills:

8.1 From the candidate's judgments, it is clear that she has excellent written linguistic skills in English. Her proficiency in any other language is unknown.

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

9.1 There were 34 judgments in which the candidate presided as an Acting Judge.

9.2 All of the candidate's judgments under review were delivered promptly.

10. The candidate's fairness and impartiality:

10.1 The candidate's fairness and impartiality is evident from the judgments that she has written, in particular from Krecjir (supra).

11. The candidate's independent mindedness:

11.1 There is nothing to suggest that the candidate is not independently minded.

12. The candidate's ability to conduct court proceedings;

12.1 There is nothing to suggest an inability to conduct court proceedings.

13. The candidate's administrative ability:

13.1 No information was received which cast doubt on the candidate's administrative ability.

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

14.1 No information was received which cast doubt on the candidate's integrity and ethical behaviour.

15. The candidate's judicial temperament:

15.1 No adverse information was 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's application reveals that she is sensitive to the needs of the marginalised in society, and particularly to the elderly and vulnerable. She is conscious of the needs of the community and indicates that she frequently reduced her fees, or charged no fees at all,

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as was required, to enable litigants who could not afford legal representation to have their matters heard in a court of law.

17. The candidate's potential:

17.1 No adverse information was received.

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.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Lombard Insurance Co Ltd v Schoeman and Others 2018 (1) SA 240 (GJ)

South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund and Others 2019 (4) SA 608 (GJ)

Unreported decisions

ISP Cash Ekurhuleni (Pty) Ltd v ISP Cash (Pty) Ltd (52620/2015) [2016] ZAGPPHC 1144 (7 December 2016)

Opposed interlocutory application to compel compliance with notice delivered in terms of Rule 35(12); whether substantial compliance with Rule 30A.

Respondent opposed on two grounds, the first being that the documents sought were not relevant to the proceedings and the second being that the documents called for were confidential by their nature and privileged from disclosure

Documents containing information of a confidential nature are not per se privileged. Confidential information which is not privileged cannot be refused on grounds of confidentiality. The mere agreement between parties that certain communications will be treated as confidential does not preclude a court from requiring the disclosure of documentation that is relevant to a matter forming the subject matter of litigation. Furthermore, production of the documents under compulsion of a court order would not expose the respondent to an unlawful breach of any confidentiality agreement.

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The second ground of opposition was that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is bona fide disputed on reasonable grounds, as winding-up proceedings are not intended as a means of deciding claims which are genuinely and reasonably disputed. This rule is generally known as the 'Badenhorst rule'.

Court found that the documents called for in the applicant's Rule 35(12) notice were subject to disclosure.

Van Wyk and Others v Topaz Sky Trading 146 (Pty) Ltd and Others (50235/15)
[2017] ZAGPPHC 1 (3 January 2017)

The matter concerned an agreement of sale subject to a suspensive condition and in respect of a portion of agricultural land but without the Minister of Agriculture's consent. The court had to determine whether the subdivision was invalid and whether the transfer of the farm was valid. The court found that the applicants failed to prove that the subdivision was valid and enforceable. The agreement of sale was found to be void ab initio.

Halocure (Pty) Ltd v Thunderstruck INV 166 (Pty) Ltd t/a Boesmanland Safaris; In re: Thunderstruck INV 166 (Pty) Ltd t/a Boesmanland Safaris v Halocure (Pty) Ltd (47439/2015) [2016] ZAGPPHC 992 (2 December 2016)

This was an application for rescission of a default judgment granted against the applicant on 10 November 2015 for payment of the amount of R273 600.00, together with interest and costs. The issue to be determined was whether the applicant had shown that the default judgment was erroneously sought or granted because the summons was not served by the respondent at the applicant's existing registered

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address. The default judgment granted against the applicant was rescinded and set aside.

The Employees of Sphynx Trading CC v Sphynx Trading CC 2019 JDR 1098 (GJ)

The application was brought in terms of section 131 of the Companies Act 71 of 2008 for an order commencing business rescue proceedings in respect of the first respondent, Sphynx Trading CC. The court found that the application constituted an abuse of court process and dismissed same.

National Savings and Investments (Proprietary) Ltd v Chimaliro and Others
(26598/2017) [2019] ZAGPJHC 176 (24 May 2019)

Application for eviction - dispute regarding whether valid lease agreement in place with previous owner of the property; whether a tacit relocation had occurred; whether it was just and equitable to evict taking into account all relevant circumstances. Court found it just and equitable to evict respondents.

Phambili Environmental Services (Pty) Limited v Pikitup Johannesburg Soc Ltd
2018 JDR 2195 (GJ)

Tsatsi v Virgin Active 2018 JDR 2194 (GJ)

RS v Road Accident Fund 2018 JDR 1217 (GJ)

Bowden NO. v SA Rice Mills (Pty) Ltd 2018 JDR 1027 (GJ)

JL Excavators (Pty) Ltd v The City of Tshwane Metropolitan Municipality 2018 JDR
0996 (GP)

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Boneltha (Pty) Ltd v Pandelani NO. 2018 JDR 0982 (GP)

Mabando v Standard Bank of South Africa Limited 2016 JDR 2270 (GP)

Rodrigues v Boababsky (Pty) Ltd 2016 JDR 0981 (GJ)

*Oakhurst Insurance Company Limited v B-Sure Africa Insurance Brokers (Pty) Ltd
2017 JDR 2127 (GJ)*

Helukable S.A. (Pty) Ltd v O'Toole 2017 JDR 2126 (GJ)

F v F 2017 JDR 0177 (GP)

Vorster v Vorster 2017 JDR 0176 (GP)

Ramkaran v The Road Accident Fund 2018 JDR 2214 (GJ)

Eiser v Zuma 2018 JDR 2213 (GJ)

S v Sebogo 2018 JDR 2212 (GJ)

Plumlink SA (Pty) Ltd v Smith 2018 JDR 2211 (GJ)

S v Matsoka 2018 JDR 2210 (GJ)

S v Daniels 2018 JDR 2200 (GJ)

JG v JG 2018 JDR 2199 (GJ)

S v Marunga 2018 JDR 2198 (GJ)

Barend Johannes Coetzer v Road Accident Fund 2017 (7C5) QOD 34 (GJ)

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This was an action for damages arising from injuries that were sustained by the plaintiff in a motor collision on 2 July 2013.

The trial proceeded in respect of the quantum of the plaintiff's damages, the defendant previously having conceded the merits by accepting liability for 100% of the plaintiff's proven damages.

The court was only required to assess the award in respect of the plaintiff's past and future loss of earnings and/or earning capacity and general damages, as all the other heads of damages had become settled between the parties. It was not in dispute that the plaintiff in fact suffered a loss of earning capacity. The issue under this head of damage concerned the factual basis underpinning the computation of the quantum.

The defendant was liable to compensate the plaintiff for 100% of the proven damages sustained by the plaintiff during the motor collision which occurred on 2 July 2013. The defendant shall pay the capital amount of R3 192 790,00 in respect of the plaintiff's claim for general damages and past and future loss of earnings and earning capacity.

Tshikila v The Minister of Police 2019 JDR 0198 (GJ)

Tshikila and Others v Minister of Police (16/06499) [2019] ZAGPJHC 174 (23 April 2019)

The application for leave to appeal by the applicants is dismissed with costs.

Jonkers v The Minister of Police 2019 JDR 0202 (GJ)

Diesel Power Opencast Mining (Pty) Ltd v Mbali Coal (Pty) Ltd 2019 JDR 1097 (GJ)

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Ramloutan v Kalianujee NO. 2019 JDR 1106 (GJ)

Whether execution against the estate of an insolvent is automatically stayed despite the sheriff not gaining knowledge of the sequestration as contemplated in section 20(1)(c) of the Insolvency Act 24 of 1930. The appeal was dismissed with costs.

*Juna Trading DMCC v We R The Stars Trading and Projects CC 2019 JDR 1107
(GJ)*