

**APPLICANT: JUDGE DAVID NAT UNTERHALTER****COURT FOR WHICH CANDIDATE APPLIES: CONSTITUTIONAL COURT****1. The candidate's appropriate qualifications:**

- 1.1. BA (Cambridge, 1980)
- 1.2. LLB (Wits University, 1984)
- 1.3. BBC (Oxford, 1985)
- 1.4. MA (Cambridge, 1987)

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

- 2.1. The JSA submits that Justice Unterhalter is unquestionably a fit and proper person;
- 2.2. His character is, in our submission, beyond reproach;
- 2.3. That he is a fit and proper person is evidenced by the leadership positions that he has held throughout his career in various facets of the profession (see paras 6 and 7 of the JSC Questionnaire on pg 5 and his CV from pg 141 ff), for example:
  - 2.3.1. as a practitioner, he was conferred the status of Silk approximately 30 years ago, in 1990;
  - 2.3.2. as an academic, he holds full professorships at both Wits University and UCT as well as visiting professorships at University College (London), Columbia Law School (New York) and National University (Singapore);

- 2.3.3. He has been the director at the helm of important legal research centres such as CALS and the Mandela Institute;
- 2.3.4. He has held executive positions in various legal organisations including the National Institute for Crime Prevention, the Society for the Abolition of the Death Penalty, the Johannesburg Bar Council and AFSA; and
- 2.3.5. As a judge, domestically, he has held a permanent judicial appointment in the High Court and acting appointments in the Competition Appeal Court and Supreme Court of Appeal. Internationally he has been a member of the Appellate Body of the World Trade Organisation in Geneva and was later appointed as its chairperson.

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

- 3.1. Justice Unterhalter is a white male;
- 3.2. He has applied to the Constitutional Court;
- 3.3. There are currently no white male judges on the Constitutional Court's bench of 11 judges. In that sense, Justice Unterhalter's appointment would certainly help to reflect the racial and gender composition of South Africa in that particular court.

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

- 4.1. The JSA submits that Justice Unterhalter's knowledge of the law is excellent.

4.2. Moreover, his considerable knowledge spans many areas of the law most significantly constitutional and administrative law on the one hand, and competition law, international trade and international law on the other. It is in relation to the latter where his knowledge, skills and expertise are probably unparalleled in this country. He will, if appointed, bring a whole new dimension to the Constitutional Court.

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

5.1. The JSA submits that Justice Unterhalter is unquestionably committed to the values of the Constitution;

5.2. His commitment to the values of the Constitution is, in our opinion, beyond reproach;

5.3. His commitment is reflected in the vast body of work that he has dedicated much of his career to:

5.3.1. he has been an executive member of some very important organisations that are committed to human rights, even before South Africa got its Constitution and Bill of Rights, such as the Society for the Abolition of the Death Penalty and Lawyers for Human Rights (see para 7 of the JSC Questionnaire on pg 5);

5.3.2. he has delivered seminars and presented papers at conferences on a number of constitutional and human rights issues. He has also written several peer-reviewed academic journal articles on constitutional law and human rights topics. He was in fact the chairperson of the editorial board of the South African Journal of Human Rights (see annex 1 of his CV on pg 149 ff);

5.3.3. as a practitioner, he was lead counsel in a number of extremely important constitutional judgments (see annex 2 of his CV on pg 157 ff). Amongst his extensive and impressive list of cases are some which have produced judgments that have unquestionably shaped the course of constitutional law in this country and are still cited on a frequent basis in all courts around the country, including the Constitutional Court. These include illustratively the following dozen cases:

- 5.3.3.1. *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC)
- 5.3.3.2. *In re: Certification of the Amended Text of the Constitution of the Republic of South Africa* 1997 (2) SA 97 (CC).
- 5.3.3.3. *Ferreira vs. Levin N.O.* 1996 (2) SA 621 (CC).
- 5.3.3.4. *Beinash vs. Earnest & Young* 1999 (2) SA 166 (CC).
- 5.3.3.5. *Jooste vs. Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC).
- 5.3.3.6. *Simelane N.O. vs. Seven-Eleven Corporation SA (Pty) Ltd & Another* 2003 (3) SA 64 (SCA).
- 5.3.3.7. *Phillips vs Director of Public Prosecutions WLD* 2003 (3) SA 34 (CC).
- 5.3.3.8. *Radio Pretoria vs. Chairman of the Independent Communications Authority of SA* 2004 (3) SA 346 (SCA).

- 5.3.3.9. *Mkontwana vs. Nelson Mandela Metropolitan Municipality & Another* 2005 (1) SA 530 (CC).
- 5.3.3.10. *SCAW vs. The International Trade Administration Commission* 2012 (4) SA 618 (CC).
- 5.3.3.11. *National Treasury vs. OUTA* 2012 (6) SA 223 (CC).
- 5.3.3.12. *DA vs. President of the Republic of South Africa* 2013 (1) SA 248 (CC).
- 5.3.3.13. *All Pay Consolidated Investment Holdings (Pty) Ltd vs. Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC).
- 5.3.3.14. *Trencon Construction (Pty) Ltd vs Industrial Development Corporation of South Africa Limited* 2015 (5) SA 245 (CC).
- 5.3.3.15. *Tasima (Pty) Ltd vs. Department of Transport* 2017 (2) SA 622 (CC).
- 5.3.3.16. *UDM vs. Speaker of the National Assembly* 2017 (5) SA 300 (CC).
- 5.3.4. As a judge, Justice Unterhalter's judgments promote constitutional values and we see this influence even in common law matters where he infuses these values into the law. A good example of this is the oft-cited case of *Ndoro vs. South African Football Association* 2018 (5) SA 630 (GJ) which has shed light on the reviewability of a domestic tribunal and, indeed, on the proper characterisation of decisions made by voluntary associations that perform a

public function. Another is *Van der Bijl vs. Featherbrook Estate Home Owners Association* 2019 (1) SA 642 (GJ) which was a delictual matter where Justice Unterhalter developed the commons law in relation to questions of unlawfulness and wrongfulness by infusing constitutional values through the mechanism of section 39(2) of the Constitution.

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

- 6.1. Only one judgment, to the best of our knowledge, has ever been overturned on appeal. That was *Basson vs. Hugo & Others* 2018 (3) SA 46 (SCA); and
- 6.2. All of Justice Unterhalter's other judgments have either stood uncontested or else remained undisturbed on appeal.

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

- 7.1. The JSA can confirm that Justice Unterhalter's professional experience is both extensive and broad;
- 7.2. In this CV he lists no fewer than 126 reported judgments in the field of constitutional and administrative law, another 171 reported judgments in the field of competition law and related, a further 24 reported judgments in the broad area of commercial law including company law and intellectual property, and then approximately 12 reported judgments in international trade law.

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

- 8.1. Justice Unterhalter is extremely well spoken and particularly erudite. He also writes very well and this makes his judgments accessible to academics, practitioners, others judges and the general public.

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

9.1. Justice Unterhalter has always produced judgments promptly. The JSA has canvassed his track record with a number of senior colleagues and the feedback has been overwhelmingly positive; he produces judgments quickly and diligently.

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

10.1. The JSA submits that Justice Unterhalter is fair and impartial; and

10.2. His fairness and impartiality are, according to us, beyond reproach.

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

11.1. Justice Unterhalter is independently minded. The JSA has canvassed his track record with a number of senior colleagues and the feedback received has confirmed as much.

11.2. Justice Unterhalter's independent mindedness is reflected in some of the decisions that he has handed down from the bench as a judge. We see this in a number of judgments, but most significantly in *Trio Engineered Products Inc vs. Pilot Crushtec International (Pty) Ltd* 2019 (3) SA 580 (GJ) which concerned a careful analysis of where contractual and delictual obligations may co-habit. The judgment canvasses new territory. He did the same thing in *Ndoro vs. South African Football Association* 2018 (5) SA 630 (GC) where he boldly sought to reconcile a number of divergent decisions concerning the difficult topic of when private entities can be reviewed under PAJA despite them lacking a statutory source of power. In a more recent judgment which has not yet been reported, *Zamani Marketing & Management Consultants (Pty) Ltd vs. HCI Invest 15 (Pty) Ltd*

[2020] JOL 46637 (GJ) Justice Unterhalter examined number of cases in our law that dealt with an arbitrator's duty to produce notes made by him in the preparation of an award. In that case, very usefully, he distinguished between different types of decisions and attached to each of them an appropriate duty of disclosure; and

- 11.3. What the three cases that we have referred to above demonstrate, although they are by no means a closed list, is Justice Unterhalter's independent mindedness and his willingness to depart from established principles and, where appropriate, make new law.

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

- 12.1. Justice Unterhalter has been conducting court proceedings in the High Court as well as on the bench of various appeal courts for a number of years. The JSA has received positive feedback from senior members of the bar whose views were canvassed. According to all reports, his ability to conduct court proceedings in a clear and purposive manner is excellent;
- 12.2. His ability to do so has also been recognised by his fellow judges on the panels on which he has served. Thus, whilst he was a member of the Appellate Body of the WTO for a number of years, he was later appointed as its chairperson;
- 12.3. His ability to effectively and efficiently conduct court proceedings is enhanced by his high work ethic. The report back from senior members unanimously confirms that, without exception, he comes to court prepared and ready to engage with counsel from the bench at a meaningful level.

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

- 13.1. The JSA submits that Justice Unterhalter is extremely diligent and administratively capable; and
- 13.2. The JSA has canvassed this issue with senior colleagues of the Bar and, according to all reports received, he manages his cases, administratively, excellently.

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

- 14.1. The JSA submits that Justice Unterhalter's reputation for integrity and ethical behaviour is beyond reproach.

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

- 15.1. The JSA submits that Justice Unterhalter has excellent judicial temperament; and
- 15.2. According to reports received from senior members of the Bar, Justice Unterhalter is friendly, polite, and engaging. He often engages in constructive debates with Members of the Bar during argument. In relation to Junior colleagues at the Bar, our feedback is that he is kind, caring and readily offers helpful guidance to them.

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

- 16.1. The JSA submits that Justice Unterhalter is committed to human rights (a point canvassed extensively above) and that he is also in touch with the needs of the community.
- 16.2. Once again, according to feedback sourced from colleagues at the Bar - both senior and junior members - Justice Unterhalter has

consistently promoted the advancement of black and woman advocates in the profession. This is not only part of his recognition of the need to transform the profession itself but can be understood to be part of a recognition of the broader needs of society as a whole.

**17. The candidate's potential:**

17.1. The JSA submits that Justice Unterhalter has the potential to become one of South Africa's all-time leading Constitutional Court judges. If appointed, he will undoubtedly make a significant impression on the Constitutional Court and on the jurisprudence emanating from it.

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

18.1. Justice Unterhalter's appointment to the Constitutional Court will send a positive message to the South African legal community and the general public.

18.2. It is important that the broader community has confidence in the judiciary and Justice Unterhalter's appointment to the highest court in the country will go a long way to giving the broader community the sense of trust and confidence in the judiciary that is much needed, particularly at this time when the integrity of the judiciary has come under threat from a number of quarters.

**ANNEXURE: LIST OF JUDGMENTS CONSIDERED****Reported decisions:**

*Continental Tyres South Africa (Pty) Ltd and another v Competition Commission of South Africa and others* [2018] 2 CPLR 476 (CAC)

*Phaahla v Minister of Justice and Correctional Services and Another* 2018 (1) SACR 218 (GP)

*Continental Tyres South Africa (Pty) Ltd and another v Competition Commission of South Africa and others* [2018] 2 CPLR 476 (CAC)

*Benson v Standard Bank of SA (Pty) Ltd* 2019 (5) SA 152 (GJ)

*Income Tax Case No. 1926 82 SATC* 161

*Trio Engineered Products Inc v Pilot Crushtec International (Pty) Ltd* 2019 (3) SA 580 (GJ)

*ACSA v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ)

*Kassel v Thompson Reuters (Markets) SA* 2019 (1) SA 251 (GJ)

*Nampak Glass (Pty) Ltd v Vodacom (Pty) Ltd and Others* 2019 (1) SA 257 (GJ)

*Ndoro v South African Football Association and Others* 2018 (5) SA 630 (GJ)

*Van der Bijl v Featherbrooke Estate Homeowners' Association* 2019 (1) SA 642 (GJ)

*Murray and Roberts Ltd v Alstom S&E Africa (Pty) Ltd* [2019] 4 All SA 495 (GJ)

*Achuko v Absa Bank Ltd* 2020 (1) SA 533 (GJ)

*Mitsubishi Hitachi Power Systems Africa (Pty) Ltd v Murray & Roberts Power & Energy* 2020 JDR 2035 (SCA)

**Unreported Decisions (selection):**

*De Bruyn v Steinhoff International Holdings NV and Others* [2020] JOL 47482 (GJ).

*Zamani Marketing and Management Consultants Proprietary Ltd vs. HCI Invest 15 Ltd* [2020] JOL 46637 (GJ).

*Uniplate Group (Pty) Ltd v Competition Commission of South Africa* [2020] 1 CPLR 136 (CAC).

**Judgments upheld on appeal:**

*Phaahla vs Minister of Justice and Correctional Services* 2018 (1) SACR 218 (GP).

*Betterbridge (Pty) Ltd v Masilo* 2015 (2) SA 396 (GP).

**Judgments overturned on appeal:**

*Basson v Hugo & Others* 2018 (3) SA 46 (SCA).