

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. BCL (Oxford, 1985); and
- 1.4. MA (Cambridge, 1987).

2. Whether the candidate is a fit and proper person

- 2.1. The candidate is a fit and proper person, and no comments to the contrary have been received.

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

- 3.1. The Constitutional Court bench currently comprises nine Justices of whom three will shortly leave the court, having served their respective non-renewable terms. As a result, the court will, by the end of 2021, comprise six Justices (three black men, and three black women).
- 3.2. The candidate is a white man.

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

- 4.1. The candidate's knowledge of the law is widely acknowledged to be of

the highest order and in particular he is known to be an exceptionally gifted constitutional lawyer.

4.2. His knowledge straddles many areas of the law including constitutional and administrative law, competition law, international trade and international law. His knowledge, skills and expertise in the latter areas are probably unparalleled in this country. He will, if appointed, bring a store of knowledge and experience to the Constitutional Court.

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

5.1. The candidate is committed to the values of the Constitution:

5.1.1. He has been an executive member of organisations that are committed to human rights, including before South Africa had a Constitution and Bill of Rights, such as the Society for the Abolition of the Death Penalty and Lawyers for Human Rights.

5.1.2. 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 the chairperson of the editorial board of the South African Journal of Human Rights.

5.1.3. As a practitioner, he was lead counsel in a number of the leading constitutional judgments. Amongst his extensive list of cases are some which have produced judgments that have shaped the course of our constitutional law. These include, by way of illustration, the following:

- 5.1.3.1. *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).
- 5.1.3.2. *In re: Certification of the Amended Text of the Constitution of the Republic of South Africa* 1997 (2) SA 97 (CC).
- 5.1.3.3. *Ferreira v Levin N.O.* 1996 (2) SA 621 (CC).
- 5.1.3.4. *Beinash v Earnest & Young* 1999 (2) SA 166 (CC).
- 5.1.3.5. *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC).
- 5.1.3.6. *Simelane N.O. v Seven-Eleven Corporation SA (Pty) Ltd & Another* 2003 (3) SA 64 (SCA).
- 5.1.3.7. *Phillips v Director of Public Prosecutions WLD* 2003 (3) SA 34 (CC).
- 5.1.3.8. *Radio Pretoria v Chairman of the Independent Communications Authority of SA* 2004 (3) SA 346 (SCA).
- 5.1.3.9. *Mkontwana v Nelson Mandela Metropolitan Municipality & Another* 2005 (1) SA 530 (CC).
- 5.1.3.10. *SCAW v The International Trade Administration Commission* 2012 (4) SA 618 (CC).
- 5.1.3.11. *National Treasury v OUTA* 2012 (6) SA 223 (CC).
- 5.1.3.12. *DA v President of the Republic of South Africa* 2013 (1) SA 248 (CC).

5.1.3.13. *All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC).

5.1.3.14. *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited* 2015 (5) SA 245 (CC).

5.1.3.15. *Tasima (Pty) Ltd v Department of Transport* 2017 (2) SA 622 (CC).

5.1.3.16. *UDM v Speaker of the National Assembly* 2017 (5) SA 300 (CC).

5.1.4. The candidate's judgments, where appropriate, promote constitutional values. This is evident in his published decisions on common law matters where he infuses these values into the application of the law. A good example of this is *Ndoro v South African Football Association* 2018 (5) SA 630 (GJ) which has shed light on the reviewability of a domestic tribunal's decision and on the proper characterisation of decisions made by voluntary associations that perform a public function. Another is *Van der Bijl v Featherbrook Estate Homeowners Association* 2019 (1) SA 642 (GJ) which was a delictual matter where the candidate developed the common law in relation to questions of unlawfulness and wrongfulness by infusing constitutional values through the mechanism of section 39(2) of the Constitution.

5.1.5. One of his recent decisions, delivered as an Acting Justice in the Supreme Court of Appeal, is *Capitec Bank Holdings Limited and*

Another v Coral Lagoon Investments 194 (Pty) Ltd and Others (470/2020) [2021] ZASCA 99 (09 July 2021). This decision, which faithfully applies and advances recent Constitutional Court jurisprudence, is a significant contribution on fundamental questions of the proper approach to the interpretation of contracts; good faith; consent as a requirement for the sale of shares; past conduct as a guide to interpretation; the parol evidence rule; and good faith at common law.

6. Whether any judgments have been overturned on appeal

- 6.1. Only one judgment has been found that was overturned on appeal. That was *Basson v Hugo & Others* 2018 (3) SA 46 (SCA).
- 6.2. The candidate's other judgments have either stood uncontested or else remained undisturbed on appeal, and several have been applied by the Supreme Court of Appeal and Constitutional Court.

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

- 7.1. The candidate's professional experience is extensive and broad.
- 7.2. The candidate 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.

- 7.3. The candidate has held leadership positions throughout his career in various facets of the profession, for example:
- 7.3.1. As a practitioner, he joined the Johannesburg Bar approximately 30 years ago in 1990 and was conferred the status of Silk in 2002;
 - 7.3.2. 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);
 - 7.3.3. He has been the director of legal research centres such as CALS and the Mandela Institute;
 - 7.3.4. 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
 - 7.3.5. 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.

8. The candidate's linguistic and communication skills

- 8.1. The candidate is well-spoken and erudite. He also writes impeccably and this makes his judgments accessible to academics, practitioners,

others judges and the general public, which is reflected in the significant number of his decisions that have been reported despite his relatively short judicial tenure.

9. The candidate's ability to produce judgments promptly

9.1. The candidate has always produced judgments promptly.

9.2. A number of senior members of the JSA have given feedback on the candidate that has been overwhelmingly positive.

10. The candidate's fairness and impartiality

10.1. The candidate is fair and impartial.

11. The candidate's independent mindedness

11.1. The candidate has a reputation for being independent-minded.

11.2. This is apparent in a number of judgments, but most significantly in *Trio Engineered Products Inc v 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 v South African Football Association* 2018 (5) SA 630 (GC) where he 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, *Zamani Marketing & Management Consultants (Pty) Ltd v HCI Invest 15 (Pty) Ltd* 2021 (5) SA 315 (GJ) the candidate examined a 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, he distinguished between different types of decisions and attached to each of them an appropriate duty of disclosure.

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

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

- 12.1. The candidate 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 at a meaningful level.

13. The candidate's administrative ability

- 13.1. The candidate has a reputation for diligence and administrative capability, evidenced by his leadership roles canvassed above and in the experience of those who have appeared before him as a judge.

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

- 14.1. The candidate's reputation for integrity and ethical behaviour is beyond reproach.

15. The candidate's judicial temperament

- 15.1. The candidate has excellent judicial temperament.
- 15.2. According to reports received from senior members of the Bar, the candidate is friendly, polite, and engaging. He often engages in constructive debates with members of the Bar during argument. Junior members of the Bar report that the candidate 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 candidate is committed to human rights (canvassed above) and is in touch with the needs of the community.
- 16.2. According to feedback from members of the Bar – both senior and junior members – the candidate 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. If appointed, the candidate 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. The candidate would bring a store of knowledge and experience to the Constitutional Court.

18.2. The appointment of a candidate of his calibre would send a positive message to the community at large that the apex court continues to be a centre of excellence where justice is served by the most skilled lawyers in the land.

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)

Zamani Marketing and Management Consultants Proprietary Ltd v HCI Invest 15 Ltd 2021 (5) SA 315 (GJ)

Unreported Decisions (selection)

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

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

Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others (470/2020) [2021] ZASCA 99 (9 July 2021)

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)