

CANDIDATE: DAVID NAT UNTERHALTER

**COURT FOR WHICH CANDIDATE APPLIES: GAUTENG
PROVINCIAL DIVISION**

1 The candidate's appropriate qualifications

1.1 BA (University of Cambridge);

1.2 MA (University of Cambridge);

1.3 LLB (University of Witwatersrand);

1.4 BCL (University of Oxford).

1.5 The candidate possesses the requisite qualifications for the position for which he has applied.

2 Whether the candidate is a fit and proper person

2.1 The candidate is senior member of the Johannesburg Society of Advocates. He is a member in good standing and there are no disciplinary or other proceedings pending or anticipated against him.

2.2 There is nothing in the application or judgments considered by the reviewers that would suggest that the candidate is not a fit and proper person.

2.3 To the best of the reviewers' knowledge, no complaints of any type have been lodged with the JSC in respect of this candidate and concerning his tenure as acting judge.

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 male.

3.2 The candidate's appointment to the bench would, accordingly, not help to reflect the racial and gender composition of South Africa on the bench.

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

4.1 The candidate has extensive experience in public law, including constitutional law, as well as a wide spectrum of commercial law.

4.2 The candidate has practised as an advocate since 1990, and took silk in 2002.

- 4.3 The candidate has acted as a judge on seven separate occasions, six of which occurred in and since 2014. In the capacity as an acting judge, the candidate has two reported judgments.
- 4.4 The candidate is also a tribunal member of four different arbitration bodies, and an executive member of the Arbitration Foundation of South Africa.
- 4.5 The candidate has appeared as counsel in an array of Constitutional Court and Supreme Court of Appeal matters that have addressed the spectrum of constitutional issues, including cases dealing with the separation of powers, the impact of the Bill of Rights on private law, fair trial procedures, and administrative law and the principle of legality.
- 4.6 The candidate is plainly familiar with constitutional jurisprudence and the proper approach to it. The reviewers consider that should the candidate be appointed, his constitutional experience will be of benefit to the judicial system as a whole, and in particular the High Court, a court which increasingly deals with any number of constitutional and public-law orientated matters.
- 4.7 The candidate also has extensive commercial law experience, with an emphasis on competition law and trade law.

- 4.8 The reviewers consider that if the candidate were appointed, his commercial experience would be of significant benefit to the bench.
- 4.9 The candidate's knowledge of the law is also evident from several of his written judgments, which are summarised in the annexure hereto.
- 4.10 The candidate has a significant number of academic publications, addressing topics from censorship and the bill of rights to competition and trade adjudication.

5 **The candidate's commitment to the values of the Constitution**

- 5.1 The candidate, to the best of the reviewers' knowledge, has demonstrated a firm commitment to the values of the Constitution and to the rule of law.
- 5.2 The candidate has held a position as an executive member of Lawyers for Human Rights, and as a trustee of the Helen Suzman Foundation, both of which organisations are committed towards promoting the values of the Constitution. Similarly, the candidate was the Johannesburg Chairperson of the National Institute for Crime Prevention and for the Society for the Abolition of the Death Penalty in SA.

5.3 The candidate has acted *pro bono* in a large number of matters for litigants seeking to vindicate their constitutional rights, or litigating in the public interest to promote constitutional values and to strengthen constitutionally entrenched institutions.

5.4 It is noteworthy that, of a long career in which the candidate has appeared in numerous significant cases, the first to which the candidate refers in his list of significant cases are the *Certification of the Constitution of the Republic of South Africa* cases.

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

6.1 The candidate has 7 written judgments as an acting judge of the High Court. None of his judgments has been overturned on appeal.

6.2 One of his reported judgments, *Betterbridge (Pty) Ltd v Masilo & others* 2016 (2) SA 396 (GP) was upheld on appeal by the Supreme Court of Appeal in *Masilo NO. v Betterbridge (Pty) Limited* 2016 JDR 0967 (SCA). Cachalia JA held “*The facts and the reasoning of the learned judge are set out fully in his judgment, which has now been reported sub nom as Betterbridge (Pty) Ltd v Masilo & others 2015 (2) SA 396 (GP). I agree fully with the judgment*”.

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

7.1 The candidate has considerable professional experience that would be relevant to holding judicial office.

7.2 The candidate has hundreds of reported and unreported decisions in which he acted as counsel for one of the parties. The candidate is widely regarded as one of the country's top advocates. His experience as counsel is also general in nature, and he would be capable of presiding over cases of any nature.

7.3 The candidate's experience on the World Trade Organisation Panels and its Appellate Body, as well as his experience as an arbitrator, would have given him extensive experience in performing judicial functions.

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

8.1 From the candidate's judgments, it is clear that he has excellent linguistic skills in English. His proficiency in any other language is unknown to the reviewers.

8.2 No adverse comments have been raised about the candidate's communication skills.

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

- 9.1 There can be no doubt that the candidate has the ability to promptly produce judgments.
- 9.2 Both of the candidate's *reported* judgments were handed down within three days of the hearing of the application concerned and, remarkably, both in the same week. In *Potgieter v Olivier and Another* 2016 (6) SA 272 (GP), the application was heard on Monday, 13 October 2014, with judgment being handed down on Thursday, 16 October 2014. And in *Betterbridge (Pty) Limited v Masilo and Others* 2015 (2) SA 396 (GP), the matter was heard in the same week on Tuesday, 14 October 2014 and the candidate handed down his judgment on Friday, 17 October 2014. He *also* delivered a written judgment in a trial on 17 October 2014, which appears to have been heard sometime between 6 and 17 October, in the matter of *K M Mogale v Road Accident Fund* (47697/13) [2014] (17 October 2014).
- 9.3 The reviewers record that they have focused on the candidate's judgments as an acting judge of the South African High Court. The candidate has sat on a number of WTO panels and as a judge on the Appellate Body of the WTO and, in that capacity, appears to have been responsible for over 30 cases. These judgments have not been reviewed.

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

10.1 There is no indication that the candidate is unfair or lacking impartiality in the judgments that he has delivered.

10.2 No adverse comments have been received.

11 **The candidate's independent mindedness**

11.1 No adverse comments have been received.

11.2 The reviewers note the candidate's compelling treatment of the issues in *Potgieter v Olivier and Another* 2016 (6) SA 272 (GP), which is summarised in the annexure hereto. The candidate demonstrated deference to judicial precedent (*stare decisis*), showing an appreciation that a Full Bench judgment was binding, but nevertheless proceeded to explain that he would, in its absence, have reached a different interpretation and conclusion.

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

12.1 No adverse comments have been received.

12.2 He also has extensive judicial experience. As highlighted above, after several years as a Panel member of the World Trade Organisation (WTO), he served on the Appellate Body, the permanent adjudicative branch of the WTO, from 2007 to 2013,

and ultimately as its Chairperson in 2010-2011. He acted as a Judge of the High Court in 2003, 2014, 2016 and again in 2017.

12.3 On Thursday, 24 August 2017, the candidate was the victim of an armed robbery while driving in Johannesburg on his way to Court, shortly before the commencement of proceedings over which he was presiding as an acting judge. Despite the ordeal, the candidate continued with his Court duties. Following the incident, the reviewers received the following e-mail from a member who appeared before him on the day:

- “1. I am aware that Unterhalter SC has applied for a permanent position as a judge. For that reason, the following account of events in the urgent court of the South Gauteng High Court may be relevant.
2. I was representing a respondent in this urgent court on Thursday 24 August.
3. My matter was stood down and I remained in court. I listened to Unterhalter AJ deal with an application launched by an unrepresented prisoner who was there in chains and accompanied by a guard. I remember thinking to myself that the judge displayed a fair amount of patience (a lot actually) whilst listening to the applicant complain about the injustices he had to deal with.
4. When it was my turn to argue I was offered the same patience but with a much firmer hand. My opponent and I were told in clear terms what the judge's prima facie view was, which did not agree with how my client wished things to be.
5. Yet I was still given an opportunity to disagree with the judge, who actually listened to me. To me this is a most preferable quality for a presiding officer: the ability to listen to a person he or she disagrees with.

6. When I finished I went back to chambers grumbling about the jungle justice of urgent court.
7. None of the above is remarkable - we all have good and bad experiences in the stressful environment of urgent court.
8. What is out of the ordinary is that later in the day I read on News24 that this judge had been robbed, at gunpoint, shortly before his urgent court started on time at 10 am.
9. None of the trauma of being robbed affected this judge. At least that is how things appeared.
10. Despite what he went through my client had his day in court and for this I thank him.”

12.4 A senior member of the Johannesburg Bar who appeared before the candidate in an opposed motion commented that:

“He had read the papers well and provided both parties a proper, courteous and well-directed hearing, asking probing and appropriate questions and getting to the main points very effectively. He displayed the ideal balance of authority, knowledge, courtesy and open-mindedness that made his conduct the epitome of judiciousness. His judgment was promptly delivered and extremely well reasoned and to the point.”

13 **The candidate’s administrative ability**

13.1 No adverse comments received.

13.2 It should be noted under this heading that the candidate has a reputation for managing an extremely busy practice as a Senior

Counsel of the Johannesburg Bar, while juggling this with his position on the WTO, as well as other commitments.

14 The candidate's reputation for integrity and ethical behaviour

14.1 No adverse comments have been received.

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

15 The candidate's judicial temperament

15.1 No adverse comments have been received.

15.2 The judgments that have been reviewed all appear to give thorough consideration to the issues.

15.3 We also refer to the comments received and highlighted in paragraph 12 above.

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

16.1 The candidate's application reveals that he has held various positions in organisations and institutions committed to human

rights and the transformation of South Africa and its legal profession. These include:

- 16.1.1 National Institute for Crime Prevention (NICRO), at which the candidate was the Johannesburg Chair from 1989 – 1995;
- 16.1.2 Society for the Abolition the Death Penalty in South Africa, of which the candidate was a member and Chair of the Johannesburg Chapter from 1990 – 1995
- 16.1.3 Lawyers for Human Rights (LHR); the candidate was an Executive Member from 1990 – 1996;
- 16.1.4 The Helen Suzman Foundation, in relation to which the candidate has served as a Trustee from 1994 to date; and
- 16.1.5 Centre for Applied Legal Studies (CALS) at the University of Witwatersrand, at which the candidate was the Director between 1997 and 2000.
- 16.2 As an advocate, he has acted in numerous cases which implicate human rights, also demonstrating his willingness to appear *pro bono* for applicants deprived of their rights, in South Africa and elsewhere. As an example of the latter, in *R v Nzima and Others* (257/2005) [2006] SZHC 52 (10 March 2006), a matter not

referred to in his extensive list of cases, the applicant appeared before the Acting Chief Justice in the Swaziland High Court in an urgent, and ultimately successful, bail application on behalf of various applicants charged with High Treason, many of whom were being tortured in the Swaziland jails.

- 16.3 He has displayed an on-going involvement in legal education, serving as a lecturer and professor of law at the Universities of Cape Town and Witwatersrand, as well as assisting in advocacy training organised by the GCB between 2002 to date. He is a frequent contributor to the Wallenberg advocacy training courses. His work in legal education at various levels is notable.

17 **The candidate's potential**

- 17.1 In our view, the candidate is well qualified for permanent appointment to the High Court, regard being had to his extensive experience as an advocate and his position on WTO panels and the WTO Appellate Body. The candidate's manifest skills will be a valuable addition to the Gauteng Division of the High Court.
- 17.2 The reviewers are of the view that the candidate is a strong contender for appointment. He has a wealth of experience, both as an advocate and judge, and in the full breadth of the law.

17.3 We also believe that the candidate has the potential to be appointed to higher courts in the future.

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

18.1 We respectfully suggest that the candidate's elevation to the bench will send a message that the bench is always open to skilled and experienced lawyers who wish to serve the cause of justice.

18.2 In this regard, we refer to the following comment from Vincent Maleka SC, made in the nomination letter attached to the candidate's application "*It is remarkable, certainly admirable, that Unterhalter has now decided to make himself available as a candidate for judicial office by sacrificing a well-established professional practice in order to serve a greater public and civic duty that will enrich a more representative judiciary, in respect of not only race and gender, but also the requisite capacity to fulfil its ultimate role of dispensing justice. It is a sacrifice which merits recognition that a constitutional democracy such as we have ought to bestow to one of its eminent lawyer.*"

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

Betterbridge (Pty) Limited v Masilo and Others 2015 (2) SA 396 (GP). This was a special plea of prescription argued as a separated issue. The matter dealt with the interpretation of the statutory phrase, “*the debt is the object of a claim filed against ... a company in liquidation*” in section 13(g) of the Prescription Act 68 of 1969. The Plaintiff argued that a claim is filed when it is submitted to the presiding officer who presides at the meeting of creditors, alternatively that the claim is filed when it is admitted to proof. The Defendants argued that a claim is filed when the claim is in fact proved – admitted by the officer presiding. The candidate found that he was bound by the full bench decision in *Thrupp Investment Holdings v Goldrick* 2008 (2) SA 253 (W), finding “... *a claim has been filed against the company in liquidation when the presiding officer at either the first or second meeting of creditors admits the claim for purposes of proof in the sense of allowing the claim to go forward to the meeting of creditors so as to determine whether the claim should be admitted or rejected.*” The candidate dismissed the special plea. The matter was heard on 14 October 2014 and the candidate handed down his judgment on 17 October 2014.

The candidate’s judgment was subsequently taken on appeal to the SCA (2016 JDR 0967), which appeal was dismissed with costs.

Potgieter v Olivier and Another 2016 (6) SA 272 (GP). In this case, Potgieter sold an immovable property to the Oliviers for R1 million, to be paid for in instalments of R10 000 per month, along with interest on the purchase price. He later approached a court for a declaration that the agreement was void, on the basis that the sale was a credit transaction; that he was a credit provider; that s 40(1)(b) of the National Credit Act 34 of 2005 required him to register as such; and that he had failed to do so. The candidate held that the agreement was a credit agreement and that Potgieter was a credit provider, but that on the strength of full bench authority (*Friend v Sendai* 2015 (1) SA 395 (GP)), he was not required to register as one. (That authority was to the effect that the obligation to register (s 40(1)(b)) was not applicable to a once-off transaction, but was aimed at participants in the credit market, where a once-off credit agreement could not be said to be such participation.) The candidate proceeded to find, however, that he would not have followed the full bench decision in *Friend*, but for its binding nature, because its interpretation of section 40(1)(b) – based on the purposes of the Act – could not be reconciled with the language of the section.

Unreported decisions

Dr Wouter Basson v Professor JFN Hugo and Others 29967/2015 (NGP). This was a review application in which the applicant, Dr Basson, sought to review and set aside the Health Professions Council of South Africa's professional conduct committee's decision to refuse an application for the

recusal of two its members from the hearing into the Applicant's conduct. The candidate found that, Mr Basson enjoyed an internal remedy of appeal under the Health and Professions Act 56 of 1974 and that he is under a duty to exhaust this remedy in terms of Section 7 of PAJA. The candidate found that Dr Basson has not discharged his duty to exhaust his remedy of appeal before initiating review proceedings. The candidate further found – despite the fact that a potential decision by the professional conduct committee to suspend or revoke a member's licence to practice had immediate effect, and despite an appeal being noted – that this did not constitute an 'exceptional circumstance' exempting the applicant from first exhausting all internal remedies before approaching the Court. The candidate dismissed the review application.

Emalahleni Local Municipality v Mahlalerwa Construction CC and Another, Mahlalerwa Construction CC v Emalahleni Local Municipality (48087/14) [2016] ZAGPPHC 179 (5 April 2016). The candidate dealt with two applications, the first, a Review Application of an arbitration award and the second an Enforcement Application. The Review Application was brought outside the time frames imposed by section 33(2) of the Arbitration Act 42 of 1965 ("the Arbitration Act"). The award of the Arbitrator was made available to the parties on 2 August 2013. The Review Application was launched on 30 June 2014. The candidate found that there was no justification for the delay, occasioned by the conduct of the Applicant, nor was there any reason why the Court ought to exercise its discretion in extending the statutory limitation periods in section 38 of the Arbitration Act. Although the candidate found that the review had good prospects on the merits, he found that where the Applicant had demonstrated such a flagrant and gross abuse that its prospects

of success did not warrant a second chance. In the exercise of the candidate's discretion, he found that good cause had not been shown for an extension of time, and accordingly dismissed the review. Absent a successful review the Enforcement Application was successful. The matter was heard on 9 February 2016 and judgment was delivered on 5 April 2016.

K M Mogale v Road Accident Fund (47697/13) [2014] (17 October 2014). In this matter, the Plaintiff instituted an action for damages suffered as a result of injuries he sustained in a motor collision that occurred on 20 October 2009. The first issue in the trial was whether a workmen's compensation award in favour of the Plaintiff was to be set off against his claim for past medical expenses which was no longer in dispute. The candidate found that under the provisions of section 36 (2) of the Compensation for Occupational Injuries and Diseases Act of 1993, he was required to have regard to the compensation paid. He also noted that the fact that the Plaintiff may secure an additional award from the Workmen's Compensation Fund is not relevant to whether the set off may take place. The candidate thus gave effect to the set off. Secondly, the candidate had to consider the quantum of damages. After weighing the evidence led in the trial before him, the candidate found that the appropriate award of general damages was an amount of R1.1 million. The candidate then assessed whether the Plaintiff should be placed under curatorship or whether the damages awarded by the Court should be secured by way of a protective trust, and found that "*a trust be constituted so as to protect the Plaintiff and his lifelong dependency on the proceeds of the award of damages that I will make*". The judgment was handed down on 17 October 2014, the same date as *Betterbridge (Pty) Limited v Masilo and Others* 2015 (2) SA 396 (GP). This

appears to have been very shortly after the trial itself (the date of which is not indicated), as the candidate acted in the NGHC from 6 to 17 October 2014.

Tridevco (Pty) Ltd & Others v Zenprop Property Holdings (Pty) Ltd & 8 Others (8578/2016) (unreported). This was an application for an urgent interim interdict, pending the determination of an application, brought by the Applicants, to review and set aside a decision of the Ekurhuleni Metropolitan Municipality, taken in August 2004, to approve the establishment of Jan Smuts Extensions 2 as a Township in terms of the Town Planning and Township Ordinance 15 of 1986. The Applicants sought to interdict certain Developers, being the 1st to 4th Respondents, from proceeding to develop a regional shopping centre on the basis of the Municipality's August 2004 approval, contending that such development was detrimental to the 1st Applicant's plans to establish a rival regional shopping centre. The candidate found that the matter was urgent and that all of the requirements for an interim interdict had been satisfied. Notably, he found that the Applicants had not lost the right pursue the underlying review application because it had been brought outside the 180 days after the decision was made in 2004. The candidate dealt with the issues succinctly and with precision and gave judgment within a short period of time as it appears that the judgment was granted *ex tempore*.

Traxys North America LLC v New Reclamation Group (Pty) Ltd (16/3577 dated 29/02/2016). In this case, the candidate granted an application for an urgent interim interdict preventing the respondent (New Reclamation) from selling 'Zinc Cake', said to be the subject of an agreement between Traxys

and New Reclamation, to a third party. The judgment called for an interpretation of a complex commercial agreement between the parties.

Judgments upheld on appeal

The candidate's judgment in *Betterbridge (Pty) Ltd v Masilo & others* 2016 (2) SA 396 (GP) was upheld on appeal by the Supreme Court of Appeal in *Masilo NO. v Betterbridge (Pty) Limited* 2016 JDR 0967 (SCA).

Judgments overturned on appeal

None