

JSC INTERVIEW ROUND: OCTOBER 2023

CANDIDATE: JUDGE DAVID NAT UNTERHALTER

COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL

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

1.1. The candidate is appropriately qualified.

1.2. The candidate holds the following formal qualifications:

1.2.1. BA, Cambridge (1980);

1.2.2. LLB, Wits University (1984);

1.2.3. BCL, Oxford (1985); and

1.2.4. MA, Cambridge (1987).

1.3. The candidate's professional admissions and honours:

1.3.1. Advocate (1990); and

1.3.2. Senior Counsel (2002).

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 22 judges permanently appointed to the SCA. Based on the names listed on the SCA website, the SCA's racial and gender composition appears to be:

3.1.1. 10 black women (7 African, 1 Indian, 2 coloured);

3.1.2. 2 white women;

3.1.3. 7 black men (5 African, 1 Indian, 1 coloured); and

3.1.4. 3 white men.

3.2. The candidate is a white man.

4. The maximum time period the candidate could serve if appointed:

4.1. Section 176(2) of the Constitution provides that all judges other than Constitutional Court judges "*hold office until they are discharged from active service in terms of an Act of Parliament.*" The Act in question is the Judges Remuneration and Conditions of Employment Act 47 of 2001.

4.2. Section 3(2)(a) of the Act provides that, subject to section 4(4), a judge will ordinarily be discharged from active service upon reaching the age of 70 if, by that date, they have completed a period of active service of not less than ten years. If not, they will be discharged from active service after having completed ten years of active service.

- 4.3. Section 4(4) allows for a judge who reaches the age of 70 to continue serving until the age of 75 if, at the time of turning 70, they have not yet served 15 years' active service.
- 4.4. The candidate was appointed as a judge in January 2018. He will turn 70 on 18 November 2028, at which point he will have served as a judge for less than 15 years.
- 4.5. If appointed, the candidate could serve a further 10 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 organisations that are committed to human rights, including in South Africa, before the implementation of the Constitution and Bill of Rights, including 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 participation in civil society, as well as 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. The candidate further delivered (as an acting justice in the Supreme Court of Appeal) the decision in *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. In *Tuta v The State* 2023 (2) BCLR179 (CC), speaking in favour of the majority of the bench in the Constitutional Court, the candidate clarified the doctrine of putative self-defence in criminal law, and – as stated in his nomination form attached to his application – “*in the process, gave a sophisticated treatment of how to deal with important points of law that arise on appeal*”. This decision upholds the important notion of liberty of the citizens of this country.
- 6.6. Since serving as an acting justice in the Supreme Court of Appeal and the Constitutional Court in the recent past, the candidate has displayed the utmost respect for the values of the Constitution.

- 6.7. 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:
- 6.7.1. *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC);
 - 6.7.2. *In re: Certification of the Amended Text of the Constitution of the Republic of South Africa* 1997 (2) SA 97 (CC);
 - 6.7.3. *Ferreira v Levin N.O.* 1996 (2) SA 621 (CC);
 - 6.7.4. *Beinash v Ernst & Young* 1999 (2) SA 116 (CC);
 - 6.7.5. *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC);
 - 6.7.6. *Simelane N.O. v Seven-Eleven Corporation SA (Pty) Ltd & Another* 2003 (3) SA 64 (SCA);
 - 6.7.7. *Phillips v Director of Public Prosecutions* WLD 2003 (3) SA 34 (CC);
 - 6.7.8. *Radio Pretoria v Chairman of the Independent Communications Authority of SA* 2004 (3) SA 346 (SCA);
 - 6.7.9. *Mkontwana v Nelson Mandela Metropolitan Municipality & Another* 2005 (1) SA 530 (CC);
 - 6.7.10. *National Treasury v OUTA* 2012 (6) SA 223 (CC);
 - 6.7.11. *DA v President of the Republic of South Africa* 2013 (1) SA 248 (CC);

- 6.7.12. *All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC);
- 6.7.13. *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited* 2015 (5) SA 245 (CC);
- 6.7.14. *Tasima (Pty) Ltd v Department of Transport* 2017 (2) SA 622 (CC); and
- 6.7.15. *UDM v Speaker of the National Assembly* 2017 (5) SA 300 (CC).

6.8. 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 Supreme Court of Appeal.

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 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 approximately 46 judgments in his application. The candidate's percentage of reported judgments since his permanent appointment as a judge is notably high. Over 416 pages of his judgments are annexed to his application, all of which contain decisions that have been significant in the development of our law.
- 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 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 areas, 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 33 years ago in 1990 and was conferred the status of Silk in 2002;
- 8.5.2. he holds full professorships at both the University of the Witwatersrand and University of Cape Town, 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;

8.5.5. as a judge, domestically, he has held a permanent judicial appointment in the High Court for a period of 5 years and has served various acting appointments in the Competition Appeal Court, the Constitutional Court, and the Supreme Court of Appeal; and

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 against 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 Supreme Court of Appeal 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 profession, the candidate is friendly, polite and engaging. He often engages in constructive debates during argument. Junior members 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 evident from the judgments in the cases that he has argued and in his judgments.

12.4. This is clear 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 experiences 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 those who have served with distinction thus far, and are widely respected, both by the public and their peers. The candidate's dedication to constitutional values and principles, as well as his institutionalised expertise in a vast area of law, would only strengthen the bench, and the public's confidence in the Supreme Court of Appeal.

- 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 Supreme Court of Appeal.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED1. Reported decisions:

- 1.1. *Bertie Van Zyl (Pty) Ltd t/a ZZ2 and Others v Minister of Agriculture, Forestry and Fisheries and Others* 2021 JDR 1544 (SCA)
- 1.2. *Buthelezi v Minister of Police* 2020 (2) SACR 21 (GJ)
- 1.3. *FirstRand Bank Limited v The Spar Group Limited* 2021 (5) SA 511 (SCA)
- 1.4. *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another* [2021] 4 All SA 1 (SCA)
- 1.5. *Soni v S* 2021 (2) SACR 241 (SCA)
- 1.6. *South African Navy and Another v Tebeila Institute of Leadership, Education, Governance and Training* (2021) 42 ILJ 1431 (SCA)
- 1.7. *Swatch AG (Swatch SA) v Apple Inc* [2021] 3 All SA 723 (SCA)
- 1.8. *Capitec Bank Holdings Ltd v Coral Lagoon Investments (Pty) Ltd* 2022 (1) SA 100 (SCA)
- 1.9. *De Bruyn v Steinhoff International Holdings NV & Others* 2022 (1) SA 442 (GJ)
- 1.10. *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* 2023 (4) BCLR 461 (CC)
- 1.11. *Reddell and Another v Mineral Sands Resources (Pty) Ltd and Others* 2023 (2) SA 404 (CC) (dissent)

- 1.12. *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* 2023 (5) BCLR 527 (CC)
- 1.13. *Blind SA v Minister of Trade, Industry & Competition and Others* 2023 (2) BCLR 117 (CC)
2. Unreported decisions:
 - 2.1. *Alminic Construction (Pty) Ltd v Hahlakela Trading CC* [2019] JOL 41034 (GJ)
 - 2.2. *Billion Property Developments (Pty) Ltd v Rhino Log Furniture and Lapas CC and Another* (51992/2016) [2019] ZAGPPHC 53
 - 2.3. *Blue Financial Services Limited v Absa Bank Limited and Another* (39633/2014) [2019] ZAGPJHC 340
 - 2.4. *Business Connexion (Pty) Ltd v Vexall (Pty) Ltd and Another* (182/CAC/Mar20) [2020] ZACAC 4
 - 2.5. *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N O* (479/2020) [2021] ZASCA 163
 - 2.6. *Consol Glass (Pty) Ltd v Commissioner for the South African Revenue Service* (1010/2019) [2020] ZASCA 175
 - 2.7. *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
 - 2.8. *HCI Invest 15 Holdco Proprietary Limited and Another v Ithuba Holdings Proprietary Limited (RF) and Others* (19/31803) [2019] ZAGPJHC 534

- 2.9. *Justice Project South Africa v Registrar of Road Traffic and Others* (30665/2016) [2019] ZAGPPHC 1048
- 2.10. *Kathu Solar Park (RF) (Pty) Ltd v Mahon and Another* (2020/4931) [2020] ZAGPJHC 277
- 2.11. *Kausi v S* (A103/2019) [2019] ZAGPJHC 511
- 2.12. *Khourie v Levine and Others* (95/06622) [2018] ZAGPJHC 418
- 2.13. *Makhala & Another v S* (438/20) [2022] ZASCA 19 (18 February 2022)
- 2.14. *Masibuyisane Services (Pty) Ltd v Eqstra Corporation (Pty) Ltd* (1245/2019) [2020] ZASCA 159
- 2.15. *Member of the Executive Council for Health, Eastern Cape v Z M* (576/2019) [2020] ZASCA 169
- 2.16. *Nandi Jacobs v The Minister of Justice and Correctional Services* (431/2020) [2021] ZASCA 151
- 2.17. *Sekepe Investments (Pty) Ltd and Others v Government Employees Pension Fund and Another* (110/2019) [2020] ZASCA 183
- 2.18. *Turley Manor Body Corporate v Pillay and Others* (10662/18) [2020] ZAGPJHC 190
- 2.19. *Women in Capital Growth (Pty) Ltd and Another v Scott and Others* (1193/2019) [2020] ZASCA 95
- 2.20. *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* [2023] ZASCA 63

3. Judgments upheld on appeal:

3.1. None

4. Judgments overturned on appeal:

4.1. None