

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: /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

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I, the undersigned,

**JUDITH FEBRUARY**

do hereby make oath and state as follows:

- 1 I am the Executive Officer of Freedom Under Law, the Applicant in this application. I am duly authorised to bring this application and depose to this affidavit on the Applicant's behalf.
- 2 The facts contained herein are to the best of my knowledge true and correct and are, unless otherwise stated or indicated by the context, within my personal knowledge.
- 3 Where I make legal submissions, I do so on the advice of my legal representatives. I accept such advice as correct.

**INTRODUCTION**

- 4 The Applicant, Freedom Under Law ("**FUL**"), brings this application in two parts (Part A for an urgent review and Part B for declaratory and directory relief):

**Part A (Urgent review)**

- 5 **Part A** is an urgent review application brought under Rule 53 of the Uniform Rules of Court. Part A concerns the failure of the Judicial Service

Commission (“**JSC**”) to fill all vacancies on the Supreme Court of Appeal (“**SCA**”) at its meeting of 2 to 3 October 2023 in circumstances where there were appropriately qualified and fit and proper candidates for appointment.

- 6 Section 178 of the Constitution of the Republic of South Africa, 1996 (“**Constitution**”) establishes the JSC. The JSC plays a pivotal role in the appointment of judges. The Constitution provides, in section 174(6), that the President *must* appoint the judges of all courts (other than the Constitutional Court) on the advice of the JSC.<sup>1</sup> This includes judges of the SCA.
  
- 7 The JSC had (and has) a duty to interview and select candidates for judicial appointment in respect of all superior courts in South Africa, including for four vacancies at the SCA, which were announced in mid-2023. The JSC selected two candidates following the interviews held on 2 and 3 October 2023, but failed to select any candidates to fill the remaining vacancies. By failing to select candidates to fill all four vacancies in the SCA, the JSC, in effect, left two vacancies unfilled. The JSC has stated that it did not make any deliberate decision to do so. This means that the JSC effectively failed to take a decision to fill the remaining two vacancies in the SCA when it bore the responsibility to do so. It is this failure to take a decision that is impugned in Part A.

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<sup>1</sup> This is other than the President and Deputy President of the Supreme Court of Appeal (see section 174(3) of the Constitution) (see section 174(4) of the Constitution).



- 8 The JSC did not even consider the question whether to leave the two vacancies unfilled. It terminated its deliberations without considering whether to fill the remaining vacancies, whether any of the remaining candidates were suitable for appointment to those vacancies and, if more than two of them were suitable, which of them to recommend for appointment. The upshot was that the JSC did not fill two of the vacancies, not because it decided to leave them vacant, but because it failed to consider the question at all. This was a dereliction of its constitutional duty to recommend candidates for appointment whenever it is feasible and appropriate to do so, in circumstances where the JSC had shortlisted eleven candidates for the four SCA vacancies. It was an irrational abandonment of the JSC's own appointments process.
- 9 What makes the JSC's failure to fill the two remaining vacancies in the SCA all the more irrational is that the Justice Petse, the Deputy President of the SCA who filled in for the President of the SCA during the interviews and deliberations of 2 to 3 October 2023, had specifically described the crisis faced by the SCA, given the vacancies on that court and the loss of experienced judges over the past few years and the urgent need to appoint more judges and particularly more "heavy lifters".
- 10 The failure to appoint appropriately qualified and fit and proper permanent candidates to these vacancies weakens the SCA and leaves it under-resourced. It is also damaging to the judiciary in general having regard to the important role of the SCA in the judicial system. The JSC's failure to fulfil its constitutional duties and to act in accordance with the Constitution

and the law is likely to deter excellent candidates from accepting nomination and making themselves available for appointment to judicial posts. The JSC's conduct thus diminishes the ability of the judicial appointment processes to attract and result in the selection of the best possible candidates to serve on the judiciary.

11 FUL seeks final relief in Part A on a semi-urgent basis. In Part A, 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*"):

11.1.1 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.

11.1.2 Its failure to consider whether the remaining candidates should be recommended for appointment to the remaining two vacancies.

11.1.3 Its decision not to recommend any of the remaining candidates for appointment to the remaining two vacancies.

12 FUL further seeks an order directing the JSC, within 20 days of this Court's order, to reconvene its meeting of 2 and 3 October 2023,

12.1 to consider whether the remaining candidates are fit for appointment to the Supreme Court of Appeal;

12.2 if more than two of them are fit for such appointment, to determine the two most suitable for such appointment; and



12.3 to recommend the candidates so identified for appointment to the Supreme Court of Appeal.

**Part B (Declaratory and directory relief)**

13 **Part B** of the application seeks declaratory and directory relief concerning the JSC's processes for interviewing, deliberating on and selecting candidates for appointment as judges. Part B is not brought on an urgent basis.

14 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:



14.1 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 the latest round of judicial interviews of October 2023 that these Guidelines are not being (or are not able to be) consistently applied during the selection process itself. Thus, for example, notwithstanding that it is required under the JSC Criteria and Guidelines that the JSC comply with the principles of *audi* and put any potential adverse contentions to candidates, certain members of the JSC did not do so, and raised serious allegations against certain candidates during the deliberative stage, when these had not been put to the relevant candidates during the interview process.



14.2 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 – such as because they were homosexual, or because of perceived personal bias, or for no reason at all – 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.

14.3 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.

15 These deficiencies seriously undermine the judicial selection process and the constitutional imperative that administrative action – in this instance of the JSC – be lawful, reasonable and procedurally fair. The decision-making processes of the JSC fall short of the requirements of our Constitution, and The Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Offices which are dealt with further below.

16 In Part B, FUL therefore seeks an order declaring the JSC's failure to develop, publish and apply assessment criteria to be utilised and applied by the Commissioners during the interview and selection process of candidates for appointment as judges unlawful.

17 FUL further seeks orders directing the JSC to:

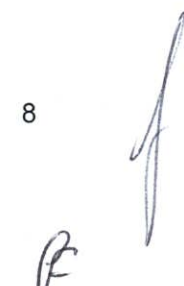
17.1 develop and publish assessment criteria for the interviewing and selection of candidates for the appointment as judges within three months; and

17.2 require each of its members to assess each candidate, in writing, for compliance with its published assessment criteria when it selects candidates for appointment as judges.

18 Whilst FUL does not seek to have this court prescribe any particular criteria or assessment method for the interviewing and selection of candidates to the JSC beyond the remit of its reviewing function, it is envisaged that such criteria would facilitate rational and consistent decision-making, and would align with the constitutional requirements in sections 165(4) and 174 of the Constitution, and broadly reflected in the JSC Criteria and Guidelines, aimed at answering the following questions:

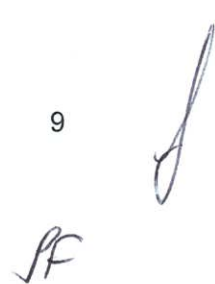
18.1 is the candidate an appropriately qualified person?

18.2 is the candidate a fit and proper person?

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- 18.3 would the candidate's appointment help to reflect the racial and gender composition of South Africa? and
- 18.4 would the candidate be independent?
- 19 What is important, however, and what distinguishes the assessment criteria from the current JSC Criteria and Guidelines is:
- 19.1 first, the requirement that an assessment of each candidate for judicial appointment is performed utilising the assessment criteria by each Commissioner during the interview and selection process, and that candidates are assessed against these criteria by the Commissioners. Pursuant to this process Commissioners are required to complete an assessment sheet reflecting their evaluation of each candidate against the assessment criteria; and
- 19.2 these assessment criteria forms then comprise part of the record of the JSC's decision, reflecting the reasons for the selection or non-selection of any judicial candidate.
- 20 In this affidavit, I address the following issues in turn:
- 20.1 First, I describe the parties to the application;
- 20.2 Second, I deal with this Court's jurisdiction in relation to this application;

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- 20.3 Third, I set out the factual background to this application, with an emphasis on the most recent round of JSC interviews which took place on 2 and 3 October 2023;
- 20.4 Fourth, I discuss the relevant legal framework;
- 20.5 Fifth, I set out FUL's preliminary grounds of review in relation to Part A, and the question of urgency;
- 20.6 Penultimately, I deal with the relief set out in Part B;
- 20.7 Finally, I conclude.

## **THE PARTIES**

- 21 The Applicant is FUL, a not-for-profit company registered in terms of section 21 of the Companies Act 61 of 1973 with its address at 25 Camelot Street, Fairhaven Country Estate, Atholl Street, Somerset West, Western Cape.
- 22 FUL's mission is, amongst others, to promote democracy under law, advance the understanding and respect for the rule of law and the principle of legality and secure and strengthen the independence of the judiciary.
- 23 Throughout its existence, FUL has monitored the judiciary and the courts as the primary promoters and protectors of the rule of law within South Africa's constitutional democracy. In November 2022, FUL released a Report which reviews the activities of the JSC between 2009-2022. That Report details appointment processes specifically during that time and

also analyses how the JSC has dealt with matters of judicial conduct.<sup>2</sup> In addition, FUL has made submissions to the JSC in relation to the publication of the JSC Criteria and Guidelines, dealt with further below.<sup>3</sup>

24 The issues in this application – in Part A concerning the failure of the JSC to perform its important constitutional function of selecting judges for recommendation for appointment to the Supreme Court of Appeal, and in Part B the process through which judicial appointments are made – are of considerable public interest and importance. One of the central issues that this Court will have to consider is the constitutional duty placed upon the JSC as an organ of State to appoint judges to the courts in the Republic, and to act diligently and properly in the performance of its constitutional obligations.

25 The public has an interest in courts being adequately resourced and being served by judges who are appropriately qualified and fit and proper for office, and in vacant positions being filled as soon as reasonably possible. These issues affect all litigants and future litigants in the SCA and indeed the courts in South Africa more broadly.

26 FUL accordingly brings this application:

26.1 in its own interest;

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<sup>2</sup> A copy of the Report is available here: [https://www.freedomunderlaw.org/wp-content/uploads/2023/01/FUL11\\_20012023-pages.pdf](https://www.freedomunderlaw.org/wp-content/uploads/2023/01/FUL11_20012023-pages.pdf)

<sup>3</sup> A copy of FUL's submissions are available here: <https://www.freedomunderlaw.org/2023/09/04/submission-judicial-service-commission-interviews-april-2023/>

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26.2 in the interest of all litigants and future litigants in the SCA and South African Courts more broadly; and

26.3 in the public interest.

27 The First Respondent is the JSC, a body established by section 178 of the Constitution, vested with the powers assigned to it in the Constitution and by national legislation. The JSC is situated at the Office of the Chief Justice, 188-14<sup>th</sup> Road, Noordwyk.

28 The JSC serves an important gatekeeping function in respect of the judiciary by interviewing candidates for vacancies on the bench and making recommendations for appointment and by dealing with complaints brought against judges. The JSC's role in creating and maintaining a competent, impartial, independent and accountable judiciary cannot be overemphasised.

29 Historically, the JSC was introduced out of the need for a more transparent and accountable appointment process for judges in the new constitutional dispensation. The JSC's establishment accorded with developments in the rest of the world at the time of a trend away from unfettered executive powers toward a more inclusive and consultative process involving an independent commission to represent various interest groups. In this context, the objects of the JSC under the new Constitution are twofold. First, it is to prevent unmeritorious candidates being appointed on political and other improper grounds; and second, to encourage the transformation

of the judiciary by the appointment of suitably qualified, fit and proper candidates.

30 As dealt with further below, on 2 and 3 October 2023, the JSC interviewed and considered for selection 10 candidates (referred to collectively as “**the candidates**”) for the four vacancies on the SCA. Two of the candidates were selected for appointment, while the remaining eight candidates were not recommended for appointment.

31 The Second to Ninth Respondents are the candidates who were not selected for appointment by the JSC (“**the remaining candidates**”). These candidates are joined to these proceedings because of the interest that they have in the relief sought in Part A. More specifically, in Part A, FUL seeks an order requiring the JSC to: consider whether any of these candidates are fit for appointment; if more than two of them are fit for such appointment, to determine the two most suitable for such appointment; and to recommend the candidates so identified for appointment to the SCA.

32 I am advised and submit that the candidates who were selected for appointment to the SCA do not have a direct and substantial interest in the subject-matter and outcome of this application which requires their joinder as respondents. This application does not impugn or seek to set aside any of the appointments of the candidates selected by the JSC (more on this below).

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## JURISDICTION

- 33 The operations of the JSC fall within this Court's jurisdiction and the impugned proceedings of the JSC were conducted within this Court's jurisdiction.
- 34 I am advised and submit that this Honourable Court has jurisdiction to hear this application under section 21(1) of the Superior Courts Act 10 of 2013.

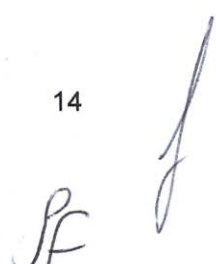
## FACTUAL BACKGROUND

### The JSC proceedings

- 35 On 18 May 2023 the JSC published notices in the media calling for nominations of interested persons to fill vacancies in the following courts – Electoral Court, the Gauteng, Limpopo, and KwaZulu-Natal Divisions of the High Court; the Labour Court, the Labour Appeal Court and (importantly for present purposes) for five vacancies in the SCA. The closing date for submission of nominations was 19 June 2023. A copy of the Announcement is annexed marked "JF1".
- 36 I understand that there were a number of candidates who were nominated for the five vacancies on the SCA. In terms of the Procedure of the Commission,<sup>4</sup> a screening committee of the Commission prepares a

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<sup>4</sup> Published under GN 404 in GG 41547 of 29 March 2018.



shortlist of candidates to be interviewed for appointment. The shortlist includes *“those who qualify for appointment and who in the opinion of the majority of the members of the screening committee, have a reasonable prospect of selection for appointment”* (paragraph 3(e)).

- 37 On 21 July 2023, the JSC published its shortlist of candidates to be interviewed and considered for appointment to the SCA. The shortlist published by the JSC is annexed hereto marked **“JF2”**.
- 38 The JSC shortlisted 11 candidates, namely: Judge Johannes Petrus Daffue, Judge Fayeeza Kathree-Setiloane, Judge Anna Maleshane Kgoele, Judge Nelisa Phiwokazi Mali, Judge Mokgere Busisiwe Shareen Masipa, Judge Gloria Nozuko Mjali, Judge Zamani Mswazi Nhlangulela, Judge Mmathebe Violet Phatshoane, Judge Namhla Thina Yvonne Siwendu, Judge John Eldrid Smith and Judge David Unterhalter.
- 39 The notice further explained that while the JSC had initially advertised five vacancies on the SCA, one vacancy had subsequently been withdrawn and interviews would be conducted to fill only four vacancies.
- 40 Over two days, on 2 and 3 October 2023, ten candidates were interviewed by the members of the JSC for appointment to the SCA. The interviews were held in public at The Capital on The Park Hotel, 101 Katherine St, Sandown, Sandton. The proceedings were also livestreamed on the

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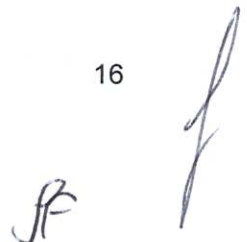


Judiciary RSA YouTube Channel.<sup>5</sup> Judge Mali did not participate in the interviews and was, accordingly, not considered for appointment to the SCA.

- 41 Following the final interview of the candidates for appointment to the SCA, the JSC deliberated in private and voted in secret on the candidates.
  
- 42 On 3 October 2023, at 11:58 pm, the JSC announced on the official page of the South African Judiciary on X (previously known as twitter) that it had resolved to recommend Judge Kathree-Setiloane and Judge Kgoele for appointment to the SCA. A copy of the announcement is annexed hereto marked "JF3".
  
- 43 The JSC did not recommend any of the other eight candidates, who were interviewed to the President for appointment to the SCA. Consequently, the two remaining vacancies were left unfilled. In essence, the JSC chose to prefer (while not making any explicit decision in this regard) a vacancy over any of the remaining candidates – some of whom are eminently suitable for appointment. The JSC did so despite having called for nominations, shortlisted and interviewed the candidates on the basis that there were four vacancies in the SCA.
  
- 44 The JSC advised the Presidency of the judges recommended for appointment to the SCA. On 7 October 2023, the President of the Republic

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<sup>5</sup> <https://www.youtube.com/@JudiciaryRSA/streams>.

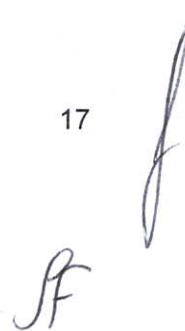
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of South Africa, acting on the advice of the JSC, appointed Judge Kathree-Setiloane and Judge Kgoele to the SCA with effect from 1 December 2023. A copy of the media statement announcing the appointments is annexed hereto marked "JF4". As indicated, FUL does not take issue with these two appointments.

45 On 2 November 2023, the JSC published a media announcement inviting nominations of candidates to fill vacancies of judges in various courts. No vacancies in the SCA were announced. A copy of the media announcement is annexed hereto marked "JF5".

46 It thus appears that, without this intervention of this Court, the two remaining vacancies on the SCA are likely to remain open for a further lengthy period despite the vacancies having already existed for a long period and the SCA being under-resourced. The JSC meets bi-annually, and it appears that the next time that a vacancy could be announced in relation to the SCA is for the interviews likely to take place in October 2024. This is some 18 months since the initial five vacancies were announced (in mid-2023), and in circumstances where only two of those vacancies have been filled. For reasons elaborated on further below, FUL submits that this inordinate delay in filling vacancies on the SCA is constitutionally unsustainable.

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## The JSC's reasons

- 47 On 5 October 2023, the Council for the Advancement of the South African Constitution (“**CASAC**”) sent a letter to the JSC requesting written reasons for:
- 47.1 The decision of the JSC not to recommend four candidates to fill the four vacancies on the SCA; and
- 47.2 The decision of the JSC to recommend the two candidates who were recommended for appointment.
- 48 CASAC further asked to be informed whether, in the opinion of the JSC, any of the remaining candidates do not meet the requirements for appointments as set out in section 174(1) and (2) of the Constitution or any or all of the criteria set out in the JSC’s Criteria and Guidelines for Judicial Appointment.
- 49 CASAC further requested a detailed breakdown of the voting procedure adopted by the JSC in this instance. A copy of CASAC’s letter is annexed hereto marked “**JF6**”.
- 50 Ms Mbali Mondlane responded to CASAC on behalf of the JSC a full month later, on 6 November 2023, purporting to provide written reasons for the JSC’s decisions. CASAC made the JSC’s response available to the public

by publishing the letter on its website.<sup>6</sup> A copy of the written reasons provided by the JSC is annexed hereto marked “JF7”.

51 The JSC explained that, as there were 23 Commissioners eligible to participate in the interviews, deliberations and voting for candidates for appointment to the SCA, each candidate had to secure at least 12 votes to be recommended for appointment. This is because section 178(6) of the Constitution provides that the JSC takes its decisions by a majority of its members.

52 The JSC further explained that it conducted two rounds of voting:

52.1 In the first round of voting, one candidate obtained 19 votes and four candidates obtained 12 votes each.



52.2 The JSC explained that “[s]ince only four candidates could be appointed, the JSC resolved to conduct a second round of voting to resolve the tie”.

52.3 In the second round of voting, one candidate obtained 20 votes and one obtained 12 votes. All the other candidates did not secure the required minimum of 12 votes.

52.4 The JSC explained that “[t]he result was that, since only two candidates obtained 12 votes or more, the JSC could only advise the President to appoint those two candidates” (paragraph 2.8.).


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<sup>6</sup> <https://casac.org.za/media-statement-08-november-2023/>.

- 53 The JSC refused to disclose the voting procedure used in this instance, alleging that *"the voting procedure is in secret"*. The JSC also did not disclose which of the remaining candidates had obtained the required minimum of 12 votes in the first round of voting.
- 54 The JSC says that it *"did not take any specific decision not to fill all four vacancies"* on the SCA (paragraph 2.4). It resolved only to recommend two candidates because only those two candidates obtained the minimum required number of votes in the second round.
- 55 The JSC does not appear to have recorded the reasons for its decision to only recommend the two successful candidates and not to recommend any of the other candidates contemporaneously. Instead, in its letter of 6 November 2023, the JSC attempts to construct the reasons for its decisions after the fact (and taking a full month to do so). It does so by, in effect, guessing the commissioners' reasons for voting in the way in which they did from what was said during the deliberations.
- 56 In purporting to explain why two vacancies remain unfilled, the JSC points out one factor that it considers *"may have influenced one or more of the commissioners not to vote for some of the candidates"* (emphasis added). This is that that the Deputy President of the SCA, Justice Petse, who participated in the proceedings in the stead of the President of the SCA, had informed the members of the JSC that the SCA had lost very experienced judges with the recent retirements at the court and that the SCA needed experienced judges to be appointed to replace them, and that

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*"[t]here was a view that some of the candidates still needed more experience in the High Court before they could be appointed to the SCA" (paragraph 3).*

57 Regarding the successful candidates who were recommended for appointment, the JSC explained that:

57.1 *"Judge Kathree-Setiloane was considered to be an outstanding candidate. She has a broad range of expertise in various areas of law, including constitutional and administrative law, labour law, competition law and general commercial law. She has acquired experience as an appellate justice at the Constitution Court, Supreme Court of Appeal, Competition Appeal Court and Labour Appeal Court. She performed well during the interview and demonstrated a clear grasp of understanding the role of the SCA. She is also committed to transformation of society and the legal system as it is apparent from her CV. Judge Kathree-Setiloane received 20 votes."*

57.2 *"Judge Kgoele was considered to qualify for recommendation based on her writing abilities, the symbolism of her appointment from a transformation perspective and her experience in general areas of the law. Some commissioners were not convinced about the answers she gave during the interviews and whether these reflected an adequate grasp of legal principles and whether she had acquired enough experience to qualify for appointment to the SCA. Judge Kgoele received 12 votes."*

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58 Regarding the remaining candidates who were not recommended for appointment:

58.1 The JSC stated that it did not form the opinion that any of the remaining candidates did not meet the requirements of section 174(1) and (2) of the Constitution (paragraph 4).

58.2 The only criteria in the JSC's Criteria and Guidelines for Judicial Appointments that was considered not to have been met by some judges was experience. In responding the CASAC's question whether the JSC formed the opinion that any of the remaining candidates did not meet these criteria, the JSC only said that "*[s]ome of the Commissioners did feel that some of the Candidates did not have the amount of experience that was required for a Judge of the SCA*" (paragraph 4).

59 The JSC further set out the views expressed during the deliberations regarding each of the remaining candidates. Importantly, these are stated to be views that were expressed during deliberations and are not put up as reasons for the JSC's failure to select any of the remaining candidates for appointment.

60 Regarding Judge Unterhalter, the JSC said:

60.1 "*The commissioners who motivated for Judge Unterhalter stated that he was an excellent judge. He had acquired appellate experience at the Constitutional Court, Competition Appeal Court and at the SCA.*"

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*His judgments are praised by his colleagues and members of the legal profession alike, for their erudition and insightfulness. Petse DP stated that the SCA needs “heavy lifters and lawyers of substance, of which Judge Unterhalter was considered as one. It was also noted that he has usually been allocated more than his fair share of judgments per term. Some of the commissioners stated that Judge Unterhalter is not a team player and appears to be arrogant and even ‘racist’. These allegations were considered by some commissioners to be without substance and baseless.”*

61 Regarding Judge Siwendu, the JSC said:

61.1 *“Some Commissioners considered Judge Siwendu to be an excellent candidate whose judgments, both at the High Court and the SCA demonstrated a clear understanding of legal principles. In her judgments she has also written cogently on questions of transformation of society and the rule of law. However, some Commissioners felt that, having been a Judge of the High Court only for six years or so, she still needed to gain more experience in the High Court before she could be appointed to the SCA, especially because the Deputy President of the SCA, Justice Petse had told the Commissioners that the SCA had lost a lot of experienced Judges which suggested that all attempts should be made to replace them with experienced High Court Judges. During her interview, Judge Siwendu was candid with Commissioners and described herself as ‘work in progress’. She was also candid with the Commissioners and*

*told them that, prior to her interview, she had heard the questions that had been put to other candidates which were also put to her."*

62 Regarding Judge Smith, the JSC said:

62.1 *"Judge Smith was considered to be experienced in general as a judge, but some commissioners were not convinced about his experience specifically as an appellate justice."*

63 Regarding Judge Daffue, the JSC said:

63.1 *"Commissioners considered that Judge Daffue had performed poorly during his interview. There were several judicial shortcomings that were highlighted in the exchange with Justice Petse during the interviews which must have led to him not receiving enough votes."*

64 Regarding Judge Masipa, the JSC said:

64.1 *"Justice Petse expressed the view that Judge Masipa required more experience. He noted that Judge Masipa had been allocated judgments to write when she was an Acting Justice at the SCA but the quality of her drafts in some of those judgment was not satisfactory and, for that reason, some had to be co-written with other colleagues before they could be considered ready for hand down."*

65 Regarding Judges Mjali and Nhlangulela, the JSC said:



65.1 *“Judges Mjali and Nhlangulela were considered to lack appellate experience. It was noted that with more acting opportunities, they could improve their abilities as potential justices of the SCA.”*

66 Regarding Judge Phatshoane, the JSC said:

66.1 *“Judge Phatshoane was viewed to be a great prospect, but there was a sense that her application for elevation to the SCA was premature.”*

67 The reasons purportedly provided by the JSC in its letter of 6 November 2023 are not the reasons for the decisions taken by the JSC, but rather *ex post facto* reasons constructed by guesswork. Nonetheless, these are the only reasons provided by the JSC for its decisions, and the JSC is bound by them.

68 These reasons must, therefore, be considered to reflect in their totality the reasons why the JSC decided to recommend only two candidates for appointment to the SCA, with the necessary effect of leaving two vacancies open. It is not open to the JSC to retrofit its reasons in answer in these proceedings.

69 Against this background, I turn now to set out the legal framework pertaining to the appointment of judges in South Africa. Before doing so, I briefly reference the attempts by FUL’s attorneys to obtain the Rule 53 record on an expedited basis.

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## The Record

- 70 On 17 November 2023, FUL's attorneys (Nortons Inc) addressed correspondence to the JSC, a copy of which is annexed marked "JF8". The letter recorded that FUL has significant concerns relating to the failure by the JSC to recommend four candidates for the four vacancies on the SCA on 3 October 2023; that it believes that the process that was followed by the JSC in this regard is deeply flawed; and that it intends launching review proceedings as soon as reasonably possible in this regard.
- 71 The letter continued by recording that given the fact that the JSC has already provided reasons for its decision to CASAC, it can be assumed that the JSC would have assembled the record in order to do so, and also that the audio recordings of the deliberations of the JSC would be available.
- 72 FUL requested that the JSC provide the record of its deliberations as a matter of urgency as this will avoid the need for supplementing the founding affidavit in due course once the record has been produced. FUL also requested, in line with the decision of the Constitutional Court in *Helen Suzman*, that the recording of the deliberations be provided on an urgent basis, and tendered to arrange transcriptions of the recordings.
- 73 FUL's attorneys followed up with the JSC and on 22 November 2023, the JSC responded noting "*Kindly be advised that the letter is being considered and deliberated upon. We will advise you of the decision taken in due time. We acknowledge the urgency of the matter and as soon as the*

*decision is finalized, we will advise you of same*". A copy of this email trail is attached as "JF9".

74 On 23 November 2023, the JSC responded in a letter saying that "*it may only provide a record pursuant to Rule 53 of the Uniform Rules of Court*" and that "*once a review application has been launched, the tenets of Rule 53 will be adhered to*". A copy of this letter is attached as "JF10".

75 Given the unhelpful approach of the JSC, despite the acknowledged urgency of the matter, FUL has had to launch these proceedings prior to obtaining the record, but will seek to obtain them urgently through Rule 53.

## LEGAL FRAMEWORK

### Constitutional framework

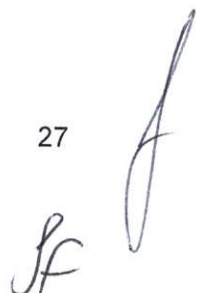
76 The JSC has the powers and functions assigned to it in the Constitution and national legislation. It is the body responsible for nominating judicial candidates for appointment to the President, and the President must appoint judges on the advice of the JSC.

77 The JSC is established in terms of section 178 of the Constitution. It is composed of the following members in terms of section 178(1):

*(a) the Chief Justice, who presides at meetings of the Commission;*

*(b) the President of the Supreme Court of Appeal;*

*(c) one Judge President designated by the Judges President;*



*(d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;*

*(e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;*

*(f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;*

*(g) one teacher of law designated by teachers of law at South African universities;*

*(h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;*

*(i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;*

*(j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and*

*(k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that Division and the Premier of the province concerned, or an alternate designated by each of them.*

- 78 All members of the JSC sit for the purpose of judicial appointments – interviewing and recommending candidates. However, the JSC sits without those commissioners who are members of the National Assembly and the National Council of Provinces in respect of all other matters (section 178(5) of the Constitution).
- 79 It is noteworthy that the JSC is one of the largest judicial selection bodies internationally, and the level of direct party-political representation is also unusual by international standards.
- 80 The extent of the JSC's role in judicial appointments varies by both court and position:

- 80.1 The Chief Justice and the Deputy Chief Justice are appointed by the President after consulting the JSC and the leaders of parties represented in the National Assembly;
- 80.2 The President and Deputy President of the SCA are appointed by the President after consulting the JSC;
- 80.3 In relation to appointments to the Constitutional Court, the JSC is required to prepare a list containing three more nominees than the number of vacancies. The President then either makes an appointment from this list – after consulting the Chief Justice and the leaders of parties represented in the National Assembly – or may reject the list and ask for it to be supplemented with further nominees; and
- 80.4 All other judges (including SCA judges) are appointed by the President on the advice of the JSC.<sup>7</sup>
- 81 The substantive criteria for selection of judicial officers are constitutionally mandated in section 174(1) and (2) as follows:

*“174 Appointment of judicial officers*

- 1. Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be*

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<sup>7</sup> Section 174 of the Constitution.



*appointed to the Constitutional Court must also be a South African citizen.*

2. *The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.”*

82 The factors in section 174(1) are necessary conditions for appointment as a judge. Only “appropriately qualified” and “fit and proper” people may be appointed as judicial officers.

83 However, these factors are not sufficient conditions for appointment. Many people may satisfy these requirements without automatically being appointed. This is because more people may meet these requirements than there are spaces available. The JSC must, accordingly, exercise its discretion in advising the President on who to appoint. In exercising such discretion, the JSC must further take into account whether the appointment would further the constitutional aim of a broadly racial- and gender-reflective bench.

### **The JSC Act and Procedure**

84 In terms of section 5 of the Judicial Service Commission Act 9 of 1994 (“**JSC Act**”), the Minister must by Notice in the Government Gazette “*make known the particulars of the procedure, including subsequent amendments which*

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*the Commission has determined in terms of section 178(6) of the Constitution”.*

85 The latest notice issued by the JSC regarding its process was in March 2018 (“**JSC Procedure**”).<sup>8</sup> The JSC Procedure set out the procedures followed by the JSC in the appointment of judges to the Constitutional Court (clause 2) and all other judges (clause 3). In relation to the appointment of “other judges”:

85.1 The Head of a Court shall inform the Commission when a vacancy occurs or will occur.

85.2 The Commission shall announce the vacancy publicly and call for nominations by a specified closing date.

85.3 A nomination contemplated in paragraph (b) shall consist of—

85.3.1 a letter of nomination which identifies the person making the nomination, the candidate and the Court for which he or she is nominated;

85.3.2 the candidate’s written acceptance of the nomination;

85.3.3 a detailed curriculum vitae of the candidate which shall disclose his or her formal qualifications for appointment as prescribed in section 174 (1) of the Constitution, together

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<sup>8</sup> GN 404 of 29 March 2018, Government Gazette No. 41547.

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with a questionnaire prepared by the Commission and completed by the candidate; and

85.3.4 such further pertinent information concerning the candidate as he or she or the person nominating him or her, wishes to provide.

85.4 After the closing date, all the members of the Commission shall be provided with a list of the candidates nominated, together with the nomination in respect of each candidate, with an invitation to—

85.4.1 inform the screening committee, prior to the meeting of the screening committee, of the names of the candidates, if any, who they feel strongly should be included in the shortlist of candidates to be interviewed, for consideration by the screening committee;

85.4.2 the signification of the preferred name(s) must be accompanied by a written motivation;

85.4.3 the screening committee shall at its meeting, prepare a shortlist of candidates to be interviewed, which shall include those who qualify for appointment and who in the opinion of the majority of the members of the screening committee, have a reasonable prospect of selection for appointment;

85.4.4 the shortlist shall then be published for comment by a specified closing date.





- 85.5 After the closing date, the shortlist together with the nomination of every shortlisted candidate, as well as all the comments received on a shortlisted candidate, shall be distributed to all members of the Commission.
- 85.6 The Commission shall interview all shortlisted candidates.
- 85.7 The interviews shall be open to the public and the media.
- 85.8 After completion of the interviews for a specific Court, the Commission shall **deliberate in private** and shall after deliberation, decide upon the candidates to be recommended for appointment by a majority vote. **The voting process shall be conducted by way of secret ballot** (clause 3(j));
- 85.9 the Commission shall announce publicly the name of the recommended candidate for each vacancy; and
- 85.10 the Commission shall advise the President of the name of the recommended candidate for each vacancy.
- 86 The JSC Procedure Notice sets out the various steps to be taken, but does not provide details about *how* and according to which criteria the JSC is to take its decision to appoint (or not to appoint) judicial officers.



## The JSC Criteria and Guidelines

- 87 The JSC has sought to explain the criteria and guidelines used by the JSC when considering candidates for judicial appointment in its Criteria and Guidelines for Judicial Appointment.<sup>9</sup>
- 88 Following a year-long revision led by the Rules Committee, in April 2023 the JSC adopted new criteria and guidelines for considering candidates for judicial appointment. The new criteria significantly expanded on the 1994 guidelines (the so-called '*Mohamed Guidelines*') and completely revised the 2010 supplementary criteria.
- 89 A copy of the JSC Criteria and Guidelines is annexed hereto marked "JF11".
- 90 The criteria that the JSC considers relevant include, among others:
- 90.1 Candidates' thorough and general knowledge of the law and a candidate's particular experience in a relevant area of legal expertise may be considered.
- 90.2 Candidates' experience, and in this regard the JSC will consider their judicial track record and whether they have acted in the court to which they are seeking appointment.

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<sup>9</sup> Adopted by the JSC at a special sitting on 4 April 2022.

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- 90.3 Candidates' skills, including technical competence and forensic and intellectual ability.
- 90.4 Candidates' capacity for communication and ability to explain their decisions clearly and succinctly.
- 90.5 Candidates' ability to run a court room and working knowledge of court procedure.
- 90.6 Candidates' capacity to give expression to the values of the Constitution and ability to discern and articulate the principles underlying the Constitution.
- 90.7 Whether candidates have a good judicial temperament, which includes, among others, fair-mindedness, impartiality, humility, patience and respect.
- 90.8 Whether candidates have the necessary energy, diligence, industry and productivity, particularly in respect of the delivery of judgments without undue delay.
- 90.9 Candidates' ability to take their own decisions independently and courage and integrity.
- 90.10 Candidates' objectivity and openness to persuasion in evaluating the arguments and evidence.
- 90.11 Candidates' sensitivity to the experiences and the needs of the litigants who appear before them, and whether a candidate has

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empathy, a sensitivity to social context and an appreciation of the needs of communities.

90.12 Candidates' commitment and contribution to transformation as well as their commitment to and participation in community-based and professional structures.

90.13 The message that a candidate's appointment will convey to the community at large, particularly when reflecting on the need for the racial and gender composition of the bench.

91 These factors are not a closed-list of relevant factors. All relevant factors must be appropriately balanced, and some factors may be accorded greater weight depending on the circumstances and the needs of the court in question. However, no one factor can override or take precedence over the other factors.

92 Our courts have held that the JSC's power to advise the President on the appointment of judges is derived from section 174(6) of the Constitution. It is a public power and subject to review under the principle of legality.

93 The principle of legality requires that the JSC act lawfully and rationally in advising the President to appoint candidates to judicial posts. This applies both to the process that the JSC follows in deciding on how to advise the President and on the advice that it ultimately gives.

94 In the light of this legal framework, we turn now to the grounds of review.

## PART A: GROUNDS OF REVIEW

95 It is already evident that the JSC's failure to fill all four of the vacancies on the SCA is unlawful. I set out FUL's grounds of review below. However, FUL reserves its right to amend its notice of motion and to supplement its grounds of review after it has received and considered the JSC's record of its proceedings under Rule 53 of the Uniform Rules of Court.

**First ground: The JSC's failure to fill the remaining two vacancies is irrational.**

96 In recommending only two candidates to the President for appointment, the JSC, in effect, failed to fill two vacancies in the SCA.

97 It did so without even considering the questions of whether to leave the two vacancies unfilled and whether any of the remaining candidates should be recommended for appointment to the remaining two vacancies. The JSC terminated its deliberations without considering these questions.

98 Indeed, the JSC says in its reasons document of 6 November that it "*did not take any specific decision not to fill all four vacancies on the SCA*".

99 Instead, the JSC only took a decision not to select any of the remaining candidates for appointment. The JSC's failure to fill the remaining two vacancies in circumstances where it did not even take a decision on leaving the remaining two vacancies unfilled is irrational.



- 100 In failing to consider whether the two remaining vacancies should be left open, the JSC derogated its constitutional duty to recommend candidates for appointment as judges (the nature of which duty is set out in more detail below) and irrationally abandoned its own appointments process.
- 101 Moreover, it was irrational for the JSC to fail to recommend candidates to fill the two remaining vacancies given the availability of competent and capable candidates, eminently suitable for appointment, in circumstances where it had itself shortlisted the candidates, and where the Deputy President of the SCA (Justice Petse) had clearly explained the pressures upon the SCA and the need to appoint competent and experienced judges to deal with that Court's workload. All that the JSC says in its reasons is that it failed to select any of the remaining candidates for appointment because none of these candidates received the required minimum number of votes in the second round of voting. Our courts have already said that this is not a sufficient reason and that, indeed, it constitutes no reason at all.
- 102 Our courts have made it clear that the JSC is constitutionally required to give reasons for its decision not to recommend candidates who are "*fit and proper*" and "*appropriately qualified*" for appointment. The JSC accepts that all of the remaining candidates are fit and proper and are appropriately qualified persons. Notwithstanding this, the only reason given for not appointing any of the remaining candidates is that they did not secure sufficient votes for appointment. The JSC says that it is "*not possible to*



*know*” reasons of commissioners for voting or not voting for certain candidates because the “*voting procedure is in secret*”.

103 Our courts have further made it clear that the fact that the JSC’s procedure, and in particular voting by secret ballot, makes it difficult for the JSC to give reasons for its decision not to select candidates is no excuse for its failure to provide reasons. The court was clear that the JSC’s procedure may need to be changed to accommodate its constitutional and legal obligation to provide reasons. Given the rationale for its establishment in the historical context of the appointment of judges in South Africa and the ‘culture of justification’ that permeates all exercises of public power, it is necessary that the JSC’s appointment process is brought in line with its constitutional and legal mandate and with every other administrative body.

104 As explained above, the JSC did not distil the reasons for the decision not to recommend candidates to fill the two remaining vacancies at the time of its deliberations and voting on 3 October 2023. Instead, the JSC attempts – long after the fact – to guess what *may* have motivated commissioners not to vote for specific candidates.

105 It says that some commissioners *may* have not voted for *some* candidates because they may have taken into account the needs of the SCA for experienced judges and that *some* candidates were not sufficiently experienced for appointment to the SCA.

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- 106 This is plainly inadequate justification. Moreover, this purported reason for the JSC's failure to select candidates for appointment is inapposite to a number of candidates, who the JSC itself appears to have considered as having the requisite experience for appointment, having initially found that five candidates were suitable for appointment.
- 107 The JSC's failure to provide adequate reasons is even more egregious in the circumstances where three of the remaining candidates secured a sufficient number of votes for appointment in the first round of voting. In these circumstances, there is a heightened duty on the JSC to provide compelling reasons for why candidates who were considered suitable for appointment were suddenly no longer considered to be suitable. The JSC's reasons do not even attempt to distil why candidates who were found to be fit and proper and to qualify for appointment in the first round of voting, were then found *not* to qualify in round two. Given that change in the voting, it was incumbent on the JSC properly to explain how such a shift could be rational.
- 108 The objective facts of this case – together with the failure of the JSC to provide reasons – leads inevitably to the conclusion that the failure to take a decision not to recommend any of the remaining candidates for appointment (and particularly those candidates who were considered suitable for appointment in the first round of voting) was irrational and unconstitutional.





**Second ground: the JSC's failure to fill the vacancies is a violation of its constitutional duties.**

109 The JSC's failure to fill the remaining two vacancies in the SCA is moreover irrational because the failure is a violation of the JSC's constitutional mandate.

110 The JSC has a duty under section 174(6) of the Constitution to recommend candidates for judicial appointment to the President. The JSC, as an organ of State, further has a duty, under s 165(4) of the Constitution, to assist and protect the courts by, amongst other things, ensuring their "independence, impartiality, dignity, accessibility and effectiveness of the courts".

111 The effectiveness and accessibility of courts requires sufficient permanent judges, who are appropriately qualified and fit and proper, appointed to handle the workload of the court. While acting judges may be appointed to assist with the workload, this is undesirable as it raises issues of continuity and even the independence of the courts. Acting positions are intended to ensure that the work of the court is not interrupted by temporary vacancies, not to compensate for lengthy vacancies.

112 Those inter-linked duties of the JSC under sections 174(6) and 165(4) are fulfilled when the JSC takes appropriate action to appoint capable, competent, experienced and suitable persons, with demonstrated judicial merit as judges. Conversely, those duties are violated when the JSC fails to appoint candidates who are capable, competent, experienced and



suitable persons, with demonstrated judicial merit, and to choose instead to leave the positions empty.

113 In failing to recommend candidates to fill the remaining two vacancies on the SCA, the JSC has failed in its constitutional duty. Its failure and inability to decide whether to prefer to keep open two vacancies rather than appoint eminently suitable candidates is manifestly irrational, a violation of the rule of law, a violation of section 165(4) of the Constitution, and an abdication of its responsibility under section 174(6) of the Constitution.

### **Third ground: Irrational voting procedure**

114 The JSC refused to disclose the voting procedure used in this instance on the premise that its “voting procedure is secret”. This premise is incorrect. While the Procedure of the Commission provides that voting is in secret, this does not (and cannot) mean that the voting *procedure* used may be shrouded in secrecy. I invite the JSC to explain the voting procedure adopted in this instance in answer to this application.

115 Nonetheless, it is plain from what the JSC has revealed of its voting procedure that the process that led to two vacancies being left open was irrational.

116 In the first round of voting, five candidates secured the required minimum number of votes for appointment. More candidates were considered suitable for appointment than there were vacancies. But the Commission

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could not simply appoint the four candidates with the highest number of votes because there was a tie between four of the candidates, who all received 12 votes.

117 Therefore, a tie-breaker was considered necessary. The JSC says that a second round of voting was conducted "*to resolve the tie*". In the second round, only two candidates secured the required minimum number of votes needed for appointment. The JSC says that it is for this reason that only those two candidates were recommended for appointment.

118 The process that the JSC adopted resulted not in a tie-breaker by which the JSC could select four candidates for appointment from the five candidates who had secured sufficient votes in the first round of voting, but in three of the candidates who had been considered suitable for appointment in the first round suddenly (and without any explanation) being disqualified in the second round. This was an irrational procedure. Once candidates have secured the required minimum number of votes to be considered suitable for appointment, it is extremely difficult to understand how they can suddenly be disqualified.

119 This process, which the JSC followed in failing to recommend candidates for appointment to two vacancies on the SCA, is plainly irrational. It is irrational for a candidate to be considered suitable in the first round and then immediately thereafter effectively disqualified in the second round.

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120 A rational process would have resolved the tie by seeking to rank the candidates who had secured sufficient votes in the first round. This could be achieved, for example, by an ordinal vote<sup>10</sup> only on the four candidates who tied in the first round with 12 votes each.

121 The JSC provides no explanation for why it adopted the process that it did. Having elected to have a second round of voting in which it once again voted on all candidates, the JSC does not explain why it did not conduct further rounds of voting until four candidates were selected for appointment, or until the JSC had taken a deliberate decision *not* to fill the vacancies in question because there were no suitable candidates. What was irrational, however, was to do neither of these things and to fail to comply with its constitutional obligations to appoint judicial officers.

122 The JSC's failure to recommend candidates to fill all the vacancies on the SCA is the result of an irrational process.

#### **Fourth ground: lack of audi**

123 The summary of the deliberations of the JSC provided in the letter of 6 November 2023 reveal that disqualifying allegations against Judge Unterhalter, including what appears to be an unsubstantiated but serious allegation of racism, to have been raised during the deliberations without (i) there being a sufficient or indeed any substantiation for the allegation and

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<sup>10</sup> An ordinal ballot is one where the voter is required to indicate preferences among the various candidates or parties by numbering their respective names, in declining order (1,2,3...).



(ii) without the allegation having ever been put to the candidate in the interview.

124 This is in violation of the JSC's own Criteria and Guidelines on Judicial Appointments, which provide that:

124.1 "*unless a sufficient substantiation for the allegation exists, the matter should not be raised with the candidate during the interview;*" and

124.2 "*prior to any questions being put to the candidate, the candidate must be given an adequate opportunity to consider and address the allegation*".

125 It goes without saying that disqualifying allegations not raised with the candidate during the interviews may not be raised during the deliberations, and may certainly not be used as a basis for voting by a member, or to influence other members as to their voting. The principle of *audi alteram partem* requires that the candidate have an adequate opportunity to address the allegation. If that is so to respect a candidate's dignity and process rights during the interview, then all the more so during the deliberations. The principle of *audi* also aims to ensure that the JSC itself can deal properly with disqualifying allegations, in order to reach the best decision. In this case, the disqualifying allegation was never put to Judge Unterhalter and his response not obtained. Accordingly, the JSC allowed itself (through one, or more of its members) to arrive at a decision by reference to an irrelevant and process-poisoning consideration.



126 In ***Helen Suzman Foundation***,<sup>11</sup> the Constitutional Court warned against unfair or improper allegations being raised during deliberations. It said:

*“One assumes that, in asserting their points during deliberations, JSC members will not – as they shouldn’t – make unfair or improper assertions that impugn the dignity or privacy of candidates. By unfair or improper assertions I mean assertions that have no basis on the material canvassed, questions asked or answers given during the interview. I have already concluded that the JSC cannot appropriately expect unfair or improper assertions made during deliberations to be shielded from disclosure.”*

127 The allegations against Justice Unterhalter impugn his dignity. In particular, the unsubstantiated allegation of racism is an egregious one, which ought not to have been raised without Justice Unterhalter having been provided an opportunity to respond thereto – and particularly not in the generalised and generic and unsubstantiated way that it appears to have been raised. Allegations of racism are serious allegations to make and unsubstantiated allegations of racism are damaging and defamatory. It is entirely improper for a member of the JSC to make such statements.

128 Since the JSC reasons record that these unfair and improper allegations played a role in the JSC’s sudden about-turn in the second round of voting in which Justice Unterhalter presumably went from securing sufficient votes

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<sup>11</sup> *Helen Suzman Foundation supra*.

to being disqualified, the JSC's failure to appoint candidates to the remaining vacancies on the SCA is unconstitutional, unlawful and irrational for this further reason.

#### **RELIEF SOUGHT: PART A**

129 As indicated above, in Part A, FUL challenges the decisions under review taken by the JSC on 2 and 3 October, which are: (i) its failure to consider whether to fill the two remaining vacancies; (ii) its failure to consider whether the remaining candidates should be recommended for appointment; and (iii) its decision not to recommend any of the remaining candidates for appointment.

130 FUL has not impugned the interview proceedings of the JSC on 2 to 3 October 2023 and does not seek an order setting aside the interviews. There is, accordingly, no need for the process to start afresh or for the candidates to undergo another round of interviews. It is for this reason that FUL seeks an order requiring the JSC to appoint candidates, if a sufficient number are considered fit for appointment, to fill the two remaining vacancies on the SCA from among the remaining candidates, who still persist in their applications. All that is required is for the JSC to reconvene its meeting of 2 and 3 October 2023 to: consider whether any of the remaining candidates are fit for appointment to the Supreme Court of Appeal; if more than two of them are fit for such appointment, to determine the two most suitable for such appointment; and recommend the candidates so identified for appointment to the Supreme Court of Appeal.



131 It is proposed that the JSC is directed to take a new decision within 20 days of the date of this Order. This ought to be sufficient time for a meeting to be reconvened to deal with the remaining candidates. During Covid-19 the JSC was able to meet online, and given that there is no need to re-interview candidates, there should be no reason that the JSC is unable to comply with the Order in question within 20 days.

132 FUL has not impugned the appointment of Judge Kathree-Setiloane and Judge Kgoele and does not seek to have their appointments set aside. Moreover, since FUL has not impugned the JSC's proceedings or sought to have them set aside, this application and the relief sought herein does not even notionally impugn the appointments of Judge Kathree-Setiloane and Judge Kgoele.

#### **URGENCY IN RELATION TO PART A**

133 FUL seeks to have Part A determined on an urgent basis. FUL will not obtain substantial redress in the ordinary course for the following reasons:

133.1 First, this matter concerns the failure of the JSC to perform its constitutional duties. It is critical that conduct that is inconsistent with the Constitution be declared invalid as soon as possible. There is an on-going violation of the rule of law without the final resolution of Part A. The longer it takes to resolve this matter, the greater the erosion of the rule of law. It is in the interests of justice that the

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constitutionality and lawfulness of the JSC's failure be tested as soon as possible.

133.2 Second, it is critical for the administration of justice generally and the SCA in particular that this matter is resolved urgently. The SCA is under-resourced. This is clear from the President of the SCA's own comments during the deliberations of October 2023 that the SCA had lost very experienced judges with the recent retirements at the court and that the SCA needed experienced judges to be appointed to replace them. A sufficient number of permanent judges of sufficient quality and experience on the SCA is essential for the court to function effectively.

133.3 Third, unless this matter is resolved urgently, the remaining candidates who were interviewed and considered for appointment on 2 to 3 October 2023 may become unavailable for appointment. It is accordingly in the public interest that this matter is determined urgently so that the appointment of eminently qualified judges is not prevented by the JSC's failure to have fulfilled its constitutional duties.

134 The usual time periods provided in the Uniform Rules of Court for the JSC to take certain steps in the proceedings have necessarily had to be truncated given the urgency of the matter. However, I submit that the truncation is reasonable and that the JSC is not prejudiced by the urgent hearing and the truncated timetable in the notice of motion.

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134.1 The time that the JSC would ordinarily have under Rule 53 of the Uniform Rules of Court for the despatching of the record of proceedings has been reduced. This will in no way prejudice the JSC, which should already have the documents that make up the record of its proceedings at hand.

134.2 The JSC will have been aware of the possibility of review proceedings being launched from as far back as 5 October 2023 (nearly two months ago) when CASAC called for reasons. Moreover, the JSC will have been aware, in light of the Constitutional Court's judgement in *Helen Suzman Foundation*,<sup>12</sup> that, in the event of a review being launched, it is required to produce the full record of its proceedings, including the audio recording and any transcript of its deliberations on 3 October 2023. The JSC will accordingly have kept a record of its proceedings, including the recording and transcription of its deliberations.

134.3 Moreover, the JSC took a full month to provide its reasons for its decisions to CASAC. It has thus had ample time to prepare the record of its proceedings, and presumably had to record at hand in order to prepare its reasons.

134.4 Moreover, as noted above, the JSC was advised as early as 10 November 2023, as a courtesy, that FUL had resolved to take its

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<sup>12</sup> *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC).

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decision on review. In these circumstances, the JSC should plainly be able to dispatch the record of its proceedings expeditiously. In its 22 November 2023 letter to FUL's attorneys, it said that "*We acknowledge the urgency of the matter*".

134.5 The time that would ordinarily be afforded to the JSC under the Uniform Rules of Court to file its opposing papers is reduced to ten days from the date of receipt of FUL's supplementary founding affidavit. I submit that this provides the JSC with an adequate amount of time within which to answer Part A of this application, in which narrow relief is sought.

## **PART B**

135 Whereas Part A is aimed specifically at the JSC's failure to appoint candidates to fill the SCA vacancies during the October 2023 interview process, the relief in Part B is broader, and is aimed at ensuring the constitutionality of the judicial appointment process as a whole. It is pursued in the ordinary course, but FUL will seek a special allocation of the matter in light of the important issues at stake and the need to ensure a judgment before the JSC next sits to consider appointment of judges, scheduled for April 2024.

136 In Part B, FUL seeks an order that declares the JSC's current selection process unlawful and invalid insofar as the JSC has failed to develop, publish and apply assessment criteria against which it requires its

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Commissioners to formally assess candidates for appointment as judges, and that directs the JSC to develop such criteria within three months.

137 FUL further seeks a direction that, when the JSC selects candidates for appointment as judges, each member of the JSC is required to assess each candidate, in writing, for compliance with its published assessment criteria. The assessment criteria will evaluate each candidate's fitness for the bench, and commitment to transformation.

138 The JSC has already come a long way in developing criteria for appointment, however it is clear from the October 2023 interviews, that the Guidelines that it has adopted do not go far enough and are not necessarily or properly followed. Thus, for example, it is clear that notwithstanding the requirement in the JSC Criteria and Guidelines that *"unless a sufficient substantiation for the allegation exists, the matter should not be raised with the candidate during the interview;"* and *"prior to any questions being put to the candidate, the candidate must be given an adequate opportunity to consider and address the allegation"*, unsubstantiated allegations of racism and arrogance were made against Justice Unterhalter during the deliberation process, and apparently influenced the vote. These allegations were not put to Justice Unterhalter either before *or* during the interview – they arose entirely improperly during the deliberation phase.

139 This is by no means the first time that there has been an ambush of this nature:



139.1 In the April 2022 interviews, Judge Unterhalter was ambushed with a question regarding his participation during an acting stint at the Constitutional Court in the dismissal of an application for leave to appeal which he had earlier dismissed in the SCA. Chief Justice Zondo informed the Commission that Judge Unterhalter had not been told that this issue would be raised because the JSC had been informed of it too late. This did not, however, bring an end to the line of questioning and Judge Unterhalter was ultimately put on the spot and given a laptop and 30 minutes to prepare a response. He later acknowledged that he should have recused himself from consideration of the petition to the Constitutional Court. Judge Unterhalter was ultimately left off the shortlist given to the President, notwithstanding his obvious fitness for the office in which he was serving at the time in an acting capacity.

139.2 Similarly, in the February 2022 interviews, Judge President Mlambo did not appear to have been forewarned that he was to be questioned about allegations of sexual harassment during the Chief Justice interviews.

140 A further deficiency in the current process is evident from the inability of the JSC to put together reasons for its decision. The reasons produced by the JSC in relation to the October 2023 interviews are, in the JSC's own words, not necessarily true reasons because the votes of individual members (and the reasons therefor) are secret. The best "reasons" that the JSC could come up with was to set out the views expressed during the deliberations



regarding each of the candidates. While those are the reasons in law that the JSC has produced, and by which it is bound, they are demonstrably bad reasons and their collation is not an acceptable substitute for true and proper reason-giving.

141 In essence, it appears that the JSC's decisions are simply taken through a non-transparent secret voting process. This means that there is no ability for the JSC to express the reasons for a particular decision or to determine whether a decision was informed by irrelevant considerations, impermissible or irrational considerations.

142 This is inadequate as a matter of administrative justice as it does not allow interested parties to know the true reasons for any particular vote, or to know whether those reasons are constitutionally justifiable.

143 There is also, under the JSC's existing processes, no way to know whether the members of the JSC are exercising a legitimate vote – by which I mean a vote for legitimate reasons. This is because the voting is done in secret, and none of the members of the JSC is required to justify his or her vote. There is no safeguard to ensure that personal bias or *mala fides* – or other insidious but hidden motivations – do not come into play in relation to the vote. There is an undeniable need for more transparency and justification in the JSC's decision-making process especially given the different interests groups that the JSC represents.



144 FUL submits that necessary structural and procedural safeguards should be in place to ensure, as far as is practically possible, that the process is not subverted for improper reasons.

145 It is against this backdrop that I turn now to deal with the Lilongwe Principles.

**The Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Offices (“Lilongwe Principles”)**

146 At its 2015 Annual Conference, the Southern African Chief Justices’ Forum (SACJF), made a firm commitment towards improving both the institutional independence of judiciaries and the decisional independence of judges. The forum noted that one of the key processes which enhances judicial independence is the selection and appointment of judicial officers. To that end it resolved to establish an ad hoc team of Judicial Service Commissions from the region to work towards developing regional principles and guidelines on selection and appointment of judges in Africa to be presented to the SACJF for discussion and adoption at its 2017 Annual Conference.

147 The *ad hoc* working group contemplated by the 2015 resolution drafted the principles and guidelines, drawing on research by the Democratic Governance and Rights Unit (DGRU) of the University of Cape Town, and also taking into account international and regional declarations and instruments relating to judicial appointments.



148 The Lilongwe Principles were adopted at the Southern African Chief Justices' Forum Conference and Annual General Meeting held in Lilongwe on 30 October 2018. A copy of the Lilongwe Principles is annexed marked "JF12". They aim to assist jurisdictions in the development of legislation, policy and practice on the selection and appointment of judicial officers. The overriding purpose of the Lilongwe Principles is to safeguard the independence and integrity of the judiciary.

149 The Lilongwe Principles set out the following underlying principles for the selection and appointment of judicial officers:

*i) **The principle of transparency should permeate every stage of the selection and appointment process.***

*ii) The selection and appointment authority should be **independent and impartial.***

*iii) The process for the selection and appointment of judicial officers shall be fair.*

*iv) Judicial appointees should exceed minimum standards of competency, diligence and ethics.*

*v) Appointments of candidates should be made according to merit.*

*vi) The appointment process should ensure stakeholder engagement at all relevant stages of the process.*

*vii) **Objective criteria** for the selection of judicial officers should be **pre-set by the selection and appointment authority, publicly advertised, and should not be altered during that process.***

*viii) The judicial bench should reflect the diversity of society in all respects, and selection and appointment authorities may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench.*

*ix) Candidates shall be sourced according to a **consistent and transparent** process.*

*x) The shortlisting of candidates shall be credible, fair and transparent.*



*x) Candidates shortlisted for interview shall be vetted and stakeholders invited to comment on the candidate's suitability for appointment prior to interview.*

*xii) Interviews should be held for the selection of candidates for appointment to judicial office.*

***xiii) The final selection (decision) to recommend for appointment shall be fair, objective and based on weighing the suitability of the candidate for appointment against the criteria set for that appointment.***

*xiv) Formal appointment shall be made constitutionally and lawfully.*

*xv) Provision shall be made for judicial officers to assume office timeously once appointed.*

150 The Lilongwe Principles place a particular and arguably overarching emphasis on transparency, requiring that transparency must permeate *"every stage of the selection and appointment process"* and that *"appropriate records of each stage of the process shall be kept by the selection and appointment authority and available to interested parties"*.

151 In relation to the establishment of objective criteria for the appointment of judges, the Lilongwe Principles emphasise that *"objective criteria for the selection of judicial officers should be pre-set by the selection and appointment authority, publicly advertised, and should not be altered during that selection process."* It is further recorded (under clause 3.2) that *"established criteria act as a guide to candidates and provide objective standards to bind the actions of the selection and appointment authority."*

152 As regards the interview and selection process (clause 3.6), the Lilongwe Principles state the following:



152.1 Interview processes should be equal, fair, rigorous, respectful and permit candidates the opportunity to choose to respond to adverse comments made against the candidate;

152.2 Questions which may be put to candidates should be agreed in advance by the members of the selection and appointment authority, taking into account the need for flexibility in assessing persons from different backgrounds. Substantively similar questions shall be put to each candidate. Questions should be relevant to measuring the competencies and attributes of the candidate against the criteria for the appointment.

153 In relation to the decision-making process (clause 3.7), the following is pertinent:

153.1 Principle xiii of the Lilongwe Principles requires that "*the final selection (decision) to recommend for appointment shall be fair, objective, and based on weighing the suitability of the candidate for appointment **against the criteria set for that appointment.***"

153.2 The Lilongwe Principles explain further: "***Emerging best practice is for the development of a ranking and scoring process for assessing candidates.*** *The selection and appointment authority is encouraged to meet before the interview process to decide mathematical weightings of the various criteria according to the needs of the position for appointment, and the needs of the judiciary*

*as a whole. This creates substantive reasons for their recommendations.”*

154 In a number of respects, the process adopted by the JSC falls short of the Lilongwe Principles, particularly in relation to the adoption of standard appointment criteria against which candidates are to be weighed, including (as best practice), a ranking and assessment process for assessing candidates.

155 As the Lilongwe Principles explain, the mathematical weighting of various criteria for appointment creates “*substantive reasons*” for recommendations. In the absence of such criteria, it is (as in the case of the JSC) almost impossible to be sure that the criteria are being applied as they are required by the JSC’s members in their deliberative process.

## **PART B RELIEF**

156 The South African experience in the JSC demonstrates the need for the introduction of pre-determined criteria for the assessment of candidates, and the clear and consistent application of those criteria by individual members of the JSC in relation to individual candidates.

157 The process that FUL envisages is the following:

157.1 Building from the requirements of the Constitution, the Lilongwe Principles and the 2023 JSC Guidelines, the JSC must develop assessment criteria which will set out the criteria to be taken into

account in assessing fitness for judicial office. These criteria will include the “*fit and proper*” criteria, the requirement of independence, and the transformative criteria stipulated in the Constitution;

157.2 In respect of each candidate, each member of the JSC will be required to assess each candidate, in writing, for compliance with the published assessment criteria as well as to write down any further reasons that he or she may choose to give either in support of or against any particular candidate; and

157.3 The JSC member will hand in their written assessment and reasons in respect of each candidate when he or she casts his or her vote (which may be cast secretly).

158 What this means is that members of the JSC, and the JSC itself, are required to account in relation to their decisions both to appoint and not to appoint judicial candidates. Should a decision of the JSC be challenged:

158.1 The JSC will be obliged to disclose the written assessment and reasons of each member in respect of each candidate as part of the record of decision; and

158.2 The JSC will be in a position to provide meaningful and true, contemporaneous reasons for its decision, by collating the reasons for and against appointment.

159 It is FUL’s hope that the JSC will welcome and embrace the relief in Part B, because these assessment criteria will provide a necessary safeguard to



the constitutional integrity of the JSC's process. It also accords with the commitment in the Lilongwe Principles, and international best practice in relation to the appointment of judicial offices.

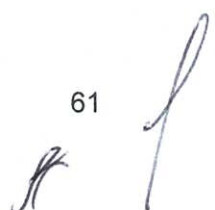
## CONCLUSION

160 The issues raised in this application are of compelling public importance – these issues concern the constitutional duties of the JSC, the rule of law and the administration of justice.

161 The appointments of a sufficient number of permanent judges, who are appropriately qualified and fit and proper, to the second highest court in the country is in the public interests. The failure of the JSC to fulfil its constitutional duty to advise the President on the appointment of judges to the vacancies on the SCA requires that its conduct be declared invalid and that appropriate just and equitable relief be granted.

162 Moreover, the broader challenges faced by the JSC and dealt with in Part B go to the heart of the judicial appointment process.

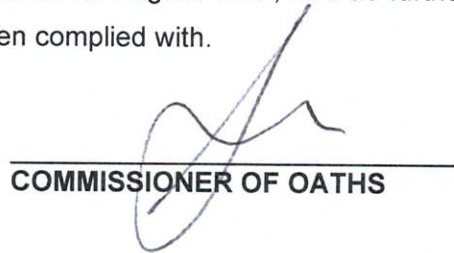
163 In all the circumstances, FUL asks for an order in terms of Part A and Part B of its notice of motion.

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JUDITH FEBRUARY

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at CAIS Town on this the 29<sup>th</sup> day of **NOVEMBER 2023**, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.



COMMISSIONER OF OATHS

**Barry John William Jessop.**  
Practising Attorney, RSA  
Commissioner of Oaths  
28 Draper Square, Draper Street,  
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**JUDICIAL SERVICE COMMISSION**  
**MEDIA ANNOUNCEMENT**  
**JUDICIAL VACANCIES**

The Judicial Service Commission invites nominations of candidates to fill vacancies of Judges in the following Courts:

**1. Supreme Court of Appeal**

Five vacancies

**2. Electoral Court**

One vacancy of a Judge-Member. Candidates nominated for this position should be Judges of the High Court.

**3. Labour Court and Labour Appeal Court**

Deputy Judge President of the Labour Court and Labour Appeal Court

Four vacancies (Judges of the Labour Appeal Court)

One vacancy (Judge of the Labour Court Durban)

One vacancy (Judge of the Labour Court Gqeberha)

One vacancy (Judge of the Labour Court Johannesburg)

**4. Gauteng Division of the High Court**

Four vacancies

**5. KwaZulu-Natal Division of the High Court**

Two vacancies (Durban)

**6. Limpopo Division of the High Court**

One vacancy (Thohoyandou)



Nominations must be accompanied by the candidate's signed written consent, detailed *curriculum vitae* disclosing the candidate's formal qualifications for appointment, the standard questionnaire completed and signed by the candidate, as well as copies of at least **three written judgments** by the candidate. The updated 2023 standard questionnaire to be completed by all nominees is available on the South African Judiciary website: [www.judiciary.org.za](http://www.judiciary.org.za) alternatively on the Constitutional Court website: [www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za). In order to comply with the Protection of Personal Information Act, 2013 (POPI Act), candidates need not provide their personal information both in their questionnaire and *curriculum vitae* i.e. (identity number, cell phone number and residential address). Candidates are, however, requested to fill in their personal information on a separate form marked annexure "A" attached to the questionnaire for office use only. The questionnaire must be accompanied by the standard latest "clearance certificate" which the candidate is required to obtain from his/her professional body regarding the candidate's professional status within that body, his or her suitability for appointment to the Bench and the nature of any disciplinary proceedings completed or pending in respect of the relevant candidate.

Nominations must be arranged in the following order:

1. Signed nomination letter;
2. Signed consent letter;
3. Signed updated 2023 questionnaire;
4. *Curriculum vitae*;
5. Good standing certificate and
6. At least three written judgments

Candidates nominated for more than one Superior Court must submit a separate nomination letter in respect of each court.

The Secretariat wishes to emphasize the following points:

1. Interviews with short-listed candidates will be conducted in public i.e. members of the public and the media are welcome to attend.

A decorative flourish consisting of several curved, overlapping lines, resembling a stylized wave or a flourish, positioned above a handwritten signature that appears to be 'JF'.



2. It is incumbent upon persons or bodies nominating candidates to motivate their nominations by referring the JSC to the candidate's qualifications and general fitness for appointment. In order to comply with the POPI Act, persons or bodies need not provide their personal information on the nomination letters i.e. (identity number, cell phone number and residential address).
  
3. Nominations must be addressed to and reach the Secretariat of the JSC by no later than **Monday, 19 June 2023**.

Interviews will take place during the week of **2 – 6 October 2023** in Gauteng. Candidates who wish to email their applications are encouraged to do so and need not hand deliver hard copies. Candidates are encouraged to make a follow-up with the Secretariat of the JSC should they not receive confirmation of receipt. Candidates who wish to hand deliver their applications should do so either at the **Office of the Chief Justice based at 188, 14<sup>th</sup> Road, Noordwyk, Midrand or alternatively at the Constitutional Court**.

Applications must be addressed to:

**The Secretariat of the JSC**

**Office of the Chief Justice**

**Private Bag X10 Marshalltown**

**Johannesburg, 2017**

**Tel: (010) 493 2687 alternatively (010) 493 2652**

**Email: [KMoretlwe@judiciary.org.za](mailto:KMoretlwe@judiciary.org.za) and [TPhaahlamohlaka@judiciary.org.za](mailto:TPhaahlamohlaka@judiciary.org.za)**

**Cc: [JSC@judiciary.org.za](mailto:JSC@judiciary.org.za)**

**Registrar's Office**

**Constitutional Court**

**1 Hospital Street**

A decorative flourish consisting of several curved lines, followed by a handwritten signature that appears to be 'JF'.

**Braamfontein  
2017**

***(Electronically transmitted)***

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**Kutlwano Moretlwe  
Secretariat: Judicial Service Commission**

A stylized graphic consisting of several thick, curved, parallel lines that resemble a wave or a signature flourish. Below this graphic, there is a handwritten signature in black ink, which appears to be 'SE' followed by a vertical line.



**JUDICIAL SERVICE COMMISSION**  
**SHORTLISTED CANDIDATES FOR JUDICIAL APPOINTMENT**

On 18 May 2023 the Judicial Service Commission (JSC) published notices in the media calling for nominations of interested persons to fill vacancies in the following courts - Electoral Court, Gauteng, Limpopo, KwaZulu-Natal Division of the High Court; Labour Court, Labour Appeal Court and Supreme Court of Appeal, the closing date for submission of nominations was 19 June 2023. The following candidates have been shortlisted to be interviewed in October 2023.

- 1. Electoral Court (One vacancy: Judge-Member)**  
Judge Leicester Rock Adams
  
- 2. Labour Court and Labour Appeal Court (Deputy Judge President)**  
Judge Edwin Mogomotsi Molahlehi
  
- 3. Labour Appeal Court (Four vacancies)**  
Judge Mzikazi Zolashe Nozibele Lallie  
Judge Madeline Portia NOMPI Nkutha-Nkontwana  
Judge Kathrine Mary Savage  
Judge Andre Van Niekerk
  
- 4. Labour Court (Three vacancies: Durban, Gqeberha and Johannesburg)**  
Adv Kelsey Allen-Yaman (Durban)  
Mr Reynaud Neil Daniels (Johannesburg)  
Mr Molatelo Robert Makhura (Johannesburg and Gqeberha)

Ms Gugulethu Purrifine Mthlane (Durban and Johannesburg)  
Adv Mzungulu Roy Mthombeni

**5. KwaZulu-Natal Division of the High Court, Durban (Two vacancies)**

Ms Narini Nirmala Hiralall  
Prof Mbuzeni Johnson Mathenjwa  
Adv Cheryl Stephanie Antonia Smart  
Mr Eric Boygani Zaca

**6. Limpopo Division of the High Court, Thohoyandou (One vacancy)**

Adv Lesibana Gemine Philemon Ledwaba

**7. Gauteng Division of the High Court (Four vacancies)**

Adv Soraya Khatija Hassim SC  
Adv Shaida Aboo Baker Mahomed  
Adv Richard Bonakele Mkhabela SC  
Adv Omphemetse Mooki SC  
Judge Graham Nasious Moshwana  
Adv Jacobus Johannes Strijdom SC  
Adv Brad Christopher Wanless SC

**8. Supreme Court of Appeal (Four vacancies)**

Judge Johannes Petrus Daffue  
Judge Fayeeza Kathree-Setiloane  
Judge Anna Maleshane Kgoele  
Judge Nelisa Phiwokazi Mali  
Judge Mokgere Busisiwe Shareen Masipa  
Judge Gloria Nozuko Mjali  
Judge Zamani Mswazi Nhlangulela  
Judge Mmathebe Violet Phatshoane  
Judge Namhla Thina Yvonne Siwendu  
Judge John Eldrid Smith  
Judge David Unterhalter



SF

While the JSC advertised five vacancies at the Supreme Court of Appeal (SCA), one vacancy has been withdrawn and interviews will be conducted to fill only four vacancies at this stage.

The shortlisted candidates will be interviewed during the week of 2 to 6 October 2023 and will be notified of the venue, date and time of the interviews in due course.

Law bodies and any persons who wish to comment on the suitability or otherwise of a shortlisted candidate should address their comments to the Secretariat of the Judicial Service Commission at [MMondlane@judiciary.org.za](mailto:MMondlane@judiciary.org.za) and [TPhaahlamohlaka@judiciary.org.za](mailto:TPhaahlamohlaka@judiciary.org.za). Copied to: [JSC@judiciary.org.za](mailto:JSC@judiciary.org.za). Comments in respect of each candidate must be submitted on a separate page in both pdf and word format, and must reach the Secretariat by no later than **1 September 2023**. **No comments received after 1 September 2023 will be considered.**

Issued by the Judicial Service Commission

**Enq: Adv MS Baloyi SC 083 631 5741 or Mr M Notyesi 072 334 9357**

A decorative flourish consisting of several curved, overlapping lines, resembling a stylized wave or a flourish, positioned above a handwritten signature. The signature is written in dark ink and appears to be the initials 'AF'.



# Post



**RSAJudiciary**  
@OCJ\_RSA

Annexure JF3 ...

Following the Judicial Service Commission interviews for the Supreme Court of Appeal, the Commission has resolved to recommend the following candidates for appointment:

Judge F Kathree-Setiloane  
Judge A M Kgoele

#JSCinterviews #ocj\_rsa #SCA



11:58 pm · 3 Oct 2023 · **152.5K** Views

## President Ramaphosa appoints Judges to High Court Divisions

Tuesday, November 7, 2023



President Cyril Ramaphosa has appointed Judges to the Supreme Court of Appeal, the Gauteng Division of the High Court and the KwaZulu-Natal Division of the High Court.

The President appointed the following Judges in terms of Section 174(6) of the Constitution of the Republic of South Africa, 1996, and on the advice of the Judicial Service Commission:

- (i) Madam Justice Fayeeza Kathree-Setiloane as a Judge of the Supreme Court of Appeal, with effect from 01 December 2023, in an existing vacancy;
- (ii) Madam Justice Anna Maleshane Kgoele as a Judge of the Supreme Court of Appeal, with effect from 01 December 2023, in an existing vacancy;
- (iii) Adv Soraya Khatija Hassim SC as a Judge of the Gauteng Division of the High Court, with effect from 01 January 2024, in an existing vacancy;
- (iv) Adv Omphemetse Mooki SC as a Judge of the Gauteng Division of the High Court, with effect from 01 January 2024, in an existing vacancy;
- (v) Adv Jacobus Johannes Strijdom SC as a Judge of the Gauteng Division of the High Court, with effect from 01 January 2024, in an existing vacancy;
- (vi) Adv Brad Christopher Wanless SC as a Judge of the Gauteng Division of the High Court, with effect from 01 January 2024, in an existing vacancy; and
- (vii) Prof Mbuzeni Johnson Mathenjwa as a Judge of the KwaZulu-Natal Division of the High Court, with effect from 01 November 2023 in an existing vacancy.

Furthermore, President Ramaphosa has appointed Justice Mogomotsi Edwin Molahlehi as Deputy Judge President of the Labour and Labour Appeal Courts with effect from 1 November 2023 in an existing vacancy.

The appointment of Justice Molahlehi was done in terms of Section 153 (1)(b) of the Labour Relations Act, 1995 (Act 66 of 1995), acting on the advice of NEDLAC

and the Judicial Service Commission and after consultation with the Minister of Justice and the Judge President of the Labour Court.

In terms of Section 169(1) of the Labour Relations Act, 1995 (Act 66 of 1995), acting on the advice of NEDLAC and the Judicial Service Commission and after consultation with the Minister of Justice and the Judge President of the Labour Appeal Court, President Ramaphosa has appointed:

- (i) Madam Justice Madeline Portia Nompoti Nkutha-Nkontwana as a Judge of the Labour Appeal Court with effect from 01 January 2024, in an existing vacancy;
- (ii) Madam Justice Katherine Mary Savage as a Judge of the Labour Appeal Court with effect from 01 January 2024, in an existing vacancy; and
- (iii) Mr Justice André Johann Van Niekerk with effect from 01 January 2024, in an existing vacancy.

Additionally, President Ramaphosa has, in terms of Section 153(4) of the Labour Relations Act, 1995 (Act 66 of 1995), acting on the advice of NEDLAC and the Judicial Service Commission and after consultation with the Minister of Justice and the Judge President of the Labour Court, appointed the following judges:

- (i) Adv Kelsey Allen-Yaman as a Judge of the Labour Court with effect from 1 December 2023, in an existing vacancy;
- (ii) Mr Reynaud Neil Daniels as a Judge of the Labour Court with effect from 01 January 2024, in an existing vacancy; and
- (iii) Mr Molatelo Robert Makhura as a Judge of the Labour Court with effect from 1 January 2024, in an existing vacancy.

“These appointments will ensure continuity in the administration of justice at all levels and centres of the judiciary.

“President Ramaphosa wishes the newly appointed justices well as they take up their new roles in upholding the rule of law in the country,” the Presidency said in a statement. - [SANews.gov.za](https://www.sanews.gov.za)

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E-mail: info@judiciary.org.za  
www.judiciary.org.za

## JUDICIAL SERVICE COMMISSION

### MEDIA ANNOUNCEMENT

### JUDICIAL VACANCIES

The Judicial Service Commission invites nominations of candidates to fill vacancies of Judges in the following Courts:

**1. Constitutional Court**

One vacancy

**2. Electoral Court**

One vacancy of a Judge-Member. Candidates nominated for this position must be Judges of the High Court.

**3. Land Claims Court**

One vacancy (Judge President)

Candidates for this position must be persons who by reason of their training and experience, have expertise in the field of land rights matters. This means that candidates for this position may be sitting Judges or any other persons with expertise in the field of land right matters.

**4. Labour Court and Labour Appeal Court**

One vacancy (Judge President)

**5. North West Division of the High Court**

One vacancy



JP



Nominations must be accompanied by the candidate's signed written consent, detailed *curriculum vitae* disclosing the candidate's formal qualifications for appointment, the standard questionnaire completed and signed by the candidate, as well as copies of at least **three written judgments** by the candidate. The updated 2023 standard questionnaire to be completed by all nominees is available on the South African Judiciary website: [www.judiciary.org.za](http://www.judiciary.org.za) alternatively on the Constitutional Court website: [www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za). In order to comply with the Protection of Personal Information Act, 2013 (POPI Act), candidates need not provide their personal information both in their questionnaire and *curriculum vitae* (i.e. identity number, cell phone number and residential address). Candidates are, however, requested to fill in their personal information on a separate form marked annexure "A" attached to the questionnaire for office use only. The questionnaire must be accompanied by the standardised latest "**clearance certificate**" which the candidate is required to obtain from his/her professional body regarding the candidate's professional status within that body, his or her suitability for appointment to the Bench and the nature of any disciplinary proceedings completed or pending in respect of the relevant candidate.

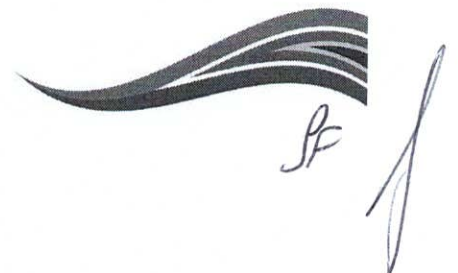
Nominations must be arranged in the following order:

1. Signed nomination letter;
2. Signed consent letter;
3. Signed updated 2023 questionnaire;
4. *Curriculum vitae*;
5. Good standing certificate from Legal Practice Council and
6. At least three written judgments

Candidates nominated for more than one Court must submit a separate nomination letter in respect of each court.

The Secretariat wishes to emphasize the following:

1. Interviews with short-listed candidates will be conducted in public i.e. members of the public and the media are welcome to attend.
2. It is incumbent on persons or bodies nominating candidates to motivate their nominations by referring the JSC to the candidate's qualifications and general fitness for appointment. In order



to comply with the POPI Act, persons or bodies need not provide their personal information on the nomination letters (*i.e.* identity number, cell phone number and residential address).

3. Nominations must be addressed to and reach the Secretariat of the JSC by no later than **Thursday, 30 November 2023**.

Interviews will take place during the week of **8 – 12 April 2024** in Gauteng. Candidates who wish to email their nominations are encouraged to do so and need not hand deliver hard copies. Candidates are encouraged to make a follow-up with the Secretariat of the JSC should they not receive confirmation of receipt by **1 December 2023 at 12:00 pm**. Candidates who wish to hand deliver their nominations should do so either at the **Office of the Chief Justice based at 188, 14<sup>th</sup> Road, Noordwyk, Midrand** or alternatively at the **Constitutional Court**.

Applications must be addressed to:

**The Secretariat of the JSC**

**Office of the Chief Justice**

**Private Bag X10 Marshalltown**

**Johannesburg, 2017**

**Tel: (010) 493 2687 alternatively (010) 493 2575**

**Email: [MMondlane@judiciary.org.za](mailto:MMondlane@judiciary.org.za) and [TPhaahlamohlaka@judiciary.org.za](mailto:TPhaahlamohlaka@judiciary.org.za)**

**Cc: [JSC@judiciary.org.za](mailto:JSC@judiciary.org.za)**

**Registrar's Office**

**Constitutional Court**

**1 Hospital Street**

**Braamfontein**

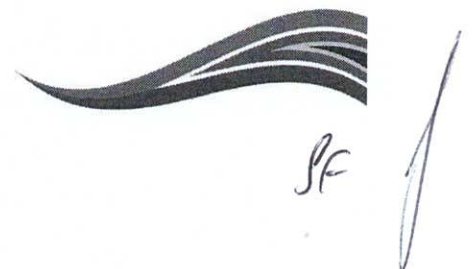
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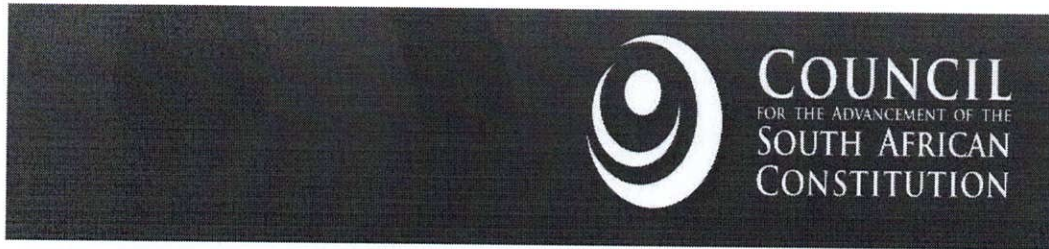
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**Mbali Mondlane**

**Secretariat: Judicial Service Commission**





**The Judicial Service Commission**

Midrand

Gauteng

c/o: Ms K. Moretlwe

Email: [KMoretlwe@judiciary.org.za](mailto:KMoretlwe@judiciary.org.za)

cc: [JSC@judiciary.org.za](mailto:JSC@judiciary.org.za) / [TPhaahlamohlaka@judiciary.org.za](mailto:TPhaahlamohlaka@judiciary.org.za)

05 October 2023

Dear Chief Justice and Commissioners,

**REQUEST FOR REASONS: SUPREME COURT OF APPEAL VACANCIES**

1. The decision of the Judicial Service Commission (JSC) to recommend only two candidates for four vacancies on the Supreme Court of Appeal on 03 October 2023 refers.
2. We note with concern that the JSC, despite having interviewed ten (10) candidates over the course of two days, has elected not to recommend candidates for appointment to all four vacancies on the Supreme Court of Appeal. This in circumstances where the JSC advertised four vacancies, and shortlisted and interviewed candidates on that basis.
3. The effect of this decision is to leave the vacancies unfilled and the Supreme Court of Appeal under-resourced and reliant on the appointment of acting judges. We note too that these vacancies have existed for a long period of time.

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4. The JSC has a constitutional obligation to advise the President on the appointment of judges to the Supreme Court of Appeal, which it must fulfil, in terms of section 237 of the Constitution, diligently and without delay.
5. In particular, we wish to be informed of the following:
  - 5.1. whether, in the opinion of the JSC, any of the eight candidates who were not recommended for appointment do not meet the requirements for appointment as set out in section 174(1) and 174(2) of the Constitution;
  - 5.2. whether, in the opinion of the JSC, any of the eight candidates who were not recommended for appointment do not satisfy any or all of the criteria set out in the JSC's 'Criteria and Guidelines for Judicial Appointment' document, and if so, which of those criteria applies in relation to each candidate; and
  - 5.3. whether the JSC's decision is rationally related to any legitimate purpose.
6. We also request written reasons for the JSC's decision to recommend the two recommended candidates. In particular, the reasons why the JSC considered the two candidates to fulfil both the constitutional criteria and the JSC's published criteria and guidelines both individually and in contradistinction to the rest of the candidates.
7. In view of the fact that the JSC's decisions are taken by majority vote in terms of section 178(6) of the Constitution, we also request a detailed breakdown of the voting procedure adopted in this instance.
8. We also wish to state, at this stage, that we consider the JSC's decision to not recommend candidates for all four vacancies to be *prima facie* irrational and contrary to its constitutional obligations.
9. We therefore request written reasons for the JSC's decision not to recommend four candidates to fill four vacancies on the Supreme Court of Appeal and its decision to recommend the two particular candidates.

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10. For the avoidance of any doubt, we do not seek access to the deliberations of the JSC but merely the reasons for its decision, which should be made public as a matter of course.
11. We hope to receive a favourable response from you soon.

Yours sincerely



**Lawson Naidoo**

Executive Secretary

Council for the Advancement of the South African Constitution (CASAC)

lawson@casac.org.za





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## Annexure JF7

6 November 2023

Mr Lawson Naidoo  
Executive Secretary  
Council for the Advancement of the South African Constitution (CASAC)  
Mowbray  
CAPE TOWN  
8000  
Email: [lawson@casac.org.za](mailto:lawson@casac.org.za)

Dear Mr Naidoo

### RE: REQUEST FOR REASONS: SUPREME COURT OF APPEAL VACANCIES

1. I refer to your letter dated 5 October 2023.
2. I am directed to provide the following response to your letter:
  - 2.1 The Chairperson of the Commission apologises for the delay in responding to your letter and appreciates your patience and understanding.
  - 2.2 Before responding as set out below, it is important to point out that the Commissioners had regard not only to the performance of the candidates in their respective interviews but also that they had regard to all the material that was before them including the length of judicial experience of the candidates.
  - 2.3 The Commissioners were informed by the Deputy President of the Supreme Court of Appeal that there was a serious problem that the SCA had, namely, that many experienced Judges had retired and that, therefore, the SCA was in great need of "heavy lifters" and Judges who would "hit the ground running".
  - 2.4 Paragraph 2 of your letter states that the Judicial Service Commission (JSC) "has elected not to recommend candidates for appointment to all four vacancies on the Supreme Court of Appeal." The JSC did not take any specific decision not to fill all

JF

four vacancies on the Supreme Court of Appeal. The circumstances in which the JSC decided to advise the President to appoint two candidates to the SCA are the following:

- 2.5 Judges of the Supreme Court of Appeal are appointed by the President on the advice of the JSC in terms of section 174(6) of the Constitution. These are Judges of the Supreme Court of Appeal other than the President and Deputy President of the SCA who are appointed in terms of section 174(3) of the Constitution.
  - 2.6 Section 178(6) states: “The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.”
  - 2.7 When interviews were conducted for the SCA in October 2023, there were 23 commissioners eligible to participate in the interviews, deliberations and voting. A candidate had to secure at least 12 votes to enable the JSC to advise the President to appoint him or her as a Judge of the SCA.
  - 2.8 After the interviews, the first round of voting resulted in one candidate obtaining 19 votes and four candidates obtaining 12 votes each. Except for the candidate who got 19 votes, no other candidate got more than 12 votes. Since only four candidates could be appointed, the JSC resolved to conduct a second round of voting to resolve the tie. During the second round of voting the candidate who had obtained 19 votes in the first round got 20 votes and only one candidate secured 12 votes. All other candidates received less than the required minimum of 12 votes. One of the candidates who had obtained 12 votes in the first round obtained 11 votes in the second round. This means that this candidate was one vote short of the required minimum of 12 votes. The result was that, since only two candidates obtained 12 votes or more, the JSC could only advise the President to appoint those two candidates.
3. In paragraphs 3 and 4 of your letter, it is stated that the fact that two and not the advertised four positions could be filled has left the SCA “under-resourced” in circumstances where the vacancies had existed for a long period of time. The JSC agrees with you that judicial vacancies should be filled without unreasonable delay and it is undesirable for a court such as the SCA to be “under-resourced”. However, it must be pointed out that one of the factors that may have influenced one or more of the Commissioners not to vote for some of the candidates

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is the fact that the Deputy President of the SCA informed the JSC that the SCA had lost very experienced Judges which was understood or may have been understood to mean that it needed experienced High Court Judges to replace the experienced Judges that it had lost. There was a view that some of the candidates still needed more experience in the High Court before they could be appointed to the SCA.

4. Paragraphs 5.1 to 5.3 of your letter enquires whether in the opinion of the JSC any of the candidates who were not recommended do not meet the requirements of sections 174(1) and (2). The JSC did not form such opinion in relation to any of the candidates who were not recommended. You also wanted to find out whether the JSC formed the view any of the candidates who were not successful did not meet the JSC's Criteria and Guidelines for Judicial appointments. It is important to point out that the Commissioners bore in mind that these were vacancies in the second highest court in the land and that, therefore, a higher degree of knowledge of the law and experience were required. In this regard it is important to point out that the requirement of "fit and proper" includes, among other factors, experience. Some Commissioners did feel that some of the Candidates did not have the amount of experience that was required for a Judge of the SCA.

- 4.1 Only four candidates could be recommended. The procedure employed by the JSC when considering candidates after their interviews is as follows:

- 4.1.1 The Head of the Court in which a vacancy or vacancies being considered is invited by the Chairperson of the JSC to give his or her views on the interviews and the candidates to guide the commissioners in their deliberation. Justice Molemela, the President of the SCA, had recused herself from the interviews and Justice Petse, the Deputy President of the SCA, stood in her stead. Justice Petse outlined the needs of the court, noting that with recent retirements from the SCA, the court had lost some 200 years of experience. He then identified four candidates by reference to their experience and expertise that he proposed for recommendation by the JSC.

- 4.1.2 Commissioners usually first deliberate on the names proposed by the Head of the Court, but any commissioner is free to introduce any other candidate that they consider should be recommended, either in support of the candidate recommended by the Head of the Court or in opposition thereof. The same procedure was adopted

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during these interviews. Commissioners expressed their views on the candidates.

4.1.3 Once these views were expressed, there was a vote. The JSC only advised the President to appoint only those candidates who got 12 or more votes. No decision was taken by the JSC that any of the candidates that were not recommended did not meet the requirements of section 174(1) and (2).

5. You have also enquired whether the “JSC’s decision” is related to any rational purpose. The JSC believes that all decisions it made related to a legitimate purpose. Indeed, it also believes that the procedure it adopted in making its decisions related to a rational purpose.

6. Paragraph 6 of your letter requests reasons for recommending the two candidates, being Judge Kathree-Setiloane and Judge Kgoele. The candidates who were recommended received the required majority vote. Commissioners deliberated on the merits of all candidates by reference to the Constitution and the JSC published criteria for judicial selection. The summary which follows is based on the views expressed by the Commissioners who motivated for the recommendation of the recommended judges.

6.1 Judge Kathree-Setiloane was considered to be an outstanding candidate. She has a broad range of expertise in various areas of law, including constitutional and administrative law, labour law, competition law and general commercial law. She has acquired experience as an appellate justice at the Constitutional Court, Supreme Court of Appeal, Competition Appeal Court and Labour Appeal Court. She performed well during the interview and demonstrated a clear grasp of understanding of the role of the SCA. She is also committed to transformation of society and the legal system as it is apparent from her CV. Judge Kathree-Setiloane received 20 votes.

6.2 Judge Kgoele was considered to qualify for recommendation based on her writing abilities, the symbolism of her appointment from a transformation perspective and her experience in general areas of the law. Some commissioners were not convinced about the answers she gave during the interviews and whether these reflected an adequate grasp of legal principles and whether she had acquired enough experience to qualify for appointment to the SCA. Judge Kgoele received 12 votes.



7. You have enquired about how these candidates are viewed in comparison to the candidates who were not successful. From the record of the deliberations, these views were expressed in relation to the candidates:

7.1 The commissioners who motivated for Judge Unterhalter stated that he was an excellent judge. He had acquired appellate experience at the Constitutional Court, Competition Appeal Court and at the SCA. His judgments are praised by his colleagues and members of the legal profession alike, for their erudition and insightfulness. Petse DP stated that the SCA needs “heavy lifters and lawyers of substance”, of which Judge Unterhalter was considered as one. It was also noted that he has usually been allocated more than his fair share of judgments per term. Some commissioners stated that Judge Unterhalter is not a team player and appears to be arrogant and even “racist”. These allegations were considered by some commissioners to be without substance and baseless.

7.2 Some Commissioners considered Judge Siwendu to be an excellent candidate whose judgments, both at the High Court and the SCA demonstrate a clear understanding of legal principles. In her judgments she has also written cogently on questions of transformation of society and the rule of law. However, some Commissioners felt that, having been a Judge of the High Court only for six years or so, she still needed to gain more experience in the High Court before she could be appointed to the SCA, especially because the Deputy President of the SCA, Justice Petse, had told the Commissioners that the SCA had lost a lot of experienced Judges which suggested that all attempts should be made to replace them with experienced High Court Judges. During her interview, Judge Siwendu was candid with Commissioners and described herself as “work in progress”. She was also candid with the Commissioners and told them that, prior to her interview, she had heard the questions that had been put to other candidates which were also put to her.

7.3 Judge Smith was considered to be experienced in general as a judge, but some commissioners were not convinced about his experience specifically as an appellate justice.

7.4 Commissioners considered that Judge Daffue had performed poorly during his interview. There were several judicial shortcomings that were highlighted in the

exchange with Justice Petse during the interviews which must have led to him not receiving enough votes.

- 7.5 Justice Petse expressed the view that Judge Masipa required more experience. He noted that Judge Masipa had been allocated judgments to write when she was an Acting Justice at the SCA but the quality of her drafts in some of those judgments was not considered satisfactory and, for that reason, some had to be co-written with other colleagues before they could be considered ready for hand down.
- 7.6 Judges Mjali and Nhlangulela were considered to lack appellate experience. It was noted that with more acting opportunities, they could improve their abilities as potential justices of the SCA.
- 7.7 Judge Phatsoane was viewed to be a great prospect, but there was a sense that her application for elevation to the SCA was premature.
8. In relation to paragraph 7 of your letter, it should be noted that the voting procedure is in secret. It is not possible to know the identities of the commissioners who voted for certain candidates and their reasons for doing so.
9. The length of service of the Candidates was as set out in the attached annexure "A".
10. It is hoped that this letter throws light on the matters you raised.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Mbali Mondlane', written over a horizontal line.

**Mbali Mondlane (Ms)**  
Judicial Service Commission  
Office of the Chief Justice

A large, stylized handwritten signature in black ink, possibly 'J.F.', located in the bottom right corner of the page.

**Urgent**

**The Judicial Service Commission**

Midrand Gauteng c/o: Ms K. Moretlwe

Email: [KMoretlwe@judiciary.org.za](mailto:KMoretlwe@judiciary.org.za)

cc: [JSC@judiciary.org.za](mailto:JSC@judiciary.org.za) / [TPhaahlamohlaka@judiciary.org.za](mailto:TPhaahlamohlaka@judiciary.org.za)

**BY EMAIL**

Dear Chief Justice and Commissioners

17 November 2023

**Re: Freedom Under Law and the failure of the Judicial Service Commission to recommend four candidates in relation to the four current vacancies in the Supreme Court of Appeal**

- 1 We represent Freedom Under Law NPC (“FUL”), which is a public interest organisation, registered as a non-profit company in South Africa. It is actively involved, *inter alia*, in the promotion of democracy and the advancement of respect for the rule of law in South Africa. Both its board of directors and its advisory board are composed of respected lawyers, judges and other leading figures in society.
- 2 Our client has significant concerns relating to the failure by the Judicial Service Commission (“JSC”) to recommend four candidates for the four vacancies on the Supreme Court of Appeal on 3 October 2023. Our client believes that the process that was followed by the JSC in this regard was deeply flawed, and it intends launching review proceedings as soon as reasonably possible in this regard.
- 3 Given the fact that the JSC has provided reasons for its decision to the Council for the Advancement of the South African Constitution, our client assumes that the JSC would have assembled the record in order to do so. Moreover, it is also understood, that recordings are made of the deliberations of the JSC as reflected in the decision of the Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC). Given the finding by the majority of the Constitutional Court in that decision (being, *inter alia*, that “*The respondent is*

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Vice President Economics: Avias Ngwenya

Senior Associates: Nicci van der Walt Nina Greyling Melissa Steele

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*ordered to comply with rule 53(1)(b) of the Uniform Rules of Court and to deliver the full recording of the proceedings sought to be reviewed in the main application, including the audio recording and any transcript of the deliberations of the JSC after the interviews on 17 October 2012.”) our client will also require the full recording of the proceedings.*

- 4 Our client requests that the JSC provide the record of its deliberations as a matter of urgency as this will avoid the need for supplementing the founding affidavit in due course once the record has been produced. Our client also requests, in line with the decision of the Constitutional Court in *Helen Suzman*, that the recording of the deliberations be provided on an urgent basis. We will arrange the transcriptions of the recordings. If the JSC provides the record on an expedited basis, it should expedite the finalisation of the review which is plainly urgent given the impact of ongoing vacancies on the Supreme Court of Appeal.
- 5 All our client’s rights are reserved.

Yours sincerely

**Anthony Norton / Anton Roets / Michelle Rawlinson / Nina Greyling  
Nortons Incorporated**

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## Annexure JF9

**From:** Dimakatso Ramaisa <[DiRamaisa@judiciary.org.za](mailto:DiRamaisa@judiciary.org.za)>  
**Sent:** Wednesday, November 22, 2023 10:29 AM  
**To:** Anton Roets <[anton@nortonsinc.com](mailto:anton@nortonsinc.com)>  
**Cc:** Mbali Mondlane <[MMondlane@judiciary.org.za](mailto:MMondlane@judiciary.org.za)>; Ndivhuwo Tshubwana <[NTshubwana@judiciary.org.za](mailto:NTshubwana@judiciary.org.za)>; Tebogo Phaahlamohlaka <[TPhaahlamohlaka@judiciary.org.za](mailto:TPhaahlamohlaka@judiciary.org.za)>  
**Subject:** FW: Freedom Under Law // Judicial Services Commission

Dear Mr Anton Roets

Kindly be advised that the letter is being considered and deliberated upon. We will advise you of the decision taken in due time.

We acknowledge the urgency of the matter and as soon as the decision is finalized, we will advise you of same.

Kind regards,

**Ms. Dimakatso Ramaisa**  
Judicial Service Commission  
Office of the Chief Justice  
Tel: 010 493 2652  
Email: [DiRamaisa@judiciary.org.za](mailto:DiRamaisa@judiciary.org.za)



OFFICE OF THE CHIEF JUSTICE  
REPUBLIC OF SOUTH AFRICA

**From:** Anton Roets <[anton@nortonsinc.com](mailto:anton@nortonsinc.com)>  
**Sent:** Tuesday, November 21, 2023 11:24 AM  
**To:** Tebogo Phaahlamohlaka <[TPhaahlamohlaka@judiciary.org.za](mailto:TPhaahlamohlaka@judiciary.org.za)>; Anthony Norton <[anthony@nortonsinc.com](mailto:anthony@nortonsinc.com)>; Nina Christina Greyling <[nina@nortonsinc.com](mailto:nina@nortonsinc.com)>; Michelle Rawlinson <[michelle@nortonsinc.com](mailto:michelle@nortonsinc.com)>  
**Cc:** Mbali Mondlane <[MMondlane@judiciary.org.za](mailto:MMondlane@judiciary.org.za)>; Dimakatso Ramaisa <[DiRamaisa@judiciary.org.za](mailto:DiRamaisa@judiciary.org.za)>; Ndivhuwo Tshubwana <[NTshubwana@judiciary.org.za](mailto:NTshubwana@judiciary.org.za)>; Tshepiso Ramonyai <[TRamonyai@judiciary.org.za](mailto:TRamonyai@judiciary.org.za)>  
**Subject:** RE: Freedom Under Law // Judicial Services Commission

Dear Ms Phaahlamohlaka

Please could you indicate whether a decision has been taken in relation to the letter that we sent?

Kind regards

A handwritten signature in black ink, appearing to be 'SF', located at the bottom right of the page.

Anton



Disclaimer: 1) Confidentiality: This email, sent from [anton@nortonsinc.com](mailto:anton@nortonsinc.com) to [tphaahlamohlaka@judiciary.org.za](mailto:tphaahlamohlaka@judiciary.org.za) on Tue, 21 Nov 2023 09:24:00 +0000, is confidential and may contain privileged or copyright information. You may not present this message to another party without consent from the sender. If you are not [tphaahlamohlaka@judiciary.org.za](mailto:tphaahlamohlaka@judiciary.org.za) please notify [anton@nortonsinc.com](mailto:anton@nortonsinc.com) and delete this email, and you are notified that disclosing, copying, distributing or taking any action in reliance on the contents of this information is strictly prohibited. 2) Liability: This email is not a binding agreement and does not conclude an agreement without the express confirmation by the sender's superior or a director of the Company. 3) Viruses: The Company does not certify that this email is free of viruses or defects. 4) Requested: The Company does not consent to its employees sending un-asked for emails which contravene the law. In the event that you feel this email is such, please notify the Company in order for the appropriate corrective action to be taken. 5) Advice: Any views or opinions presented in this email are solely those of the author and do not necessarily represent those of the company. Any actions taken on the basis of this email are at the reader's own risk. 6) Other: The sender of this email is expressly required not to make any defamatory statements. Any such communication is contrary to company policy and outside the scope of the employment of the individual concerned. The company will not accept any liability in respect of such communication, and the employee responsible will be personally liable for any damages or other liability arising.

**From:** Tebogo Phaahlamohlaka <[TPhaahlamohlaka@judiciary.org.za](mailto:TPhaahlamohlaka@judiciary.org.za)>

**Sent:** Monday, November 20, 2023 2:22 PM

**To:** Anton Roets <[anton@nortonsinc.com](mailto:anton@nortonsinc.com)>; Anthony Norton <[anthony@nortonsinc.com](mailto:anthony@nortonsinc.com)>; Nina Christina Greyling <[nina@nortonsinc.com](mailto:nina@nortonsinc.com)>; Michelle Rawlinson <[michelle@nortonsinc.com](mailto:michelle@nortonsinc.com)>

**Cc:** Mbali Mondlane <[MMondlane@judiciary.org.za](mailto:MMondlane@judiciary.org.za)>; Dimakatso Ramaisa <[DiRamaisa@judiciary.org.za](mailto:DiRamaisa@judiciary.org.za)>; Ndivhuwo Tshubwana <[NTshubwana@judiciary.org.za](mailto:NTshubwana@judiciary.org.za)>; Tshepiso Ramonyai <[TRamonyai@judiciary.org.za](mailto:TRamonyai@judiciary.org.za)>

**Subject:** RE: Freedom Under Law // Judicial Services Commission

Dear Mr Roets

The secretariat acknowledges receipt of the attached letter with much appreciation. We will revert to you as soon as circumstances permit.

Kind regards,  
Tebogo

**From:** Anton Roets <[anton@nortonsinc.com](mailto:anton@nortonsinc.com)>

**Sent:** Friday, November 17, 2023 9:31 PM

**To:** Anthony Norton <[anthony@nortonsinc.com](mailto:anthony@nortonsinc.com)>; Nina Christina Greyling <[nina@nortonsinc.com](mailto:nina@nortonsinc.com)>; Michelle Rawlinson <[michelle@nortonsinc.com](mailto:michelle@nortonsinc.com)>; Kutlwano Moretlwe <[KMoretlwe@judiciary.org.za](mailto:KMoretlwe@judiciary.org.za)>; JSC <[JSC@judiciary.org.za](mailto:JSC@judiciary.org.za)>; Tebogo Phaahlamohlaka <[TPhaahlamohlaka@judiciary.org.za](mailto:TPhaahlamohlaka@judiciary.org.za)>

**Subject:** Freedom Under Law // Judicial Services Commission

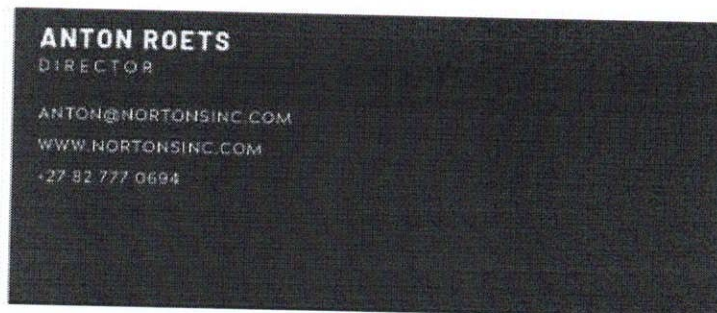
Dear Ms Moretlwe



Please find enclosed an urgent letter in relation to this matter. We would be grateful if you could draw it to the attention of the Chief Justice as soon as possible.

Kind regards

Anton



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OFFICE OF THE CHIEF JUSTICE  
REPUBLIC OF SOUTH AFRICA

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## Annexure JF10

23 November 2023

Nortons Inc Attorneys  
P O Box 41162  
Craighall, 2024  
By email: [anton@nortonsinc.com](mailto:anton@nortonsinc.com)

Dear Mr Anton Roets

**RE: REQUEST FOR THE RECORDINGS OF DELIBERATIONS FOR SCA VACANCIES  
// FREEDOM UNDER LAW**

1. I refer to your letter dated 17 November 2023.
2. I am directed to provide the following response to your letter:
  - 2.1 The Judicial Service Commission may only provide a record pursuant to Rule 53 of the Uniform Rules of Court.
  - 2.2 Once a review application has been launched, the tenets of Rule 53 will be adhered to.

Yours sincerely

**Dimakatso Ramaisa (Ms)**  
Judicial Service Commission  
Office of the Chief Justice



188, 14th Road, Noordwyk, Midrand, 1685  
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**JUDICIAL SERVICE COMMISSION  
REPUBLIC OF SOUTH AFRICA**

**SUMMARY AND EXPLANATION OF THE CRITERIA AND GUIDELINES USED BY  
THE JUDICIAL SERVICE COMMISSION WHEN CONSIDERING CANDIDATES  
FOR JUDICIAL APPOINTMENT**

- 1 At its special sitting held in Johannesburg on 4 April 2022, the Judicial Service Commission (JSC) considered and reviewed:
  - 1.1 the guidelines for questioning candidates for judicial appointment to the Constitutional Court adopted in 1994; and
  - 1.2 the criteria for judicial selection adopted in 2010.

**The JSC's decision and approach**

- 2 The JSC resolved to review and update the guidelines and publish its understanding of the criteria for judicial selection.
- 3 The JSC's purpose is to ensure consistency in its own decision-making process, to enhance the public's understanding of the JSC's selection of judicial officers and to ensure openness and transparency.
- 4 The interpretation articulated in this document is not exhaustive or definitive. Nor does it set a list of pre-determined questions. The factors to be taken into account do not constitute a closed list or restrict questioning, provided that all questions



must be relevant to the criteria. The weight to be attached to individual factors may differ depending on the circumstances.

### **The Constitutional Criteria**

5 Section 174 of the Constitution provides as follows:

- (1) *Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.*
- (2) *The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.*

6 Section 165(2) of the Constitution provides as follows:

*The courts are independent and subject only to the Constitution.*

7 These criteria are captured as follows:

- 7.1 is the candidate an appropriately qualified person?
- 7.2 is the candidate a fit and proper person?
- 7.3 would the candidate's appointment help to reflect the racial and gender composition of South Africa?
- 7.4 would the candidate be independent?



- 8 The constitutional requirements are framed in broad and general terms, and are a minimum threshold and are not exhaustive of the criteria to be considered for appointment. The factors set out below explain the requirements.

**Appropriately qualified**

- 9 This concerns the candidate's academic and professional qualifications, technical competence, skill and experience. It is not a reference to academic qualifications only, but also covers legal knowledge and experience.
- 10 It is desirable for applicants to be assessed on their own merits to determine whether they meet the "appropriately qualified" requirement, having regard to both prior acting appointments as a judge and as a practitioner in the courts.
- 11 The JSC will consider the candidate's judicial track record, experience in their practice and good judgement. Regard will be had to the candidate's ability to run a court room, a working knowledge of court procedure and forensic skill. The candidate's qualities under this section should be apparent from their judgments and awards (reported and unreported) and/or their track record as a practitioner and/or their publications.
- 12 It is desirable for candidates to have acted in a judicial or quasi-judicial role but this is not an essential requirement, particularly when it comes to elevation to an appellate court, including the Competition Appeal Court, Labour Appeal Court, Supreme Court of Appeal, and Constitutional Court. Appellate experience both as a practitioner or as an acting judge would be a relevant consideration in the



latter circumstance, but it should not be given excessive weight over other considerations.

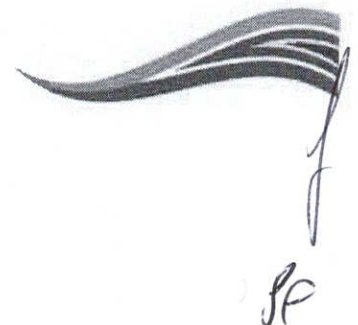
- 13 Local knowledge and expertise should be valued, but it should not be a disqualifying factor if the candidate does not come from that region.
- 14 The particular court and its level within the judicial hierarchy should be factors influencing what makes a candidate appropriately qualified for appointment, having regard to the different functions of the courts. This would include:
  - 14.1 an appreciation for the Constitution as the supreme law and for the values of the Constitution;
  - 14.2 an appreciation that the Constitution envisages the appointment of non-judges to the Constitutional Court, which envisages the inclusion of legal academics, attorneys and advocates for direct appointment to the Court;
  - 14.3 that candidates for specialist courts would be expected to have particular experience and skill in the relevant area;
  - 14.4 an ability to resolve commercial disputes in a just, economical and expeditious manner, with due regard to precedent;
  - 14.5 an understanding of social media and technology to enable them to deal with disputes concerning, for example, privacy, data gathering and the effects of the publication of damaging information; and



14.6 in addition to other qualities, those applying for leadership positions in the judiciary should have vision, leadership qualities, good interpersonal and case-management skills, and must have demonstrated maturity of judgement and relational wisdom.

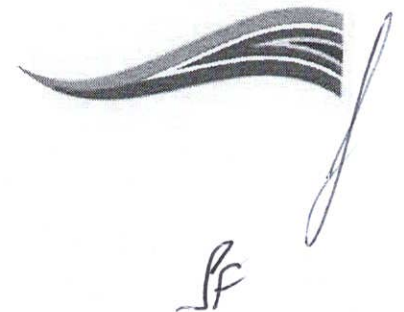
### Fit and proper

- 15 This concerns a holistic assessment of a candidate's suitability for appointment to the bench, with reference to a broad and cumulative reading of multiple factors, which will include integrity, knowledge, scholarship, experience, dignity, humility, courtesy, judgement, wisdom, independence, character, courage, forensic skill, capacity for articulation, diligence, energy and industry. Character includes considerations such as whether a candidate is honest, truthful, trustworthy and whether they keep their word.
- 16 The proposed appointee must be a competent and experienced person, and must be technically competent and have the capacity to give expression to the values of the Constitution.
- 17 Judges must interpret and enforce the Constitution in such a way as to support its fundamental values of democracy, the rule of law and the protection of fundamental human rights. All candidates should be able to demonstrate an understanding of the Constitution and the importance of infusing the jurisprudence of our courts with the core Constitutional values, rights and obligations. Judges must be able to discern and articulate the principles which underlie the Constitution. For example, they must understand



the importance of a commitment to the realization of socio-economic rights, especially for poor people, and access to justice.

- 18 Candidates must be capable of applying or distinguishing previous decisions of other courts, and they must be able to give expression to the moral convictions of an open and democratic society based on freedom and equality. Judges must be able to explain cogently and concisely why they rejected any plausible argument. They must have the ability to explain their decisions clearly and succinctly to all those involved.
- 19 All this requires considerable forensic and intellectual ability, an appreciation of the practical workings of court procedure, a thorough and general knowledge of law and an appreciation of the relevant ethical duties and rules designed to protect the integrity of the legal process.
- 20 The candidate should have a good judicial temperament. This includes such factors as fair-mindedness, humility, impartiality, courtesy, patience, respect, fairness, sensitivity to social context, commitment to public service and the equal administration of justice. The candidate should show courtesy, patience and respect to all who appear before the candidate including unrepresented litigants, witnesses, practitioners appearing before them and colleagues.
- 21 Consideration will be given to whether the candidate is a person with the necessary energy and motivation, writing skills, critical reasoning, diligence, stamina, industry, work ethic and productivity, particularly in respect of the delivery of judgments without undue delay.





- 22 The candidate's qualities under this section should be apparent from their judgments and awards (reported and unreported) and/or their track record as a practitioner and/or their publications.

**Reflection of the racial and gender composition of South Africa**

- 23 It is a constitutional imperative that race and gender must be taken into account in the selection of judges to achieve representativity and diversity.
- 24 The constitutional instruction must be understood as reflecting that the Courts, to do justice, must have the capacity to understand and relate to the experiences of all South Africans. The concern is with the effectiveness of the Court as an instrument of justice. The constitutional instruction is based on the conviction that the Court must be constituted from a broad enough spectrum of South African society to be able to understand the experience of all South Africans and empathise with their needs. The ability to understand the experience of a race or a gender and empathise with its needs is generally present to a much greater degree in those who have lived that experience than in those who have merely studied it.
- 25 The "*need to constitute a court which is ... representative in respect of race and gender*" cannot be understood to rigidly or mechanically require that each court represents the races and genders in direct proportion to their share of the national population. It is recognised that a balance must be struck: whilst a particular court may not represent the races and genders in direct proportion to their share of the national population (although appointments to



that court should seek to reflect the need to transform that particular court), the racial and gender composition of the judiciary remains an important factor. Diversity is a quality without which the Court is unlikely to be able to do justice to all the citizens of this country, but it is not an independent requirement, superimposed upon the constitutional requirement of competence. Properly understood, diversity is a component of competence – the Court will not be competent to do justice unless, as a collegial whole, it can relate fully to the experience of all who seek its protection. It is for this reason that, if the Court does not meet the standard set by the constitutional instruction, it will lack the confidence of the nation, and consequently lack legitimacy.

- 26 The constitutional imperative suggests a general concern that judges should be sensitive to the experience and needs of all who supplicate for justice before them. A capacity for empathy and an appreciation of the needs of the community are therefore relevant considerations in the selection of judges.
- 27 In evaluating a candidate's professional experience and potential, the JSC may take into consideration that opportunities for advancement in the profession for black persons and women were limited by institutional, historical, systemic and other barriers. The reality of race-based and gender-based bias, which hinder worthy candidates from obtaining experience and competency in certain areas of practice, should not result in candidates being unfairly disqualified. This is particularly relevant when considering a black female candidate. Where a candidate who will not enhance racial or gender representativity is better qualified in an important respect, the JSC should give due

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consideration to that fact in weighing all relevant factors. These may include the overall needs of the judiciary at the relevant time, the performance and needs of the relevant court, discrimination that still pervades legal practice and the extent to which the candidate may have been historically prejudiced.

- 28 A candidate's commitment and contribution to transformation will be considered. In addition, the candidate's commitment and participation to community-based and professional structures will be considered.
- 29 The message that a particular appointment may convey to the community at large will also be considered.

#### **Independence**

- 30 Judges should make their own decisions independently and be possessed of courage, fairness and good judgement.
- 
- 31 Judicial independence means that the judge is required to make up his or her own mind on an issue, independently of pressure or coercion from some other person or body, and independently of loyalty or affiliation to some other person or body.
- 32 The judge must have the courage and the integrity to be able to resist pressure, which may be external, such as political, commercial or personal, or internal, such as a desire for popularity and even the pressure of a direct threat. A judge should deliver a judgment which he or she believes is required by the law and evidence before them and should not be diverted from this course by any such external or internal pressure.



- 33 Since membership of a society, whether secret or otherwise, or a close political affiliation or loyalty to such a society or organisation, may have a bearing on a candidate's capacity to be an independent judge, a candidate may be questioned about such a membership, affiliation or loyalty. Membership of, or affiliation with, an organisation which demonstrably seeks to undermine the values of the Constitution, may be a disqualifying consideration.
- 34 This does not mean that the candidate has to be free of personal convictions, political or other, that might be relevant to a case. But the candidate must have the capacity to put her or his own convictions at a sufficient distance – to view those convictions with sufficient detachment – to be able to evaluate the arguments and the evidence in the case with an open mind. Openness to persuasion is an indispensable quality in a judge.
- 35 It is clear that a judge cannot be relied upon to bring these qualities to bear unless she or he is a person of courage and integrity. A person of integrity is someone who is faithful to his or her principles and oath of office. None of this means that the character of a candidate for appointment to the Court has to be free of all lapses or blemishes; but a personal history of hypocrisy, dishonesty, opportunism or expediency will disqualify a candidate from being appointed to a judicial office.

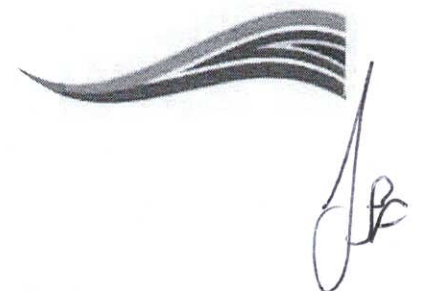
**Guidelines regarding the JSC's approach to the interviews**

- 36 The interviewing process is to be governed by an overarching and all-embracing principle of fairness and respect for a candidate's dignity. While



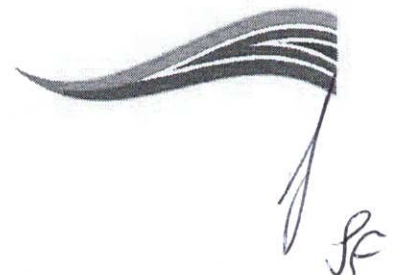
the interviews should be thorough and robust, Commissioners should be reminded that in their questioning, they are required to respect the dignity candidates. Therefore, humiliating a candidate or asking sexist or racist questions, for example, should not be permitted.

- 37 Questions put by commissioners to a candidate must be relevant to the criteria. It is the obligation of the chair of the JSC to enforce this guideline rigorously. In doing so, the chair will enjoy a discretion. After hearing the commissioners, the chair's ruling on the permissibility of a question will be final.
- 38 A candidate may not be asked a question which cannot be answered without giving an undertaking or a commitment about how the candidate would answer that question if it arose for decision before the Court. Questioning of this kind is not compatible with a judge's duty to approach issues entrusted to them for adjudication independently and with an open mind, as judges should not commit themselves to an answer before hearing argument. A candidate must decide impartially and so can offer no forecasts, or hints, that may indicate a disregard for the specifics of the particular case.
- 39 The object of the selection process is to discover the candidates who are best qualified for the Court and that judges of the highest calibre possible are appointed. The search is therefore primarily for positive qualities, not disqualifications.
- 40 This does not mean that the JSC can ignore serious disqualifying allegations. In regard to such allegations, and because they may affect a



candidate's reputation or dignity or otherwise intrude into the candidate's privacy, and/or the reputation or independence of the judiciary, the following guidelines will be applied:

- 40.1 the allegation must be of such a nature that, if true, could potentially render the candidate not a "*fit and proper*" person;
- 40.2 unless a sufficient substantiation for the allegation exists and the candidate is given advance written notice of the allegation with sufficient time to prepare to meet allegations, the matter may not be raised with the candidate during the interview;
- 40.3 the JSC will receive input from the Objection Committee.



# LILONGWE PRINCIPLES AND GUIDELINES ON THE SELECTION AND APPOINTMENT OF JUDICIAL OFFICERS

The development of these guidelines was made possible with the support of the SACJF resource partner, the Democratic Governance and Rights Unit and the financial support of the Ford Foundation and the Hanns Seidel Foundation.



ADOPTED AT THE SOUTHERN AFRICAN  
CHIEF JUSTICES' FORUM CONFERENCE AND  
ANNUAL GENERAL MEETING, LILONGWE,  
30 OCTOBER 2018



SOUTHERN AFRICAN CHIEF JUSTICES' FORUM

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**Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers**

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The development and promotion of the Principles and Guidelines is supported as one of the priority activities of the 2018-2019 workplan of the Global Judicial Integrity Network (<https://www.unodc.org/ji/>).



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## SOUTHERN AFRICAN CHIEF JUSTICES' FORUM

***Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers*** adopted at the Southern African Chief Justices' Forum Conference and Annual General Meeting, Lilongwe, 30 October 2018

### 1. Introduction

At its 2015 Annual Conference, the Southern African Chief Justices' Forum (SACJF), made a firm commitment towards improving both the institutional independence of judiciaries and the decisional independence of judges. The forum noted that one of the key processes which enhances judicial independence is the selection and appointment of judicial officers. To that end it adopted a resolution to:

Establish an ad hoc team of Judicial Service Commissions from the region to work towards developing regional principles and guidelines on selection and appointment of judges in Africa to be presented to the SACJF for discussion and adoption at its 2017 Annual Conference.

The ad hoc working group contemplated by the 2015 resolution drafted the principles and guidelines, drawing on research by the Democratic Governance and Rights Unit (DGRU) of the University of Cape Town, and also taking into account international and regional declarations and instruments relating to judicial appointments.

From its research and consultations, the working group has compiled these principles and guidelines to assist jurisdictions in the development of legislation, policy and practice on the selection and appointment of judicial officers. The overriding purpose of the guiding principles and best practices is to safeguard the independence and integrity of the judiciary.

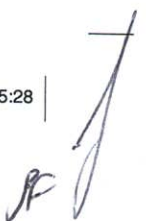
The working group is cognisant that judicial independence is ensured through the integrity of the selection and appointment process along with security of tenure of judicial officers. This process also enhances public confidence and trust in the administration of justice.

For the purposes of these principles and guidelines, the following terms have been used:

- a) "selection and appointment authority" to refer to Judicial Service Commissions, Judicial Appointment Commissions, Supreme Judicial Councils, all or any bodies which may be involved in the selection and appointment of judicial officers.
- b) "selection and appointment process" (or the "process") to refer to the entire process of the recruitment of judicial officers, from the declaration of a vacancy to the final act of appointment of the judicial officer.
- c) "appointing authority" to refer to the specific body or person responsible for the appointment of judicial officers.
- d) "judicial officers" refers to all persons appointed to perform judicial functions.
- e) "appointment" refers to the formal process of appointment of a candidate.

The implementation of the principles and guidelines will take place subject to national law.

This document is structured as follows. Section 2 lists the underlying general principles which inform the specific guidelines, and may serve to provide broad guidance for all aspects of the selection and appointment process. Section 3 then sets out the specific principles and guidelines, accompanied by an explanation of both the principles and guidelines, including descriptions of best practice, based on the underlying research. The guidelines are listed under the relevant underlying principles, although some principles are applicable to multiple guidelines.



## 2. Underlying Principles for the Selection and Appointment of Judicial Officers

- i) *The principle of transparency should permeate every stage of the selection and appointment process.*
- ii) *The selection and appointment authority should be independent and impartial.*
- iii) *The process for the selection and appointment of judicial officers shall be fair.*
- iv) *Judicial appointees should exceed minimum standards of competency, diligence and ethics.*
- v) *Appointments of candidates should be made according to merit.*
- vi) *The appointment process should ensure stakeholder engagement at all relevant stages of the process.*
- vii) *Objective criteria for the selection of judicial officers should be pre-set by the selection and appointment authority, publicly advertised, and should not be altered during that process.*
- viii) *The judicial bench should reflect the diversity of society in all respects, and selection and appointment authorities may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench.*
- ix) *Candidates shall be sourced according to a consistent and transparent process.*
- x) *The shortlisting of candidates shall be credible, fair and transparent.*
- xi) *Candidates shortlisted for interview shall be vetted and stakeholders invited to comment on the candidate's suitability for appointment prior to interview.*
- xii) *Interviews should be held for the selection of candidates for appointment to judicial office.*
- xiii) *The final selection (decision) to recommend for appointment shall be fair, objective and based on weighing the suitability of the candidate for appointment against the criteria set for that appointment.*
- xiv) *Formal appointment shall be made constitutionally and lawfully.*
- xv) *Provision shall be made for judicial officers to assume office timeously once appointed.*

### 3. Guidelines for the Selection and Appointment of Judicial Officers

#### 3.1. Overall framework

##### 3.1.1. Transparency

Principle (i): *The principle of transparency should permeate every stage of the selection and appointment process.*

Guideline: *Appropriate records of each stage of the process shall be kept by the selection and appointment authority and available to interested parties.*

Transparency is a principle which should be encouraged throughout the selection and appointment process to enhance the integrity of the process. As far as possible, processes which encourage record keeping and transparency should be favoured in the development of legislation, policy and practice.

Transparency as a principle should permeate all levels of the selection and appointment process:

- a) the public should be made aware of the persons and bodies involved in the various stages of the process;
- b) vacancies should be widely advertised with reasonable time provided for candidates to be nominated, recommended, or to apply. That procedure should pay due regard to achieving the substantive objects and purposes of the selection and appointment process, rather than heed to administrative and procedural technicalities;
- c) the criteria for the appointment, shortlisting, selection and decision-making process should be pre-determined and publicly available. They should not be amended during the selection process;
- d) subject to national laws, all records generated by the process should be documented and kept by the selection and appointment body, and be available to interested parties; and
- e) the nomination of persons, appointment and assumption of office by a judicial officer should be publicised in order to ensure the integrity of the process.

### 3.1.2. Independence of selection and appointment authority

Principle (ii): *The selection and appointment authority should be independent and impartial.*

Guideline: *The Chief Justice should represent the Judiciary on the selection and appointment authority.*

The selection and appointment authority should be independent and impartial, not subject to the direction or control of any person, ministry, body or organisation. The Chief Justice should be represented on that body and best practice is for broad involvement from a wide range of representatives. International best practice instruments recommend that a broad-based selection and appointment body, comprising around 33% judicial officers, as well as members of the legal profession, teachers of law, and lay persons.<sup>1</sup>

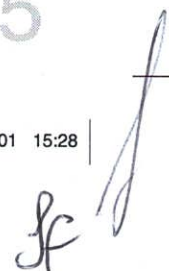
To secure the fairness of the administration of the process, there may be need to separate the administration of the selection and appointment authority from any factors which may affect the integrity of the process. Best practice may be to ensure that the administration should be in separate offices or premises from other structures within the judiciary, or any other organ of state.

### 3.1.3. Fairness

Principle (iii): *The process for the selection and appointment of Judicial Officers shall be fair.*

There should be fairness at all levels of the selection and appointment process including measures designed to guard against abuse of discretion, arbitrary interference, and unconscious bias. There should be substantively equal treatment of similarly placed candidates.

<sup>1</sup> See for example Commonwealth Lawyers' Association, Commonwealth Legal Education Association and Commonwealth Magistrates' and Judges' Association – *Judicial Appointments Commissions: A Model Clause for Constitutions*, article 2.



### 3.1.4. Appointment on merit

Principle (iv): *Judicial appointees should exceed minimum standards of competency, diligence and ethics.*

Principle (v): *Appointments of candidates should be made according to merit.*

Appointments should primarily be made according to merit. There is an overarching need to ensure that judicial appointees exceed the minimum standards of competency, diligence and ethics through rigorous interviewing and vetting processes in order to ensure effective and just decision-making, and the integrity of the judiciary. Meritorious appointments increase public confidence in the judiciary.

Seniority on the bench may be a relevant criterion for the purpose of continuity and judicial promotion, but should not equate to automatic promotion.

A candidate's professional performance may be a key component of assessment of eligibility for appointment or promotion.

### 3.1.5. Stakeholder engagement

Principle (vi): *The appointment process should ensure stakeholder engagement at all relevant stages of the process.*

In order to ensure the legitimacy and accountability of the process, meaningful engagement and participation from all relevant stakeholders should be sought at all applicable stages of the process.

## 3.2. Criteria

Principle (vii): *Objective criteria for the selection of judicial officers should be pre-set by the selection and appointment authority, publicly advertised, and should not be altered during that selection process.*

**Guideline:** *In order to be appointable, judicial officers should, at a minimum:*

- (a) hold a recognised law degree;*
- (b) hold an appropriate level of post-qualification experience;*
- (c) be a fit and proper person;*
- (d) be competent to perform the functions of a judicial officer;*
- (e) possess good written and communication skills;*
- (f) be able to diligently render a reasoned decision;*
- (g) not have any criminal convictions, other than for minor offences;*
- (h) not have any ongoing political affiliation after appointment.*

**Principle (viii):** *The judicial bench should reflect the diversity of society in all respects and selection and appointment authorities may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench.*

The principles of fairness and transparency are reinforced by the publication of criteria for the selection of judicial officers. These criteria should be pre-set by the selection and appointment authority, advertised at the opening of the recruitment process, and should not be altered during the process, in line with the rule of law. Established criteria act as a guide to candidates and provide objective standards to bind the actions of the selection and appointment authority.

### *3.2.1. Minimum requirements*

Criteria should cover the minimum requirements candidates are expected to meet, and should include:

- a) academic qualifications, including, at minimum, a recognised law degree;
- b) a specified minimum level of post-qualification experience;
- c) ethical (fit and proper) standards;
- d) competence to perform the functions of a judicial officer including the appropriate personal skills, adequate cultural and legal knowledge, and analytical capabilities;





- e) good written and communication skills, and
- f) an ability to make reasoned decisions, and to do so diligently.

### 3.2.2. *Fit and Proper standards*

Candidates shall be fit and proper persons to hold judicial office. The fit and proper requirement shall take into account the ability to uphold the provisions of the applicable Constitution and Judicial Code of Ethics. It is guided by the requirements in the Bangalore Principles of Judicial Conduct.

Immediately following appointment, candidates shall divest themselves of all interests which may affect their ability to carry out their judicial duties. At a minimum, appointees shall not hold political office or have any active political affiliations or membership.

Subject to domestic laws, candidates should not have any previous criminal convictions besides minor offences.

### 3.2.3. *Diversity*

In appointing candidates, the selection and appointment authority should ensure that the judicial bench reflects society in all respects, and may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench.

Appropriate grounds include:

- a) diversity of academic, personal, social, and professional background;
- b) gender;
- c) race;
- d) culture;
- e) ethnicity;
- f) disability;
- g) geographical and regional representation;
- h) religion;
- i) language; and
- j) people who have worked with those groups and are thereby aware of specific issues or challenges experienced by the groups.

Diversity of age groups on the bench may be considered in order to ensure continuity and progressive retirement.

### 3.3. Sourcing of candidates

Principle (ix): *Candidates shall be sourced according to a consistent and transparent process.*

Guideline (1): *Candidates for appointment may be sourced through applications, nominations, proposals, direct searches or invitation to express interest and apply.*

Guideline (2): *Regardless of how candidates are sourced, no distinction may be drawn between candidates in the selection and appointment process once their names are sourced.*

The selection and appointment authority may choose to source candidates through calls for application or nomination, or through directly inviting certain applicants or classes of applicants to apply. This may be done, for example, to specifically address diversity gaps.

This should be through a standardised, transparent process. Where nominations are accepted, a standardised process should protect against interference with the independence of the candidates. However the candidates are sourced, they should be subjected to the same process and complete the same documentation.

The required documentation should include a curriculum vitae, and contain sufficient detail on the following:

- a) health status;
- b) publications;
- c) employment history;
- d) business interests;
- e) previous political involvement including membership of political parties;
- f) potential conflicts of interest; and
- g) disclosure of anything which if discovered after appointment may cause the judiciary embarrassment or bring the judiciary into disrepute.



Records of all candidates shall be kept by the selection and appointment authority and made available.

### 3.4. Shortlisting

Principle (x): *The shortlisting of candidates shall be credible, fair, and transparent.*

Guideline (1): *Objective criteria should be developed to guide the process for the shortlisting of appointable candidates.*

Guideline (2): *These criteria should be agreed and publicised before the shortlisting process.*

Guideline (3): *The body responsible for shortlisting should be made known to stakeholders and the candidates.*

The selection and appointment authority shall develop guidelines to enable it to create a shortlist of appointable candidates who meet the minimum criteria for the available positions.

Shortlisting criteria, including how and by whom the shortlisting is done, shall be known prior to the sourcing of candidates.

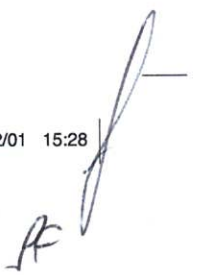
The selection and appointment authority should ensure that a sufficient number of applicants are shortlisted to ensure a meaningful appointment process.

The selection and appointment authority may decide to make the names on the shortlist public.

### 3.5. Vetting and stakeholder engagement

Principle (xi): *Candidates shortlisted for interview shall be vetted and stakeholders invited to comment on the candidate's suitability for appointment prior to interview.*

Post-shortlisting, prior to interviewing, candidates shall be vetted and stakeholder comments shall be actively encouraged. Where the selection and appointment authority does not undertake the vetting process it shall not abdicate its function, but shall have the final say on the weight to be attached to findings about the suitability of candidates.



Financial interests, criminal records, wealth declarations and reference checks shall be carried out to ensure veracity of disclosure.

Vetting procedures shall be objective, factual and fair.

Stakeholder comment shall be encouraged as best practice. Comments shall be solicited from core groups, including the bar, academia, the judiciary and civil society. The shortlisted names should be made available to the general public.

Anonymous comments on candidates' suitability may be entertained where the comments have some foundation taking into account the gravity of the complaint, the credibility of the source, and the reasons for confidentiality.

Candidates shall be made aware of adverse comments arising out of the vetting process and stakeholder comment. Candidates may be given the opportunity to respond appropriately at, or prior to, the interview stage.

### 3.6. Interviews and selection

*Principle (xii): Interviews should be held for the selection of candidates for appointment to Judicial Office.*

*Guideline (1): Interview processes should be equal, fair, rigorous, respectful and permit candidates the opportunity to choose to respond to adverse comments made against the candidate.*

*Guideline (2): Records of interviews shall be made, kept, and available.*

Best practice is that interviews are held for the selection of candidates.

The interview process should ensure substantive equality in the treatment of candidates.

The interview may be supplemented by a written assessment.

Questions which may be put to candidates should be agreed in advance by the members of the selection and appointment authority, taking into account the need for flexibility in assessing persons from different backgrounds. Substantively similar questions shall be put to each candidate. Questions should be relevant to measuring the competencies and attributes of the candidate against the criteria for the appointment.



The tone of the interview should be non-confrontational and ensure that candidates are treated with dignity and respect. However, the selection and appointment authority may engage in robust but respectful questioning in appropriate cases. Interview questions should not seek to serve alternative agendas or take candidates by surprise.

Candidates should have the opportunity to respond adequately to adverse comments during the interview. The selection and appointment authority should enable candidates to elect to answer certain personal questions in private or in public. Candidates should also be able to withdraw from the process.

Records of the interview process shall be maintained by the selection and appointment authority, and made available.

### 3.7 Decision making

*Principle (xiii): The final selection (decision) to recommend for appointment shall be fair, objective, and based on weighing the suitability of the candidate for appointment against the criteria set for that appointment.*

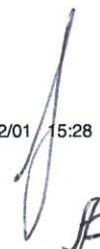
After interviews, the decision-making process shall be fair, objective, and based on a weighing of the pre-set criteria.

Emerging best practice is for the development of a ranking and scoring process for assessing candidates. The selection and appointment authority is encouraged to meet before the interview process to decide mathematical weightings of the various criteria according to the needs of the position for appointment, and the needs of the judiciary as a whole. This creates substantive reasons for their recommendations.

Members of the selection and appointment authority should attempt to reach consensus, and may resolve deadlock by vote as a final resort.

Records of the decision-making process shall be kept by the selection and appointment authority.

Subject to constitutional and national legislation, the selection and appointing authority may choose to make its recommendations public for transparency purposes.



### 3.8. Appointment

Principle (xiv): *Formal appointment shall be made constitutionally and lawfully.*

The appointment of judicial officers is made according to constitutional and national legislative provisions. Best practice is that this is made timeously.

### 3.9. Post appointment

Principle (xv): *Provision shall be made for judicial officers to assume office timeously once appointed.*

Guideline (1): *Appointed candidates shall assume office timeously, preferably within six months of appointment.*

Guideline (2): *Appointees shall have adequate time to complete cases, close legal practices, and divest themselves of potential conflicts of interest.*

Guideline (3): *Arrangements shall be made for appropriate induction to the appointment position and ongoing skill and legal development.*

Following appointment, the appointing authority and the judiciary should coordinate to ensure that the appointee assumes office within a reasonable time, allowing a maximum period of six months for the appointee to wrap up their practice, or finish judgments and to take appropriate steps to resign from conflicting interests.

Furthermore, the judiciary is responsible for ensuring that appointees are appropriately inducted. A compulsory period of training immediately post appointment is best practice, and requirements for ongoing legal and skills development should be encouraged.



### 3.10. Applicability

Guideline (1): *The principles underlying these guidelines should be followed in the appointment of all judicial officers*

Guideline (2): *These guidelines should be applied as far as possible in the appointment of all judicial officers*

As far as practicable these principles and guidelines for appointment should be applied to all judicial appointments, including short-term acting and contractual appointments, subject to variations in the constitutional and legislative frameworks governing such appointments. It is acknowledged that in some jurisdictions the appointment of judges on contract remains an important supplement to the bench, and measures should be taken to ensure that such candidates are appointed through the same process as permanent appointees.

Where abridged appointment processes take place for the appointment of acting judges, the same principles of merit, fairness, transparency and rationality of the appointment shall apply.

## SOUTHERN AFRICAN CHIEF JUSTICES' FORUM

***Background note on the Principles and Guidelines on the Selection and Appointment of Judicial Officers adopted at the Southern African Chief Justices' Forum Conference and Annual General Meeting, Lilongwe, 30 October 2018***

At its 2015 Annual Conference, the Southern African Chief Justices' Forum (SACJF) adopted a resolution to:

Establish an ad hoc team of Judicial Service Commissions from the region to work towards developing regional principles and guidelines on selection and appointment of judges in Africa to be presented to the SACJF for discussion and adoption at its 2017 Annual Conference.

The Democratic Governance and Rights Unit (DGRU) of the University of Cape Town (UCT), which participated at the 2015 Annual Conference, undertook to conduct research into the selection and appointment processes followed by countries in the SACJF grouping.

The ad hoc team contemplated by the 2015 resolution was established. This working group was chaired by Justice Makarau of the Supreme Court of Zimbabwe, and includes Chief Justice Twomey of the Seychelles, and retired Chief Justice Othman of Tanzania. The working group met in Johannesburg in April 2018 to develop an initial draft of the guidelines. This document was circulated among members of the group for further comment and input.<sup>2</sup>

<sup>2</sup> The working group was assisted in this task by Chris Oxtoby of the DGRU. The working group wishes to acknowledge the assistance of Mr Musa Kika, PhD student at the University of Cape Town, for his work on the fieldwork research; and Ms Joelle Barnes, Executive Legal Assistant to Chief Justice Twomey, for her extensive work on the drafting of the guidelines.





The principles and guidelines are based on the DGRU research. The working group has also taken into account international and regional declarations and instruments relating to judicial appointments.<sup>3</sup>

The research began with desktop research to provide a scoping study of the systems of judicial appointment in the target countries. Based on this initial research, a set of in-depth questions were developed, to be administered to subjects in the second phase of the project. Ethics approval was obtained from the Ethics Committee of the UCT Law Faculty. DGRU researchers then conducted interviews with subjects in Botswana, Kenya, Malawi, Namibia, Seychelles, Tanzania, Uganda and Zimbabwe. The subjects interviewed for each jurisdiction were: a member of the JSC; a member of the organised legal profession, particularly someone who had been engaged with the selection and appointment process; a judge who had recently been appointed, i.e. had recently been through the selection and appointment process; and a member of a civil society organisation who had been engaged with the selection and appointment process. These subjects were selected to provide a broad a range of perspectives. In some instances, researchers were put in touch with more than one subject for a particular category. These additional subjects were also interviewed.

3 The instruments that were taken into account are:

- Commonwealth Lawyers' Association, Commonwealth Legal Education Association and Commonwealth Magistrates' and Judges' Association – *Judicial Appointments Commissions: A Model Clause for Constitutions*, May 2013;
- OSCE and Max Planck Minerva Research Group – *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, June 2010;
- European Network of Councils for the Judiciary – *Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary*, May 2012;
- *Commonwealth (Latimer House) Principles on the Three Branches of Government*, 2003;
- *Venice Commission Report on Judicial Appointments*, 2007; and
- *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges in the Commonwealth*, 2015.



The completed research formed the basis for several stakeholder engagements:

- A panel discussion at the 2016 SADC Lawyers' Association Annual General Meeting in Cape Town;
- A presentation and discussion at the DGRU's 2016 SADC Judges' Forum in Malawi;
- A presentation at a session of the SACJF's 2016 Annual General Meeting in Windhoek;
- A presentation at the SACJF Annual General Meeting in Swakopmund, co-hosted by the UNODC; and
- A panel discussion at the launch of the UNODC's Global Judicial Integrity Network in Vienna in April 2018.

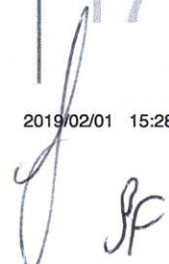
Feedback from these engagements has been incorporated into the further development of the principles and guidelines.

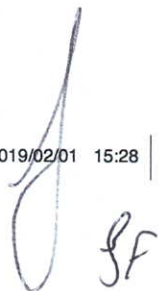
The principles and guidelines have been drawn with the understanding that:

- Judicial appointments are a contentious issue in many jurisdictions across the world.
- No two countries use exactly the same judicial selection and appointment process.
- Given the varied political, economic and social backgrounds of member states it is not an easy task to attempt to prescribe uniform appointment guidelines for the various jurisdictions in the SACJF grouping.

The working group further notes that the jurisdictions making up the SACJF have varying constitutional and legislative provisions governing the selection and appointment of judicial officers. The various jurisdictions have differing bodies involved in the selection and appointment of judicial officers, and the working group is aware of the complexities arising from the terminology used in the different jurisdictions.

The DGRU's work on this project took place in partnership with the International Commission of Jurists, and with the support of the Hanns Seidel Foundation and the Ford Foundation.

Handwritten signature and initials in the bottom right corner of the page.

A handwritten signature in blue ink, consisting of a large, stylized loop, followed by the initials 'SF' in black ink.