

JSC INTERVIEW ROUND: APRIL 2022

CANDIDATE: JUDGE DAVID NAT UNTERHALTER

COURT FOR WHICH CANDIDATE APPLIES: CONSTITUTIONAL COURT

1. The candidate's tertiary qualifications, professional admissions and honours:

1.1. The candidate holds the following formal qualifications:

1.1.1. BA, Cambridge (1980);

1.1.2. LLB, Wits University (1984);

1.1.3. BCL, Oxford (1985); and

1.1.4. MA, Cambridge (1987).

1.2. The candidate's professional admissions and honours:

1.2.1. Advocate (1990); and

1.2.2. Senior Counsel (2002).

1.3. The candidate possesses the requisite qualifications for the position for which he has applied. He is well-qualified academically.

2. The candidate's integrity and ethics:

- 2.1. No circumstances are known that would suggest that the candidate is not a person of integrity with a reputation for ethical behaviour or is not a fit and proper person for appointment.

3. Whether the candidate's appointment would help to achieve an appropriate racial and gender composition on the bench:

- 3.1. There are currently 8 full time judges on the Constitutional Court bench, comprising:

3.1.1. 3 black women (2 African, 0 Indian, 1 Coloured);

3.1.2. 5 black men (3 African, 1 Indian, 1 Coloured);

3.1.3. 0 white women; and

3.1.4. 0 white men.

- 3.2. The candidate is a white man.

4. The implications of the constitutional mandatory term limits and age requirements for discharge from active service of Constitutional Court judges:

- 4.1. Section 176(1) of the Constitution provides that a Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever is the earlier, unless extended by an Act of Parliament.

- 4.2. Section 4(1) of the Judges Remuneration and Conditions of Employment Act 47 of 2001 provides that a Constitutional Court judge whose 12-year term of office as a Constitutional Court judge expires before he or she has completed 15 years' active service as a judge must, subject to subsection (2), continue to perform active service as a Constitutional Court judge to the date on which he or she completes a period of 15 years' active service, whereupon he or she must be discharged as a Constitutional Court judge.
- 4.3. Section 4(2) of the Act provides that a Constitutional Court judge who, on attaining the age of 70 years, has not yet completed 15 years' active service as a judge, must continue to perform active service as a Constitutional Court judge to the date on which he or she completes a period of 15 years' active service as a judge or attains the age of 75 years, whichever occurs first, whereupon he or she must be discharged as a Constitutional Court judge.
- 4.4. The candidate is 63 years old and has completed a period of 4 years of active service as a permanent judge although the extent of his service as an acting judge is unknown.
- 4.5. Subject to any acting periods, if appointed, the candidate will serve for a period of approximately 11 years.
5. **The candidate's personal commitment to the values of the Constitution:**
- 5.1. The candidate is committed to the values of the Constitution.
- 5.2. He has been an executive member of organizations that are committed to human rights, including in South Africa before the implementation

of the Constitution and Bill of Rights, such as the Society for the Abolition of the Death Penalty in South Africa (1990 – 1995) and Lawyers for Human Rights (1989 – 1995).

- 5.3. The candidate further served as the Johannesburg Chair of the National Institute for Crime Prevention (1989 – 1995).
- 5.4. He has delivered seminars and presented papers at conferences on several constitutional and human rights issues. He has also written several peer-reviewed academic journal articles on constitutional law and human rights. He has served as the chairperson of the editorial board of the South African Journal of Human Rights.
- 5.5. The candidate is known to have regularly represented parties *pro bono* in public interest cases.
- 5.6. The candidate's conduct demonstrates a strong commitment to the achievement of dignity, equality and freedom for all, and human rights generally, through public service and civil society, and community involvement.

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

- 6.1. The candidate's knowledge of the law is widely acknowledged (nationally and internationally), to be of the highest order and he enjoys renowned popularity as a gifted jurist and constitutional lawyer.
- 6.2. The candidate's judgments reflect, where appropriate, a thorough understanding and appreciation of constitutional law. 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 Home Owners 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.

- 6.3. 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; and the parol evidence rule.
- 6.4. The judgment of the candidate in *Makhala & Another v S* (438/20) [2022] ZASCA 19 (18 February 2022) displays a careful treatment of the Constitution's impact on fair trial procedures and the administration of justice in criminal matters. The candidate considered the fairness of such processes not only on accused persons but on all persons who might give evidence that the State later seeks to admit in a trial. The candidate's judgment also reflects his characteristic concern with

reconciling existing precedents and, when appropriate, deciding on a principled basis between precedents that may be in tension. The decision is partially the majority decision, and partially a minority decision (on the application of principles relating to hearsay evidence).

6.5. The candidate's extensive involvement in many of the seminal decisions of the Constitutional Court is testament to this fact, which includes acting as counsel in the following significant cases:

6.5.1. *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC)

6.5.2. *In re: Certification of the Amended Text of the Constitution of the Republic of South Africa* 1997 (2) SA 97 (CC)

6.5.3. *Ferreira v Levin N.O.* 1996 (2) SA 621 (CC)

6.5.4. *Beinash v Ernst & Young* 1999 (2) SA 116 (CC)

6.5.5. *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC)

6.5.6. *Simelane N.O. v Seven-Eleven Corporation SA (Pty) Ltd & Another* 2003 (3) SA 64 (SCA)

6.5.7. *Phillips v Director of Public Prosecutions WLD* 2003 (3) SA 34 (CC)

6.5.8. *Radio Pretoria v Chairman of the Independent Communications Authority of SA* 2004 (3) SA 346 (SCA)

- 6.5.9. *Mkontwana v Nelson Mandela Metropolitan Municipality & Another* 2005 (1) SA 530 (CC)
- 6.5.10. *National Treasury v OUTA* 2012 (6) SA 223 (CC)
- 6.5.11. *DA v President of the Republic of South Africa* 2013 (1) SA 248 (CC)
- 6.5.12. *All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC)
- 6.5.13. *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited* 2015 (5) SA 245 (CC)
- 6.5.14. *Tasima (Pty) Ltd v Department of Transport* 2017 (2) SA 622 (CC)
- 6.5.15. *UDM v Speaker of the National Assembly* 2017 (5) SA 300 (CC)

6.6. The candidate's expertise covers a vast array of areas of law, including constitutional and administrative law, competition law, international trade, and international law. He will, if appointed, bring a wealth of knowledge, expertise and experience to the Constitutional Court

7. Judgments of the candidate that have been overturned, upheld or commented on, on appeal:

- 7.1. As far as can be ascertained, the only judgment of the candidate that has been overturned on appeal is that of *Basson v Hugo & Others* 2018 (3) SA 46 (SCA).

7.2. The following matters were upheld on appeal and/or commented favourably upon:

7.2.1. *Phaala v Minister of Justice and Correctional Services* 2018 (1) SACR 218 (GP); and

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

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

8.1. The candidate's professional experience is extensive and broad.

8.2. The candidate has listed 31 judgments in his application. In addition to the 15 reported judgments, and 3 unreported judgments considered by the GCB in the course of the candidate's previous review, a further five reported judgments and 40 unreported judgments have been considered for this review. The candidate's percentage of reported judgments since his permanent appointment as a judge is notably high.

8.3. Of the additional judgments considered, four were in the field of constitutional and administrative law, one in the field of competition law, a further eight in the broad area of commercial law (including company law and intellectual property law), and one in the criminal law.

8.4. As counsel, 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.

8.5. The candidate has held leadership positions throughout his career in various facets of the profession, for example:

8.5.1. As a practitioner he joined the Johannesburg Bar approximately 32 years ago in 1990 and was conferred the status of Silk in 2002.

8.5.2. 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).

8.5.3. The candidate has, further, been the director of legal research centres such as the Centre for Applied Legal Studies and the Mandela Institute;

8.5.4. 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, the General Council of the Bar, Lawyers for Human Rights and AFSA; and

8.5.5. As a judge, domestically, he has held a permanent judicial appointment in the High Court for a period of 4 years and has served various acting appointments in the Competition Appeal Court and Supreme Court of Appeal.

8.5.6. Internationally, he has been a member (and later the chairperson) of the Appellate Body of the World Trade Organisation in Geneva a standing body of seven persons that hears appeals from reports issued by panels in disputes brought by WTO Members.

8.6. The candidate has served an extensive period in the profession and has extended experience as a judge. He demonstrates an exceptional and concomitant knowledge of the law, with exemplary communication skills and the ability to manage court proceedings effectively.

8.7. The candidate has sufficient experience to serve on the Constitutional Court bench.

9. The candidate's linguistic and communication skills:

9.1. The candidate writes impeccably, and this makes his judgments accessible to academics, practitioners, fellow judges, and the general public. This is reflected in the significant number of his decisions that have been reported, and the fact that only one of his judgments has been overturned on appeal. The candidate is well-spoken and erudite.

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

10.1. The candidate has always produced judgments promptly.

10.2. The candidate indicates that he had no outstanding judgments at the time of his application.

11. The candidate's ability to conduct court proceedings fairly, efficiently and effectively:

- 11.1. The candidate is reputed to be fair and impartial with colleagues and practitioners during court proceedings.
- 11.2. From an assessment of his judgments and observations of colleagues who have appeared before him, the candidate conducts court proceedings efficiently and effectively.
- 11.3. The candidate has always displayed punctuality; is well-prepared when hearing matters and treats practitioners with extreme courtesy.
- 11.4. 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.

12. The candidate's independent-mindedness:

- 12.1. The candidate has a reputation for being independent-minded.
- 12.2. This is apparent from the fact that even before South Africa enjoyed Constitutional freedoms, the candidate did not refrain from voicing his concerns regarding human rights violations and the death penalty.
- 12.3. Since the constitutional dispensation came into effect, the candidate has demonstrated novel ways of developing constitutional law, which are self-evident from the judgments in the cases that he has argued and in his judgments.

- 12.4. 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.
- 12.5. 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.
13. **The candidate's administrative ability (other than in relation to court proceedings):**
- 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 message that the candidate's appointment would send to the public at large:

14.1. The appointment of the candidate would demonstrate the JSC's commitment to appointing excellent jurists, especially one who has served with distinction thus far, and is widely respected, both by the public and his peers.

14.2. The candidate is a distinguished legal practitioner, and his advocacy skill has been recognised internationally. His appointment would add to the credence and respect held amongst the public and the profession, for the Constitutional Court.

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

Bertie Van Zyl (Pty) Ltd t/a ZZ2 and Others v Minister of Agriculture, Forestry and Fisheries and Others 2021 JDR 1544 (SCA)

Buthlezi v Minister of Police 2020 (2) SACR 21 (GJ)

FirstRand Bank Limited v The Spar Group Limited 2021 (5) SA 511 (SCA)

Minister of Cooperative Governance and Traditional Affairs v De Beer and Another
[2021] 4 All SA 1 (SCA)

Soni v S 2021 (2) SACR 241 (SCA)

South African Navy and Another v Tebeila Institute of Leadership, Education, Governance and Training (2021) 42 ILJ 1431 (SCA)

Swatch AG (Swatch SA) v Apple Inc [2021] 3 All SA 723 (SCA)

Unreported decisions

Alminic Construction (Pty) Ltd v Hahlakela Trading CC [2019] JOL 41034 (GJ)

Billion Property Developments (Pty) Ltd v Rhino Log Furniture and Lapas CC and Another (51992/2016) [2019] ZAGPPHC 53

Blue Financial Services Limited v Absa Bank Limited and Another (39633/2014)
[2019] ZAGPJHC 340

Business Connexion (Pty) Ltd v Vexall (Pty) Ltd and Another (182/CAC/Mar20)
[2020] ZACAC 4

Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh NO
(479/2020) [2021] ZASCA 163

Consol Glass (Pty) Ltd v Commissioner for the South African Revenue Service
(1010/2019) [2020] ZASCA 175

*Cox NO and Others v Scania Finance Southern Africa (Pty) Ltd; Scania Finance
Southern Africa (Pty) Ltd v Cox NO and Another* (17481/2013; 34264/2014)
[2018] ZAGPJHC 484

*HCI Invest 15 Holdco Proprietary Limited and Another v Ithuba Holdings
Proprietary Limited (RF) and Others* (19/31803) [2019] ZAGPJHC 534

Justice Project South Africa v Registrar of Road Traffic and Others (30665/2016)
[2019] ZAGPPHC 1048

Kathu Solar Park (RF) (Pty) Ltd v Mahon and Another (2020/4931) [2020]
ZAGPJHC 277

Kausi v S (A103/2019) [2019] ZAGPJHC 511

Khourie v Levine and Others (95/06622) [2018] ZAGPJHC 418

Makhala & Another v S (438/20) [2022] ZASCA 19 (18 February 2022)

Masibuyisane Services (Pty) Ltd v Eqstra Corporation (Pty) Ltd (1245/2019) [2020]
ZASCA 159

Member of the Executive Council for Health, Eastern Cape v Z M (576/2019) [2020]
ZASCA 169

Nandi Jacobs v The Minister of Justice and Correctional Services (431/2020) [2021]
ZASCA 151

*Sekepe Investments (Pty) Ltd and Others v Government Employees Pension Fund
and Another* (110/2019) [2020] ZASCA 183

Turley Manor Body Corporate v Pillay and Others (10662/18) [2020] ZAGPJHC
190

Women in Capital Growth (Pty) Ltd and Another v Scott and Others (1193/2019)
[2020] ZASCA 95