

**APPLICANT: BRAD CHRISTOPHER WANLESS SC**

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

**1. The candidate's appropriate qualifications:**

- 1.1. BA – University of KwaZulu-Natal (1983);
- 1.2. LLB – University of KwaZulu-Natal (1985); and
- 1.3. Diploma in Maritime Law – University of KwaZulu-Natal (1986).
- 1.4. Between 23 November 1988 and 31 July 1990 the candidate served as a public prosecutor in the District and Regional Magistrates' Courts of Durban, KwaZulu-Natal. The reviewers consider this experience to be relevant and valuable to an application for a judicial appointment.
- 1.5. The candidate was a member of the Society of Advocates of KwaZulu-Natal between 01 December 1990 and 30 June 2016, and has been a member of the Legal Practice Council from 21 June 2019 to date of his application. The reviewers consider this experience to be relevant and valuable to an application for a judicial appointment.
- 1.6. The candidate achieved senior counsel status in June 2011, after approximately 20 years of practice as an advocate. The reviewers consider this period to be reflective of a successful but not stellar practice.

- 1.7. The candidate resigned from the KwaZulu-Natal Bar on 01 July 2016<sup>1</sup> but has not been removed from the roll of advocates.<sup>2</sup> From 01 July 2016 to date, it seems the candidate has remained in professional practice and had several Acting Judge appointments.
- 1.8. From 2012 to date, the candidate has spent more than two years acting as a Judge predominantly in the High Court of the Gauteng and KwaZulu-Natal Divisions.<sup>3</sup> The reviewers consider this period to be indicative of a significant commitment to judicial office.
- 1.9. It is suggested, however, that the Judicial Services Commission (JSC) should probe the extent of the candidate's practice as senior counsel, especially as the period from January 2018 to date appears to have been devoted more-or-less exclusively to acting Judge appointments.
- 1.10. The reviewers suggest too that the JSC should probe the candidate's decision to apply for appointment as a Judge of the Gauteng Division as opposed to the KwaZulu-Natal Division of the High Court.

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

- 2.1. The candidate has spent more than two years acting as a Judge in the Gauteng and KwaZulu-Natal Divisions of the High Court.
- 2.2. When acting as a Judge in the Gauteng Divisions, the candidate has personally paid the travel and accommodation costs associated with the acting Judge appointments. This suggests a dedication to fulfilling the role of Judge.

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<sup>1</sup> JSC Questionnaire, p 3, para 7.

<sup>2</sup> JSC Questionnaire, p 3, para 6.

<sup>3</sup> JSC Questionnaire, p 6, para 1.

2.3. The reviewers have been approached by a member of the Johannesburg Society of Advocates with a report on an incident in 2013 which, if faithfully reported by the member, reflects poorly on the candidate's integrity and judgment and undermines his candidacy for judicial office. At the time the member was chief executive officer of a litigant on behalf of which the candidate was briefed as senior counsel. At the conclusion of a fortnight-long hearing, the legal team and certain representatives of the litigant, including the member, said their goodbyes outside a coffee shop. One of the client's representatives was a young woman who had not been closely involved in trial preparation but had attended certain of the days of the hearing. The candidate is alleged by the member to have placed his hands on the woman's upper arms, drawn her towards him and kissed her full on the mouth. The member reports that he was taken aback by what appeared to him to be inappropriate, uninvited and wholly unwelcome conduct. The reviewers are unable to fathom how the candidate could have considered his conduct to be acceptable. Given that he applies for judicial office, a position that carries significant power, the reviewers urge that the incident be put to the candidate, for his response, at or at least in advance of his JSC interview.

2.4. Save as aforesaid, the reviewers are unaware of any other adverse comments concerning the candidate's fitness for appointment as a Judge of the Gauteng Division of the High Court.

### **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. His appointment would not advance the cause of gender or racial representation.

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

4.1. The candidate has had exposure to diverse areas of the law, from criminal law to matrimonial, maritime, contract, delict, insolvency, property, engineering and construction law.

4.2. Whilst in practice, the candidate did not practise in the field of constitutional law. In addition, none of the judgments submitted in support of this application has any bearing on this field of law. It is therefore difficult to determine what the candidate's knowledge of constitutional law is, although we reiterate the reservations expressed in paragraphs 5.5 and 5.6 below.

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

5.1. The candidate does not make specific reference to his commitment to the values of the Constitution. However, but for the alleged inappropriate conduct referred to in paragraph 2.3 above and the reservations expressed in paragraphs 5.5 and 5.6 below, there is no reason to question such commitment.

5.2. Whilst practising at the KwaZulu-Natal Bar, the candidate mentored "*approximately*" nine pupils, of whom eight are said to have been from previously disadvantaged backgrounds.<sup>4</sup> The reviewers regard this role as mentor to be a significant contribution to the affairs of the Bar. The candidate states that he endeavoured, where possible, to assist the pupil advocates, including by means of financial

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<sup>4</sup> JSC Questionnaire, p 18, para 10.

assistance. It is not known whether any of these pupils has written to the JSC in support of the candidate's application.

- 5.3. As a senior counsel, when briefed together with a junior, the candidate states that his junior was always a black junior counsel.<sup>5</sup> It is not known whether any of these juniors has written to the JSC in support of the candidate's application.
- 5.4. The candidate assisted with transformation initiatives at the KwaZulu-Natal Bar, including by "*signing-up*" for an initiative involving fee-sharing arrangements with black counsel.<sup>6</sup>
- 5.5. Of his practice at the KwaZulu-Natal Bar, the candidate says that "I have not practiced [sic] directly in the field of Constitutional Law. However, as many matters must be viewed through the prism of constitutional values, certain constitutional law aspects become relevant in the determination of a number of disputes and to this extent my practice involves Constitutional Law."<sup>7</sup> This statement strikes the reviewers as a rather tepid response to a core question by an experienced practitioner and candidate for judicial office.
- 5.6. The candidate's judgments considered by the reviewers do not disclose a particularly nuanced appreciation of the values underpinning our Constitution or their application to the resolution of disputes between parties, as appears from the survey of certain of the candidate's judgments that is annexed to this review.

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<sup>5</sup> JSC Questionnaire, p 18, para 10.

<sup>6</sup> JSC Questionnaire, p 18, para 10.

<sup>7</sup> JSC Questionnaire, pp 7-8, para 6.2.3.

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

- 6.1. None of which the reviewers are aware.
- 6.2. The candidate states that “[w]hilst I have granted leave to appeal in respect of several of my judgments, I am not aware as to whether any of those appeals have proceeded and the results thereof”.<sup>8</sup>

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

- 7.1. The candidate refers to four reported judgments in which he appeared as counsel and which he regards as being the most significant of his professional career.<sup>9</sup>
- 7.2. *Westbrook v Genref Ltd* 1997 (4) SA 218 (D) - The matter concerned the question of wasted costs occasioned by the postponement of a trial where neither party was at fault. The matter does not seem to the reviewers to have involved issues of particular novelty or significance. The candidate was the junior to Adv Pammenter SC, a fact not disclosed in his application.
- 7.3. *Venter v Nel* 1997 (4) SA 1014 (D) - This matter was an undefended action for damages on the ground that the defendant had infected the plaintiff with HIV. The candidate appeared for the plaintiff and led factual and expert witnesses in support of the claim, which was successful. According to the candidate’s letters of support, he appeared in this matter *pro deo/pro amico*.
- 7.4. *Douglas Green Bellingham v Green t/a Greens Bottle Recyclers* 1998 (1) SA 367 (SCA) – This matter was an appeal

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<sup>8</sup> JSC Questionnaire, p 16, para 9.4.

<sup>9</sup> JSC Questionnaire, pp 11-12, para 6.3.

against the reduction by the Court *a quo* of the amount of appellant's claim against an insolvent estate. By agreement between the parties, the appeal turned exclusively on a question of insolvency law. The candidate appeared for the respondent and successfully opposed the appeal.

- 7.5. ***Olivier v Olivier*** 1998 (1) SA 550 (D) – The matter concerned the adjudication of the question whether a party in divorce proceedings may rely on s 6(3) of Matrimonial Property Act 88 of 1984 to adduce evidence of the actual value of his estate at commencement of the marriage, where such value had been declared as nil in an antenuptial contract. The candidate appeared for the plaintiff and succeeded in excluding such evidence.
- 7.6. The questions of law considered in the four reported judgements referred to above suggest a limited degree of diversity in the candidate's practice whilst at the Bar. The matters do not seem to the reviewers to have involved issues of particular novelty or significance. None of them pertained to the candidate's practice as senior counsel. The last reported judgment dates back some 23 years.
- 7.7. The impression gained by the reviewers from the candidate's application, including the cases regarded by him as being the most significant of his professional career, is of an underwhelming practice as junior and thereafter senior counsel.
- 7.8. It bears mention too that the JSA member referred to in paragraph 2.3 above has informed the reviewers that he was ultimately unimpressed by the candidate's performance as senior counsel on behalf of the litigant. In particular, the member regarded the candidate as having fumbled a critical part of the cross-examination

of a central witness, a professional misstep that he believes contributed to the loss of the case.

- 7.9. Be that as it may, the candidate has experience in both criminal and civil law, encompassing both trial and motion matters.
- 7.10. The reviewers are also aware of the positive reports by two JSA members outlined in paragraphs 15.1 and 15.2 below. To these must be added the personal experience of one of the reviewers, who appeared before the candidate in March 2020. On that occasion, the candidate was clearly familiar with the lengthy papers and on top of the issues arising in the matter. The candidate impressed the reviewer with his efficient and most pleasant approach to determining the matter.

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

- 8.1. In terms of the judgments the candidate has written, both reported and unreported, the candidate exhibits reasonably good linguistic and communication skills.
- 8.2. The candidate's judgments are well written and easy to follow as the candidate deals directly with the point in issue and simplifies the application of the law to the facts logically.
- 8.3. Of minor concern in regard to the candidate's written work, is that he tends to use brackets mid-sentence in an attempt to clarify his thought process. This results in long sentences that may lead to confusion, which tends to dilute the point he may be seeking to communicate.

- 8.4. There are also typographical errors and ‘gremlins’ in the candidate’s judgments, suggesting a lack of attention to detail in the finalisation of judgments. The reviewers are however mindful of the demands of serving in extremely busy Divisions of the High Court.
- 8.5. It is notable, the reviewers consider, that the candidate has penned only two reported judgments in more than two years of serving on the Bench. Both relate to summary judgment. Neither is a work of particular significance. The second took almost five months to deliver. Whilst it is appreciated that he has acted in extremely busy Divisions of the High Court, it could be expected of the candidate to have made a greater contribution to our jurisprudence in this time.
- 8.6. The candidate has not published any articles or other publications.

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

- 9.1. The candidate on average delivers judgments within an acceptable three-month period and appears to be alive to the need for an expeditious resolution of disputes.
- 9.2. As at November 2020 (when the candidate’s application was submitted to the JSC), the candidate had one outstanding reserved judgment.

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

- 10.1. There is nothing of which the reviewers are aware to indicate that the candidate is not fair and impartial in the discharge of his duties as counsel or acting Judge.

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

- 11.1. There is nothing of which the reviewers are aware to indicate that the candidate is not independent minded in the discharge of his duties as counsel or acting Judge.

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

- 12.1. Subject to the reservations expressed in paragraphs 5.5, 5.6, 7.7 and 7.8 above, the reviewers are aware of no adverse information in this regard. No concerns appear from the judgments of the candidate that were considered by the reviewers.
- 12.2. In the reviewers' view, regard should also be had to the positive reports by JSA members outlined in paragraphs 7.9 and 7.10 above and 15.1 and 15.2 below.

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

- 13.1. No adverse comments have been received by the reviewers in this regard.
- 13.2. The candidate was a member of a committee entrusted with negotiating the renewal of the leases of various groups of advocates in Durban, KwaZulu-Natal. He has served as the vice chairman of the governing body of a primary school, as well as a committee member of a retirement village.
- 13.3. The candidate also appears to deal with cases relatively efficiently and expeditiously, as the positive reports by JSA members outlined in paragraphs 15.1 and 15.2 below attest.

13.4. On the occasion mentioned in paragraph 7.10 above, moreover, one of the reviewers witnessed the candidate manage a lengthy motion roll with ease.

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

14.1. The alleged inappropriate conduct referred to in paragraph 2.3 above requires careful scrutiny by the JSC, in the view of the reviewers.

14.2. Save as aforesaid, the reviewers are unaware of any other adverse comments concerning the candidate's fitness for appointment as a Judge of the Gauteng Division of the High Court. In addition, the letters (from attorneys) in support of the candidate's appointment refer to him as having the necessary reputation for integrity and ethical behaviour.

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

15.1. No adverse comments have been received by the reviewers in this regard.

15.2. The reviewers received the following two positive reviews from members of the JSA who have appeared before the candidate:

15.2.1. *"I ran a trial before him 3 years ago, he is knowledgeable and firm although he has a reserved personality. He is thorough, listens, debates and asks critical questions. He delivered a very good judgment within a week. I was very impressed with his temperament and I think he would be an asset to the judiciary."*

15.2.2. *"I have appeared before him a few years ago, he was part of a full bench – he seemed prepared and posed a few questions*

*to both sides. However, since he was the most junior amongst the judges and was reserved compared to the other judges who were more dominant. My sense is that he was still finding his feet and adopted a reserved demeanour. In respect of his fitness, I cannot express a view, other than, there's nothing that points to his unfitness."*

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

- 16.1. No adverse comments have been received by the reviewers in this regard.
- 16.2. Whilst practising as a member of the KwaZulu-Natal Bar, the candidate was a member of the *Pro Deo* Committee and, in his submission, a proponent of transformation by working with junior black counsel. Ultimately, the reviewers are unable to consider his contribution to the transformation of the profession to have been extraordinary.

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

- 17.1. Subject to the reservations expressed in paragraphs 5.5, 5.6, 7.7 and 7.8 above, no adverse comments have been received by the reviewers in this regard.
- 17.2. In the view of the reviewers, the candidate has the potential to be a competent and diligent Judge of the High Court.

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

- 18.1. The candidate is an experienced legal practitioner and has an extensive record of diligent service as an acting Judge.
- 18.2. The candidate should be given an opportunity to respond to the reservations expressed in paragraphs 5.5, 5.6, 7.7 and 7.8 above.

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

*SA Taxi Securitisation (Pty) Ltd v Phambuka* (8821/11) [2012] ZAKZPHC 19  
(30 March 2012)

*Absa Bank Limited v Mphahlele and Others* (45323/2019 and 42121/2019)  
[2020] ZAGPPHC 257 (26 March 2020)

**Unreported Decisions**

*Nedbank Limited v Janse Van Vuuren and Another* (33222/2011) [2018]  
ZAGPPHC 335 (4 May 2018)

*Ferrero S.P.A v Interactive Trading 716 (Pty) Limited* (38478/2019) [2020] (13  
February 2020)

*Van Rensburg NO and Another v Master of the High Court, Pretoria and Another*  
(56029/18) [2020] ZAGPPHC 73 (14 February 2020)

*Bustque (Pty) Limited v Vendor's Paradise (Pty) Limited* (56261/2019) [2020]  
ZAGPPHC (3 September 2020)

*Morton v The State* (RC35/2017; A367/18) [2020] ZAGPPHC 221 (26 March  
2020)

*S v Bonginkosi Mkhize* (155/2018) [2020] ZAGPJHC (15 June 2020)

*Orion Real Estate Limited v Zephan Properties Proprietary Limited*  
(09441/2019) [2019] ZAGPJHC 185 (18 June 2019)

*HBZ Bank Limited v Mukadam's General Enterprises and Others* (32628/2019)  
[2020] ZAGPPHC 292 (1 June 2020)

*Jabulani Zulu & Another v The State* (A596/2015) ZAGPPHC [2018] (15 February 2018)

**Judgments upheld on appeal:**

None of which the reviewers are aware.

**Judgments overturned on appeal:**

None of which the reviewers are aware.