

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 129593 /2023

In the matter between:

FREEDOM UNDER LAW (RF) NPC

Applicant

and

THE JUDICIAL SERVICE COMMISSION

First Respondent

JOHANNES PETRUS DAFFUE

Second Respondent

MOKGERE BUSISIWE SHAREEN MASIPA

Third Respondent

GLORIA NOZUKO MJALI

Fourth Respondent

ZAMANI MSWAZI NHLANGULELA

Fifth Respondent

MMATHEBE VIOLET PHATSHOANE

Sixth Respondent

NAMHLA THINA YVONNE SIWENDU

Seventh Respondent

JOHN ELDRID SMITH

Eighth Respondent

DAVID UNTERHALTER

Ninth Respondent

NOTICE IN TERMS OF RULE 41A

PLEASE TAKE NOTICE that the applicant agrees to the referral of this matter to mediation in terms of Rule 41A(2)(a).

TAKE NOTICE that the applicant does so for the following reasons –

- 1 The application concerns a challenge of a failure by the first respondent ("**JSC**") to take a decision within its remit in the exercise of its constitutionally ordained powers in terms of section 174(6) read with section 178(4) of the Constitution of the Republic of South Africa, 1996.
- 2 In respect of Part A, the applicant ("**FUL**") seeks to review, set aside and declare unlawful the following decisions taken by the JSC on 2 and 3 October 2023 ("the decisions under review"):
 - 2.1. its decision to terminate its deliberations on its recommendation of candidates for appointment to the Supreme Court of Appeal, without considering whether to fill the remaining two vacancies;
 - 2.2. its failure to consider whether the remaining candidates should be recommended for appointment to the remaining two vacancies; and
 - 2.3. its decision not to recommend any of the remaining candidates for appointment to the remaining two vacancies.
- 3 In relation to Part B, FUL highlights a number of concerning features of the JSC's current appointment process, all of which are manifest from the October 2023 interviews:
 - 3.1. The first is that, notwithstanding that the JSC has published Criteria and Guidelines for Judicial Appointment in April 2022 ("JSC Criteria and Guidelines"), it is clear from these latest round of interviews that these

guidelines are not being (or are not able to be) consistently applied during the selection process itself.

3.2. The second is in relation to the voting process itself. At present, there is no safeguard to ensure that JSC members are voting for or against particular candidates for legitimate reasons. In the current structure, it would be open to JSC members to vote against a particular candidate for wholly capricious, arbitrary and illegitimate reasons and not only would this not be challengeable but it is very unlikely ever to be known, because there is no requirement for any member of the JSC under the current system to justify his or her vote.

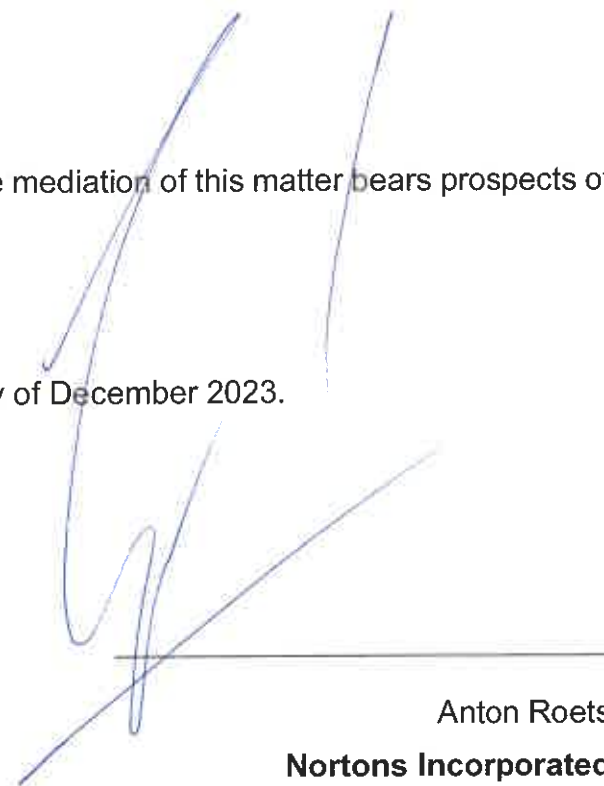
3.3. The third is that, notwithstanding that the JSC exercises critically important public power, it is clear from the reasons produced by the JSC in relation to the October 2023 interviews, that the JSC's processes do not allow for meaningful reasons to be produced justifying the JSC's decisions. The best that the JSC is able to do, because members of the JSC are not required to voice their motivation for or against a particular candidate, is to guess the reasons relied on with reference to the deliberations.

4 FUL is of the view that the issues raised in this application are capable of being mediated to obtain a more transparent, accountable and constitutionally compliant appointment process in line with the objects and provisions of Uniform Rule 41A of the Rules of Court.

5 A letter was addressed to the JSC on 30 November 2023 with the aim of achieving an expedited resolution of the issues.

6 Therefore, FUL does believe that the mediation of this matter bears prospects of success, in the public interest.

Dated at Johannesburg on this the 6th day of December 2023.



Anton Roets

Nortons Incorporated

1st Floor, The Reserve

54 Melville Road

Illovo

Johannesburg

anthony@nortonsinc.com; anton@nortonsinc.com
michelle@nortonsinc.com; nina@nortonsinc.com

Tel: 011-6667560

c/o LIESL KRIEL ATTORNEYS

3rd Floor, Building 2

Brooklyn Bridge Office Park,

570 Fehrsen Street,

Pretoria 181

liesl@lka-law.com; jan@lka-law.com

Ref: LK/js/NRT-002

**TO: THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
PRETORIA**

AND TO: THE FIRST RESPONDENT
The Office of the Chief Justice,
188-14th Road,
Noordwyk,
Midrand
Gauteng

diramaisa@judiciary.org.za
MMondlane@judiciary.org.za;
Ntshubwana@judiciary.org.za;
Tphaahlamohlaka@judiciary.org.za;
Tramonyai@judiciary.org.za

AND TO: JUDGE DAFFUE
Free State Division of the High Court
Corner Fountain & President Brand Street
Bloemfontein
Free State
Service per email as agreed: Rmatthysen@judiciary.org.za

AND TO: JUDGE MASIPA
Acting Judge of the Supreme Court of Appeal
Cnr Mirriam Makeba & President Brand Streets
Bloemfontein
Free State
Service per email as agreed: NeNgcobo@judiciary.org.za

And:

C/o Nadia Moola Attorneys
93 -123 Cowey Road
Suite 401 Cowey Centre
Essenwood
Durban

AND TO: JUDGE MJALI
Eastern Cape Local Division of the High Court, Mthatha
Nr 74 Cnr Victoria & Frere Road
Mthatha
Service per email as agreed: Tntloko@judiciary.org.za /
mjalinozuko@gmail.com

AND TO: DEPUTY JUDGE PRESIDENT NHLANGULELA
Eastern Cape Local Division of the High Court, Mthatha
Nr 74 Cnr Victoria & Frere Road
Mthatha
Service per email as agreed: Nklaas@judiciary.org.za

AND TO: DEPUTY JUDGE PRESIDENT PHATSHOANE
Northern Cape Division of the High Court
Sol Plaatjie Drive
Civic Centre
Kimberley
Northern Cape
Service per email as agreed: Mngema@judiciary.org.za

AND TO: JUDGE SIWENDU

Gauteng Local Division of the High Court, Johannesburg
Cnr Von Brandis and Pritchard Street
Johannesburg

Service per email as agreed: KwRamoroka@judiciary.org.za

AND TO: JUDGE SMITH

Eastern Cape Local Division of the High Court, Makhanda
104 - 106 High Street
Makhanda

Service per email as agreed: lkoesnel@judiciary.org.za

AND TO: JUDGE UNTERHALTER

Acting Judge of the Supreme Court of Appeal
Cnr Mirriam Makeba & President Brand Streets
Bloemfontein
Free State

Service per email as agreed: david@unterhalter.law