

**CANDIDATE: ADVOCATE RAYLENE MAY KEIGHTLEY**

**COURT FOR WHICH CANDIDATE APPLIES: HIGH COURT GAUTENG  
– NORTH AND SOUTH DIVISIONS**

**1. The candidate's appropriate qualifications**

1.1. The candidate holds the following degrees:

1.1.1. BA (University of Natal) (1982);

1.1.2. LLM (University of Natal) (1984); and

1.1.3. LLM (Cambridge University) (1988).

1.2. The candidate was a lecturer and then senior lecturer at the University of Cape Town from 1988 to 1995, and was then a senior lecturer and later associate professor at the University of the Witwatersrand from 1996 to 1999 and then again from 2008 to 2011 where she was also the director of the Centre for Applied Legal Studies.

1.3. The candidate served her articles, was an admitted attorney for a year and was admitted and practiced as an advocate since 1999, either full time or part time, and either as State Advocate or member of the Johannesburg Bar.

1.4. The candidate is appropriately qualified.

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

2.1. The candidate has been actively involved in the legal field since 1985 (when she served her articles) then as an attorney, lecturer, advocate

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(private and state), deputy director of public prosecutions, regional head of the asset forfeiture unit, director of the Centre for Applied Legal Studies and acting judge of the Gauteng Divisions in Pretoria and Johannesburg.

- 2.2. The candidate has supervised state advocates whilst at the asset forfeiture unit.
- 2.3. The candidate has been an editorial committee member of the South African Journal on Human Rights since 2011.
- 2.4. The candidate has been involved in training at the asset forfeiture unit and of magistrates and prosecutors at the Justice College.
- 2.5. The candidate has chaired student disciplinary hearings and is a member of the Wits University Student Disciplinary Committee.
- 2.6. There is no reason to doubt that the candidate is 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 and in the circumstances her appointment would address the gender composition of the bench.

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

- 4.1. The candidate has an impressive wide-ranging knowledge of the law, stemming from over fifteen years in academia, as an advocate practising for her own account, either full-time or part-time, since 2006, and as a Senior State Advocate in the Asset Forfeiture Unit and then later as the

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Deputy Director: Public Prosecutions and as the Regional Head (Johannesburg) of the Unit.

- 4.2. In addition, the candidate was for over three years the Director of the Centre for Applied Legal Studies at the University of the Witwatersrand.
- 4.3. Whilst in academia the subjects upon which the candidate lectured and wrote included succession, estates and trusts, international human rights, property law, and international law.
- 4.4. The candidate has contributed to textbooks including as co-editor of and contributor to the 1996 edition of Boberg's Law of Persons and Family Law and has written several journal articles including on human rights.
- 4.5. The candidate states that she has no speciality but has litigated at least in the following fields:
  - 4.5.1. administrative law;
  - 4.5.2. asset forfeiture law;
  - 4.5.3. constitutional law;
  - 4.5.4. contract and commercial law;
  - 4.5.5. children's rights;
  - 4.5.6. education law;
  - 4.5.7. environmental law; and
  - 4.5.8. property law.

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- 4.6. The candidate lists 29 judgments as having been handed down by her, of which four are reported in the main law reports. Twenty-two of these have been considered. The remaining seven could not be located.
- 4.7. The extent of the candidate's knowledge is also borne out by the 22 judgments of the candidate that have been considered:

<b>Field of Law</b>	<b>Cases</b>
Law of Delict	5
Company Law	1
Contract Law	4
Property Law	1
Insolvency Law	2
Civil Procedure	4
Criminal Law	2
Intellectual Property Law	1
Family Law	1
Administrative Law	1

- 4.8. The candidate also has a firm grasp of constitutional law and has appeared before the Constitutional Court on various occasions. In addition, when an opportunity presents itself the candidate in her judgments applies and develops the common law in line with the Constitution.

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- 4.9. The candidate has extensive knowledge of asset forfeiture, having spent several years in the Asset Forfeiture Unit and having appeared as counsel in asset forfeiture cases.
- 4.10. The candidate also has a firm grasp of legal analysis and accordingly is able to deliver reasoned judgments in diverse fields.
- 4.11. As appears from the candidate's application, several of her academic writings have been cited in judgments, including by the Constitutional Court.
- 4.12. The candidate also has extensive knowledge of family law, particularly children's rights. This is evident from her judgment in *Ex parte MS and Others* 2014 (3) SA 415 (GP) where the candidate dealt with whether the court could authorise surrogacy agreements *after* the artificial fertilisation of the surrogate mother. The candidate is also the co-editor and has written several chapters of the well-known Boberg's Law of Persons and Family Law, has written several chapters in other books concerning family law and also has published journal articles in the field. The candidate has also contributed the annual chapter of the Law of Succession, Trust and Administration of Estates in the *Annual Survey of South African Law* for a period of over ten years from 1997 to 2007. This knowledge would be particularly useful to a judge of first instance who would often deal with these issues.
- 4.13. In the circumstances, there can be no doubt that the candidate's knowledge of the law is impressive.

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

- 5.1. The candidate's commitment to the values of the Constitution cannot be doubted in circumstances where from early in her academic career she has been finely attuned to the values that would subsequently be incorporated in the Constitution.
- 5.2. The candidate lectured in the formative years of human rights law, writing on the subject as an academic as early as 1989 and then throughout her academic career.
- 5.3. As the candidate explains in her application, after having been admitted as a member of the Johannesburg Bar and practising full-time, the candidate in April 2008 until September 2011 became the Director for the Centre for Applied Legal Studies at the University of the Witwatersrand, before returning to full-time practise in October 2011. Her application is supported by the Centre.
- 5.4. The applicant since October 2009 is a member of the Editorial Board of the South African Journal on Human Rights.
- 5.5. The applicant has also appeared in significant constitutional cases as counsel, often as *amicus curiae*, particularly in relation to children's rights, having acted *inter alia* for the Centre for Child Law.
- 5.6. The applicant has also presented papers at conferences involving constitutional law.

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5.7. The applicant accordingly has extensive knowledge of constitutional law.

5.8. Where necessary, the candidate develops the common law incrementally in line with constitutional values.

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

6.1. The candidate lists four judgments on appeal, either to the Supreme Court of Appeal or the Full Bench and where the appeals are pending.

6.2. In one of these, *Minaar v Van Rooyen NO* [2013] ZAGPPHC 375 (20 November 2013), the candidate was overturned on appeal to the SCA ([2015] ZASCA 114 (10 September 2015)). The central issue was whether default judgment, in terms of section 424 of the Companies Act, 1974, declaring a person personally liable for the debts of a company where the business of the company has been conducted recklessly, can be granted against a defendant without the hearing of evidence. The candidate held that “*it was entirely appropriate for the learned Judge to proceed on the basis that it was not necessary for the plaintiff to lead evidence for purposes of obtaining the declaration by default*”. The Supreme Court of Appeal found otherwise: “*It is inconceivable that an order be made declaring a director liable for the debts of a company on the basis of reckless or fraudulent trading where no evidence is led to support the allegations made*”.

6.3. The candidate points out that in one matter she refused an application for leave to appeal. The subsequent application to the Supreme Court of Appeal for leave to appeal was dismissed.

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

- 7.1. The candidate sets out in detail in her application the extent and breadth of her professional experience, ranging from academia to several years in the asset forfeiture unit, as a practising advocate, including in the Constitutional Court and as Director of the Centre for Applied Legal Studies.
- 7.2. In the circumstances, the candidate has breadth of professional experience.

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

- 8.1. The candidate's judgments are in English and she is clearly fluent and proficient in that language.
- 8.2. The candidate also states that she is proficient at writing and speaking in Afrikaans (which is evident from some of the judgments we have considered where the record was in Afrikaans) and that she has basic conversational Xhosa.
- 8.3. The candidate's judgments are typically a model of clarity, with close analytical reasoning but without being overly long.
- 8.4. The candidate is able to distil the central issues and then to apply the law to the facts to decide those central issues.
- 8.5. The candidate is also able to apply her knowledge of constitutional law in developing the common law.

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

- 9.1. The majority of the candidate's judgments have been handed down in less than six weeks, with many judgments being handed down within a week or two of the hearing.
- 9.2. The judgment in *Palala Resources (Pty) Limited v Minister of Mineral Rights and Others* 2014 (6) SA 403 (GP) took three months to hand down. It is well reasoned, reconciling the application of section 73(6A) of the Companies Act, 1973 with section 56(c) of the Mineral and Petroleum Resources Development Act, 2002, and accordingly cannot be said to be unduly delayed.
- 9.3. The only judgment that took longer to hand down was in the matter of *Van Tonder and Another v Lawjohn Eiendomme Orkney CC and Another* [2014] ZAGPPHC 705 (12 September 2014), where the judgment took four months to hand down. The delay is attributable to the candidate having delayed judgment in order to provide the litigants with further time to attempt to resolve the impasse between them so as to avoid the winding-up of the respondent close corporation because of deadlock between the members. In the circumstances the candidate cannot be faulted for the delay.

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9.4. The candidate's commitment to delivering reasoned judgments, developing the common law where necessary, does not prevent her from delivering judgments promptly, which would be particularly useful in the busiest division of the High Court.

9.5. The candidate is also known to hand down *ex tempore* judgments.

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

10.1. The judgments we have considered demonstrate that there is no concern in this regard.

10.2. The candidate has had experience both within the prosecuting authority in the Asset Forfeiture Unit and as Director of the Centre for Applied Legal Studies. The candidate has been on both ends of the spectrum during her legal career.

10.3. Although the candidate formed part of the national prosecuting authorities for seven years, her impartiality is apparent from her judgment in *S v Mnguni* 2014 (2) SA CR 595 (GP) where the candidate handed down a separate concurring judgment in which she dealt with what was expected of the prosecuting authorities and the presiding officer when adducing evidence before the court to establish that a complainant was mentally disabled for the purposes of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 and in which the candidate castigated the presiding officer and the public prosecutor for the manner in which the complainant was subjected to secondary victimisation.

10.4. *Rautenbach v Minister of Safety and Security and Others* [2013]

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ZAGPPHC 387 (20 November 2013) was an action by the chair of a community policing forum against three police officers for damages arising from malicious prosecution. Apart from finding in favour of the plaintiff against the police officers, the candidate was unequivocal in her displeasure that the defendant police officers, whilst having a constitutional and civil duty to be defenders of basic rights of civilians, chose instead to be perpetrators of infringements of those rights, where their conduct appears to be motivated by revenge for the outing by the plaintiff of corruptive practices of the police officers.

- 10.5. The candidate incorporated in her judgment that the State Attorney representing the defendants provide a copy of his report to the appropriate authorities drawing attention to the police officers' conduct in order for appropriate action to be taken against the police officers and that the Minister take steps to hold them personally responsible for the financial obligations flowing from the judgment as joint and several debtors.
- 10.6. In *Mlota v Minister of Police* [2014] ZAGPPHC 311 (26 May 2014) in a closely reasoned judgment applying established principles to the proven facts the candidate dismissed the plaintiff's claim for damages arising from being struck in the face by a rubber bullet. Although it was probable that the rubber bullet had been fired by the police, the plaintiff's pleaded case and a case that the plaintiff insisted upon during evidence was that he was deliberately shot whilst sitting in the yard of a spaza shop. The candidate found that the plaintiff had not discharged the onus of demonstrating that he had been deliberately shot. The plaintiff had not pleaded or sought in evidence to advance a case of having been

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shot negligently. This the candidate recognised but nonetheless considered whether a case of negligence had been established on the largely undisputed evidence and found that it had not. The court found that the most probable explanation was that the plaintiff was part of the violent protest action that caused the police to fire rubber bullets or that he had the misfortune of being caught in the cross-fire. Although the candidate remarked that it was unfortunate that the plaintiff's claim failed, that did not deter the candidate from delivering a reasoned judgment based on established principles, demonstrating the candidate's impartiality.

10.7. The candidate's commitment to fairness including administrative fairness is evident from her extensive experience in administrative law, including her judgment in *FAM v Minister of Home Affairs and Others* [2014] ZAGPPHC 649 (22 August 2014) in which she gave a comprehensive reasoned judgment dealing with the judicial review by a refugee from Ethiopia of the decisions of the Standing Committee on Refugee Affairs and the Refugees' Status Determination Officer.

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

11.1. The candidate's independent mindedness cannot be questioned.

11.2. At the same time, the candidate respects the rule of law and uses the Constitution to develop the common law incrementally and to interpret and apply legislation but within acceptable parameters, making for reasoned judgments.

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

12.1. Several positive comments have been received from members of the Johannesburg Bar on the candidate's ability to conduct court proceedings.

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

13.1. The candidate clearly has administrative ability given her diverse professional experience, including managing various state advocates and caseloads whilst in the asset forfeiture unit.

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

14.1. There is no reason to doubt the candidate's reputation for integrity and ethical behaviour.

## **15. The candidate's judicial temperament**

15.1. Favourable comments have been received from members of the Johannesburg Bar for the manner in which the candidate conducts herself in court, displaying a composed judicial attitude.

15.2. This is also evident from her judgments, particularly in the contempt proceedings in *South African Apartheid Museum at Freedom Park v Stainbank and Others* [2014] ZAGPJHC 374 (11 December 2014). The respondent was an unrepresented litigant who had previously been declared and remained a vexatious litigant, having litigated his cause of fourteen years. Comments received were that the candidate nonetheless dealt with the respondent politely, taking care to ensure that he was treated fairly. This is also evident from the candidate's judgment in the

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contempt application and in the application refusing leave to appeal as well as her subsequent explanation in court to the candidate after having refused leave to appeal that in the circumstances her order finding that he was in contempt and was to purge his default within a specified time failing which imprisonment would follow was now in force.

- 15.3. In her judgment dismissing leave to appeal, the candidate explains that it would be on record of the hearing that every pain was taken to assist the unrepresented respondent, to explain to him what the elements of civil contempt of court were and that this was done specifically on the basis that he had elected to represent himself. (The Supreme Court of Appeal subsequently dismissed the respondent's petition for leave to appeal).
- 15.4. In the matter of *Palala Resources (Pty) Limited v Minister of Mineral Resources and Energy and Others* 2014 (6) SA 403 (GP), the court was critical of the manner in which the applicant had presented its review of the decision of the Minister in circumstances where the applicant had not set out properly its cause of action for the review of the Minister's decision and without any reference to or use of the Promotion of Administrative Justice Act. Nonetheless, the candidate found that it would be remiss of it to dismiss the applicant's review only on that basis as she was mindful of the applicant's constitutional right to administrative action that was lawful, reasonable and procedurally fair, although poorly pleaded, and that accordingly the courts must conduct themselves in a manner that is compliant with it and that she would not easily permit flaws in the founding papers to non-suit the applicant. This demonstrates that although there may have been cause for the candidate to dismiss the application, the candidate nonetheless had the judicial

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temperament to consider the application on its merits.

15.5. To similar effect is the candidate's judgment in *Kasema v Members of the Road Accident Fund Appeal Tribunal* [2014] ZAGPJHC 281 (28 October 2014) where the candidate refused the applicant's review on the basis that it was not in the interests of justice that a lengthy delay in launching the review application be condoned, particularly where the delay was unexplained, the prospects of success weak and the public interest element of finality in administrative decisions.

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

16.1. As set out above, and as appears in the candidate's comprehensive application, there can be no doubt on this issue.

**17. The candidate's potential**

17.1. The candidate will be a valuable addition to the busiest division of the High Court. The extent and breadth of professional experience in the legal field and her wide-range of knowledge of the law, coupled with her ability to produce prompt, well-reasoned analytical judgments will be a welcome addition to the High Court, especially given her appreciation of constitutional law and human rights.

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

18.1. The candidate's appointment would send a positive message to the community at large as not only is the candidate well qualified and suited

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to being a judge, but the candidate is also a woman, and so her appointment would assist in addressing the gender imbalance of the Bench.

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## **ANNEXURE: LIST OF JUDGMENTS CONSIDERED**

### **Reported decisions**

*Ex parte MS and Others* 2014 (3) SA 415 (GP)

*S v Mnguni* 2014 (2) SA CR 595 (GP) (a separate concurring judgment)

*Oosthuizen v Van Heerden t/a Bush Africa Safaris* 2014 (6) SA 423 (GP)

*Palala Resources (Pty) Limited v Minister of Mineral Resources and Energy and Others* 2014 (6) SA 403 (GP)

### **Unreported decisions**

*Barnard v Road Accident Fund* (30265/12) [2013] ZAGPPHC 324 (6 November 2013)

*Minaar v Van Rooyen NO* (27788/04) [2013] ZAGPPHC 375 (20 November 2013)

*Rautenbach v Minister of Safety and Security and Others* (48774/09) [2013] ZAGPPHC 387 (20 November 2013)

*Jan Zeevaart v Kleinfontein Boerebelange Koop BPK* (A373/13) [2013] ZAGPPHC 489 (3 December 2013)

*Destination Capital (Pty) Ltd v Xekalos and Others* (45993/2013) [2014] ZAGPPHC 379 (16 May 2014)

*Absa Bank v Lochenberg and Another, In Re: Lochenberg and Another v Absa Bank Limited* (61888/13) [2014] ZAGPPHC 434 (16 May 2014)

*Mlota v Minister of Police* (65577/12) [2014] ZAGPPHC 311V (26 May 2014)

*Van Tonder and Another v Lawjohn Eiendomme Orkney CC and Another* (26221/13) [2014] ZAGPPHC 705 (12 September 2014)

*Steyn v S* (A278/13) [2014] ZAGPJHC 268 (16 October 2014)

*City of Johannesburg v Cabinet Props CC and Others* (41112/12) [2014] ZAGPJHC 291 (23 October 2014)

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*Scrapbook JHB CC and Another v Momentum Property Investments (Pty) Ltd* (19263/14) [2014] ZAGPJHC 318 (23 October 2014)

*Kasema v Members of the Road Accident Fund Appeal Tribunal Convened on 4 November 2011 and Others* (2011/47210) [2014] ZAGPJHC 281 (24 October 2014)

*Fuchs Petrolub AG v Castrol Limited and Another* (35631/14) [2014] ZAGPPHC 1031 (4 December 2014) (also cited as 2014 BIP 302 GP)

*South African Apartheid Museum at Freedom Park v Stainbank and Others* (37609/14) [2014] ZAGPJHC) 374 (11 December 2014) (and judgment on application for leave to appeal (24 March 2015))

*Bernstein NO and Another v Goldex 16 (Pty) Ltd and Another* (2014/37846) [2015] ZAGPJHC 122 (4 June 2015)

*Scott v Road Accident Fund* (13/33469) [2015] ZAGPJHC 120 (11 June 2015)

*Mokau v Eskom Holdings Soc Ltd* (19825/14) [2015] ZAGPJHC 135 (3 July 2015)

*Mr. LED (Pty) Ltd v Waxfam Investments (Pty) Ltd and Others* (14/15049) [2015] ZAGPJHC 137 (3 July 2015)