

CANDIDATE: ELMARIE VAN DER SCHYFF

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

1. The candidate's appropriate qualifications:

1.1 The candidate has a BA (Lawa), LLB and LLD.

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

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

4.1 The candidate in her application mentions that she believes that a jurist should always strive to uphold the constitutional values of this country while promoting the best interest of his/her client. This is a principle she claims to have instilled in all the students that crossed her path in her 18 years as a lecturer.

4.2 The candidate has had to apply constitutional values and norms in family law matters which she has adjudicated on pertaining to children and contempt of court proceedings.

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

5.1 The candidate has 18 years' experience in academia and has taught at a graduate and postgraduate level the law of delict, criminal procedure, law of contract, enrichment and estoppel and land law.

5.2 The candidate has published 22 articles in peer reviewed legal journals. Some of these articles have grappled with constitutional issues such as constitutional interpretation, water rights and nationalising water rights.

5.3 The candidate according to her CV practiced criminal law from 1992 – 1999 in Pongola and Parys (mainly in the magistrate's court) and has taught criminal procedure at university level. She is also currently sitting as a judge on a criminal matter with 23 accused.

5.4 In *M v M* (15986/2016) [2018] ZAGPJHC 9 (29 January 2018) the candidate was handing down judgment in the leave to appeal

application pertaining to the matter of M v M (15986/2016) [2018] ZAGPJHC 4 (22 January 2018). This was a highly contentious divorce matter. Whilst the parties had reached agreement on the breakdown of the marriage and that a liquidator would be appointed to resolve the pecuniary interest of the parties the issue of spousal maintenance, child maintenance and primary residence of the two minor children was in dispute. The matter ran for 14 days. The defendant, a German Citizen intended to relocate to Germany and sought primary residence of the children and permission to depart South Africa with the minor children in order to reside in Germany. The candidate found in favour of the defendant and, amongst other things, awarded primary residence to her and gave leave to depart South Africa. The matter thus involved the constitutional principle of the best interests of the 2 children aged 6 and 4 years old at the time.

5.5 The candidate accepted an argument that since Germany is a “first world country” there is a probability that they have a legal system that can facilitate the enforcement of an order she handed down in the Gauteng Local Division of the High Court, Johannesburg. To this end she satisfied herself at paragraph [19] that s108 and 110 of the German statute the ‘Act on Proceedings in Family Matters and Matters of Non-Contentious Jurisdiction of 17 December 2008 (Gesetz über das Verfahren in Familiensachen und in Angelegenheiten der freiwilligen Gerichtsbarkeit) – in short known as FamFG, would sufficiently protect a South African citizen armed with a South African Court order to enforce their rights in Germany. The candidate concluded at para [19]

of her judgment that she could take “judicial notice” of the FamFG and a couple of other German statutes.

5.6 At paragraph 49 the candidate stated the following: “...*Inconvenience caused by an order of court is not a compelling reason that an appeal should be heard. The plaintiff’s constitutional right as contained in s 34 is not affected since he will have access to the German courts – in this regard it is important to note that LC Haupt explained in her doctoral thesis Die reg van die kind op oorlewing, ontwikkeling en beskerming (1998) 127, that s 6 of the German Grundgesetz acknowledges the Kindeswohl (child’s best interests) as benchmark and constitutional norm that serves as a legal criterion for the foundation and limitation of the interests and rights of children, parents and the state. In any event, the plaintiff’s constitutional right as encapsulated in s 34 of the constitution must be balanced with the defendant’s constitutional right set out in s 21 and the children’s constitutional right contained in s 28(2) of the Constitution. The fact that the court is relinquishing jurisdiction over the children to German courts is a natural consequence of relocation and in light of the similarities between the approaches of the two jurisdictions to safeguarding the children’s best interests, this is not in itself a compelling reason why the appeal should be heard...*”

5.7 On the strength of her acceptance that she may take judicial notice of foreign law she gave an order that effectively removed two minor

children from South Africa to relocate permanently with their mother to Germany.

5.8 The candidate seemingly failed to appreciate that section 34 of the Constitution is only applicable in South Africa and cannot be enforced to protect a litigant in a German Court.

5.9 It is noteworthy that the candidate refused leave to appeal on a matter which had serious implications for all the parties concerned but especially the children on a subject matter on which based on her CV she had no practical experience. She has no prior experience balancing the conflicting rights of a mother and father in a difficult scenario where one wishes to relocate permanently to a foreign country. Further she has no prior experience in applying the best interest of the children test as required by section 28 of the Constitution. The candidate at that stage had very little judicial experience yet at paragraphs 29 – 32 refused to entertain that there was a possibility that she may have been biased. And whilst the candidate may feel that she was not biased and may in fact not have been biased one must surely concede at such an early stage of one's "career" as an adjudicator that it may have slipped in.

6. Whether any judgments have been overturned on appeal:

6.1 No judgments have been overturned on appeal. From *Safli and Juta* it would appear that the candidate has only written approximately 33

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judgments of which only one was reported to date. According to the candidate 84 judgments have been handed down by her in writing.

6.2 The candidate only knows of 5 matters that have been appealed.

6.3 *Jones v RAF 33711/16* the matter has been appealed to the SCA the matter is pending and has not been heard. No indication has been given whether the candidate gave leave to appeal or not.

6.4 One matter, *Vosloo v Cloete 92734/14* was taken on appeal but settled before determination on appeal. No indication has been given which court this matter was appealed to and whether it was done with leave of the candidate or not. This case does not come up on SAFLI or JUTA when searching for judgments by the candidate.

6.5 The candidate mentions that the matter of *Moagi v RAF 43682/2014* was taken on appeal but has no knowledge what has happened to the matter. No indication has been given which court this matter was appealed to and whether it was done with leave of the candidate or not. This case does not come up on SAFLI or JUTA when searching for judgments by the candidate.

6.6 The matter of *M v M 15986/2016*. This was a highly contentious divorce matter. Whilst the parties had reached agreement on the breakdown of the marriage and that a liquidator would be appointed to resolve the pecuniary interest of the parties the issue of spousal maintenance, child maintenance and primary residence of the two minor children was in dispute. The matter ran for 14 days. The defendant, a German Citizen

intended to relocate to Germany and sought primary residence of the children and permission to depart South Africa with the minor children in order to reside in Germany. The candidate found in favour of the defendant and, amongst other things, awarded primary residence to her and gave leave to depart South Africa. The plaintiff intended to appeal the decision, and ultimately did apply for leave to appeal the decision and as such sought in terms of section 18 of the Superior Courts Act 10 of 2013 that the execution of the court's decision be suspended pending the appeal. The candidate dismissed this application which gave the plaintiff an automatic appeal to the next highest court in terms of section 18(4) which appeal the candidate states was dismissed. The plaintiff requested leave to appeal the decision which leave the candidate denied. It is not clear what subsequently happened to the matter.

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

7.1 The candidate has no recent practical litigious experience to draw on. She practiced as an attorney from 1992 – 1999. She states that she joined JH Smit Attorneys as a professional assistant in 2009/2010 but no indication is given what role she performed and what experience she gained.

7.2 It is not clear from the candidate's application what practical experience she has in managing highly charged confrontational situations.

7.3 She has limited judicial and quasi-judicial experience. She has 4 weeks of appeal and law society matters experience, 8 weeks of opposed motions, 6 weeks of unopposed motions, 10 weeks of trial experience

(two of which was for the *M v M* matter and the rest mostly appeal to be RAF matters) and 1 week of urgent court and 6 weeks in a part heard criminal matter.

8. The candidate's linguistic and communication skills:

8.1 Her communication and linguistic skills are of a high standard and she is proficient in both Afrikaans and English.

8.2 In our opinion the candidate generally strives to give well-reasoned judgments. The candidate tends to be verbose and is influenced by her academic writing style.

8.3 Judicial writing is an art there is no reason to believe that the candidate will not be able to improve and master this art if appointed.

8.4 Reports on the candidate from members who have appeared before her are that she listens well and is a calm speaker.

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

9.1 This notwithstanding, from what we could glean from dates provided on Juta and Safli 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.

11. The candidate's independent mindedness:

11.1 No adverse comments have been received.

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

12.1 We have received expressions of concern that the candidate having been an academic for so many years and having no recent litigation experience is not able to command respect from senior practitioners who are more experienced in court craft and litigation craft than the candidate.

12.2 Considering the candidate's background it is questionable whether she is competent and able to make swift decisions on procedural and evidential issues as and when they arise in the course of a trial.

12.3 The above shortcomings may explain why the matter of *M v M* which was originally set down for two weeks in November 2017 and ended up running from November 2017 to 25 January 2018 with only a short break over the Christmas break. It may also explain why the matter of *S v Kodubona* and 22 others have run in excess of 9 weeks although the fact that there are 22 other accused may be an extenuating circumstance in that instance.

12.4 We have however also had reports that the candidate is extremely hardworking and conscientious which are highly desirable qualities in a judicial candidate.

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 have received reports that the candidate has integrity and is highly ethical.

14.2 We have had no reports to the contrary.

15. The candidate's judicial temperament:

15.1 There is no reason to believe that the candidate does not have an even judicial temperament.

15.2 We have however had reports that the candidate does appear to lack practical experience and needs to take breaks to make enquiries as to how to proceed.

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

16.1 The candidate made the following statement in her book "Property in Minerals and Petroleum" JUTA 2016:

“Transformation in the sphere of mineral and petroleum law was not compelled by a single constitutional imperative, although section 25 of the Constitution can aptly be labelled the ‘resource-reform’ provision. It was, however, inspired by the single constitutional vision to advance the transformation of the South African society in accordance with the constitutional paradigm founded on the values of ‘human dignity, the achievement of equality and the advancement of human rights and freedoms.’ The realization of these rights in every sphere of society is key to the advancement of race and gender equality and the creation of a culture in which men and women are equally able to achieve their full potential. Together with the rights entrenched in the Bill of Rights, these values collectively created a fine tapestry of interrelated, reciprocal and interacting value-based norms and rights that required change in the mineral and petroleum sector. At the core of this constitutionally woven masterpiece, the thread that combines and completes the artwork is the concept of substantive equality.”

16.2 She mentors students and various young colleagues.

17. The candidate’s potential:

17.1 The candidate has the requisite academic credentials, passion for the law and temperament to become a judge. It appears that she will give

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timely judgments and be committed to serving the public and the profession if given the chance.

17.2 The only concern to be raised is that she does not as yet have sufficient practical litigious experience to draw on.

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 will also indicate that the judiciary is serious about gender transformation and appointing candidates who are capable of being public servants dedicated to performing their functions in a timely and courteous manner whilst striving for excellence.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Jones v Road Accident Fund 2019 (1) SA 514 (GP)

Unreported decisions

M v M (15986/2016) [2018] ZAGPJHC 9 (29 January 2018) [100%]
(From South Africa: South Gauteng High Court, Johannesburg; 29 January 2018; 61 KB)

M v M (15986/2016) [2018] ZAGPJHC 4 (22 January 2018) [100%]
(From South Africa: South Gauteng High Court, Johannesburg; 22 January 2018; 238 KB)

H v H (25820/2015) [2019] ZAGPPHC 318 (22 July 2019) [100%]
(From South Africa: North Gauteng High Court, Pretoria; 22 July 2019; 63 KB)

Dube v Mbokazi (15843/2017) [2018] ZAGPPHC 699 (28 September 2018) [100%]
(From South Africa: North Gauteng High Court, Pretoria; 28 September 2018; 36 KB)

O v O (89495/2016) [2017] ZAGPPHC 1287 (20 December 2017) [100%]
(From South Africa: North Gauteng High Court, Pretoria; 20 December 2017; 54 KB)

S v S (64229/17) [2017] ZAGPPHC 1270 (22 December 2017) [100%]
(From South Africa: North Gauteng High Court, Pretoria; 22 December 2017; 22 KB)

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Daffue v Espach and Others (45341/19) [2019] ZAGPPHC 314 (22 July 2019)[94%]
(From South Africa: North Gauteng High Court, Pretoria; 22 July 2019; 34 KB)

Shaibu v State (A 04/2018) [2018] ZAGPPHC 782 (14 September 2018) [94%]
(From South Africa: North Gauteng High Court, Pretoria; 14 September 2018;
39 KB)

Meintjies v Road Accident Fund (92470/15) [2018] ZAGPPHC 781 (14
September 2018)[94%](From South Africa: North Gauteng High Court,
Pretoria; 14 September 2018; 39 KB)

Shaibu v The State (A04/2018) [2018] ZAGPPHC 690 (14 September
2018)[94%](From South Africa: North Gauteng High Court, Pretoria; 14
September 2018; 48 KB)

Meintjies v Road Accident Fund (92470/15) [2018] ZAGPPHC 688 (14 September
2018)[94%](From South Africa: North Gauteng High Court, Pretoria; 14
September 2018; 45 KB)

Gabuza v Road Accident Fund (70524/16) [2018] ZAGPPHC 634 (29 August
2018)[94%] (From South Africa: North Gauteng High Court, Pretoria; 29
August 2018; 40 KB)

Moseta v Chauke and Others (57885/2017) [2018] ZAGPPHC 632 (10 August
2018)[94%] (From South Africa: North Gauteng High Court, Pretoria; 10
August 2018; 51 KB)

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Gokaldas v Allah Wala Wholesalers (45779/2017) [2018] ZAGPPHC 631 (23 August 2018)[94%](From South Africa: North Gauteng High Court, Pretoria; 23 August 2018; 32 KB)

Thomas v Road Accident Fund (88435/16) [2018] ZAGPPHC 624 (29 August 2018)[94%] (From South Africa: North Gauteng High Court, Pretoria; 29 August 2018; 33 KB)

Tolley v Road Accident Fund (59403/ 2016) [2018] ZAGPPHC 623 (29 August 2018)[94%] (From South Africa: North Gauteng High Court, Pretoria; 29 August 2018; 30 KB)

Lourens v Road Accident Fund (31816/2017) [2018] ZAGPPHC 621 (23 August 2018)[94%] (From South Africa: North Gauteng High Court, Pretoria; 23 August 2018; 47 KB)

Bell v Road Accident Fund (7174/14) [2018] ZAGPPHC 619 (14 August 2018)[94%] (From South Africa: North Gauteng High Court, Pretoria; 14 August 2018; 24 KB)

Makhubele v Road Accident Fund (77208/2014) [2017] ZAGPPHC 805 (23 November 2017)[94%] (From South Africa: North Gauteng High Court, Pretoria; 23 November 2017; 87 KB)

Van Eeden v Road Accident Fund (19294/17) [2018] ZAGPPHC 783 (14 September 2018)[88%] (From South Africa: North Gauteng High Court, Pretoria; 14 September 2018; 26 KB)

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Incredible Sand (Pty) Ltd v Vos (2376/2018) [2018] ZAGPPHC 698 (28 September 2018) [88%] (From South Africa: North Gauteng High Court, Pretoria; 28 September 2018; 53 KB)

Van Eeden v Road Accident Fund (19294/17) [2018] ZAGPPHC 685 (14 September 2018)[88%] (From South Africa: North Gauteng High Court, Pretoria; 14 September 2018; 28 KB)

Greef NO v Greef and Others (61180/2016) [2017] ZAGPPHC 1106 (20 October 2017)[88%] (From South Africa: North Gauteng High Court, Pretoria; 20 October 2017; 40 KB)

Stevens-King v Hoorzuk and Others (73637/2016) [2017] ZAGPPHC 1098 (20 October 2017) [88%] (From South Africa: North Gauteng High Court, Pretoria; 20 October 2017; 38 KB)

Ekurhuleni Metropolitan Municipality v Christensen and Another (44684/16) [2018] ZAGPJHC 701 (16 November 2018) [82%] (From South Africa: South Gauteng High Court, Johannesburg; 16 November 2018; 49 KB)

Mmamphsika and Another v Mmamphiska and Another (1932/2017) [2018] ZAGPPHC 628 (16 August 2018) [82%] (From South Africa: North Gauteng High Court, Pretoria; 16 August 2018; 38 KB)

Reeds and Another v First Rand Bank Limited (56648/2015) [2018] ZAGPPHC 626 (23 August 2018) [82%]

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(From South Africa: North Gauteng High Court, Pretoria; 23 August 2018; 33 KB)

Iemas Financial Services (Co-operative) Ltd v Ntokane (48941/15) [2018] ZAGPPHC 622 (10 August 2018) [82%]
(From South Africa: North Gauteng High Court, Pretoria; 10 August 2018; 29 KB)

Dias v Van Der Westhuizen and Others (69367/2016) [2017] ZAGPPHC 1286 (11 December 2017) [82%]
(From South Africa: North Gauteng High Court, Pretoria; 11 December 2017; 63 KB)

Grove v Road Accident Fund and Another (36786/06) [2017] ZAGPPHC 757 (28 November 2017) [82%]
(From South Africa: North Gauteng High Court, Pretoria; 28 November 2017; 61 KB)

Ospoort Boerdery CC and Another v Freyson Attorneys and Another (15637/2018) [2018] ZAGPJHC 696 (13 November 2018) [76%]
(From South Africa: South Gauteng High Court, Johannesburg; 13 November 2018; 42 KB)

Feni v The Pan South African Language Board and Another (49965/16) [2019] ZAGPPHC 125 (25 April 2019) [76%]
(From South Africa: North Gauteng High Court, Pretoria; 25 April 2019; 23 KB)

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Jones v Road Accident Fund (33711/2016) [2018] ZAGPPHC 661; 2019 (1) SA 514 (GP) (7 September 2018) [76%]
(From South Africa: North Gauteng High Court, Pretoria; 7 September 2018; 45 KB)

Pretoria Chinese School v City of Tshwane Metropolitan Municipality (59391/17) [2017] ZAGPPHC 1244 (20 December 2017) [76%]
(From South Africa: North Gauteng High Court, Pretoria; 20 December 2017; 10 KB)

The City of Tshwane Metropolitan Municipality v Constantia Metering Services (Pty) Ltd (4095/17) [2018] ZAGPPHC 627 (23 August 2018) [70%]
(From South Africa: North Gauteng High Court, Pretoria; 23 August 2018; 44 KB)

Nedbank Limited (t/a MFC, A division of Nedbank Limited) v Lewis (97066/16) [2017] ZAGPPHC 1158 (10 November 2017) [70%]
(From South Africa: North Gauteng High Court, Pretoria; 10 November 2017; 62 KB)

Commercial Industrial Domestic Electrical Contractors (Pty) Ltd v Van Der Merwe and Another (35371/2016) [2017] ZAGPPHC 1096 (10 November 2017) [64%](From South Africa: North Gauteng High Court, Pretoria; 10 November 2017; 39 KB)

Mathys Wynand De Bruyn t/a De Bruyn and Associates v Classis Number Trading 80 (Pty) Ltd t/a Nashua Tshwane (13470/17) [2017] ZAGPPHC 982 (7 December 2017) [52%]

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(From South Africa: North Gauteng High Court, Pretoria; 7 December 2017;
20 KB)

*Basenzi Construction CC t/a Power Wheel and Tyre and Another v Hofmil
Investments (Pty) Ltd Hofmil 4 (Warehouse) (3573/2016) [2017] ZAGPPHC
848 (10 November 2017) [52%]*

(From South Africa: North Gauteng High Court, Pretoria; 10 November 2017;
36 KB)

*BMW South Africa (Pty) Ltd and Others v Mahlatsi and Others, In re: Mahlatsi and
Others v BMW South Africa (Pty) Ltd and Others (96026/2016) [2017]
ZAGPPHC 891 (8 December 2017) [47%]*

Judgments upheld on appeal

None

Judgments overturned on appeal

None