

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

CASE NO: 2023-129593

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

APPLICANT'S SUPPLEMENTARY FOUNDING AFFIDAVIT



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 matter. I deposed to the applicant's founding affidavit. I am duly authorised to depose to this supplementary affidavit, filed in terms of Rule 53(4) of the Uniform Rules, 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.
- 4 For the sake of convenience, I use the same abbreviations in this affidavit as the founding affidavit unless otherwise indicated.

FUL'S AMENDED RELIEF AND THE PURPOSE OF THIS AFFIDAVIT

- 5 FUL's application, launched on 6 December 2023, was brought in two parts. Part A is an urgent review of the JSC's failure to appoint candidates to fill the SCA vacancies during the October 2023 interview process, while Part B

contains a broader challenge aimed at the constitutionality of the judicial appointment process as a whole.

6 In its initial notice of motion:

6.1 in Part A, FUL sought the urgent review and setting aside of various decisions of the JSC on 2 and 3 October pertaining to the failure of the JSC to fill all vacancies on the Supreme Court of Appeal in circumstances where there were appropriately qualified and fit and proper candidates for appointment, who reflected the racial and gender demographics of South Africa. In its founding affidavit, FUL sets out why the failure to fill the two remaining vacancies is irrational and a violation of the JSC's constitutional duties. FUL did not seek to set aside or declare unlawful the JSC's proceedings on 2 and 3 October. It was only the failure to fill the remaining two vacancies that was impugned in FUL's application; and

6.2 in Part B, FUL sought orders declaring unlawful 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, and directing the JSC to develop such criteria within three months and 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.

- 7 As will be set out more fully below, the Rule 53 Record delivered by the JSC in this matter, and in particular the transcript of the JSC's deliberations, underpins and highlights the urgent need for the relief in Part A to be granted. It also makes clear the need for the broader relief sought in Part B in order to safeguard the constitutional integrity of the JSC's judicial appointments process going forward.
- 8 However, the Rule 53 Record is revealing of proceedings so flawed that FUL has amended its notice of motion in this application to seek additional relief. This additional relief is fully set out in its amended notice of motion, filed in terms of Rule 53(4). In Part B of its amended notice of motion, FUL seeks an order declaring the JSC proceedings on 2 and 3 October inconsistent with the Constitution and unlawful insofar as the failure to recommend candidates for the two remaining vacancies on the SCA is concerned.
- 9 There can be no doubt that all conduct of the JSC constitutes an exercise of public power and, as such, must comply with the principle of legality. Failure to do so renders the conduct unconstitutional and it falls to be declared invalid under the Constitution. The JSC's failure to consider overwhelmingly relevant considerations and the JSC's considering of patently irrelevant factors pursuant to an irrational process means that its proceedings of 2 and 3 October 2023 relating to the two remaining SCA vacancies were inconsistent with the Constitution and consequently invalid.

- 10 Where there is clear evidence of unlawfulness (as there is in this instance), it is not possible to shy away from or ignore that unlawfulness. Section 172(1)(a) of the Constitution requires that a court *must* declare conduct inconsistent with the Constitution to be invalid to the extent of its inconsistency. It is on this basis that FUL seeks the amended relief in Part B.
- 11 Notwithstanding the invalidity of the proceedings in so far as the JSC's filling of the SCA vacancies is concerned, FUL does *not* seek an order setting aside the appointments of judges made pursuant to the process held on 2 and 3 October 2023, namely Judges Kathree-Setiloane and Kgoele. The relief sought in FUL's amended notice of motion therefore does not impugn the appointment of these judges.
- 12 Although a court must declare conduct inconsistent with the Constitution invalid to the extent of its inconsistency, it has a discretion in terms of section 172(1)(b) of the Constitution to make any order that is just and equitable.
- 13 I submit that it would not be just and equitable for the appointment of Judges Kathree-Setiloane and Kgoele to the SCA to be set aside in circumstances where:
- 13.1 Judges Kathree-Setiloane and Kgoele were recommended for appointment by a majority of the JSC commissioners;

13.2 Judges Kathree-Setiloane and Kgoele were appointed by the President of the Republic in terms in terms of section 174(6) of the Constitution upon the recommendation of the JSC; and

13.3 such relief is, in any event, not sought by FUL.

14 In the circumstances, I submit that the appointment of Judges Kathree-Setiloane and Kgoele are not impugned by this application. Prayer 2 of Part B of FUL's amended notice of motion puts this beyond doubt.

STRUCTURE OF THE REMAINDER OF THIS AFFIDAVIT

15 I structure the remainder of this affidavit as follows:

15.1 First, I deal with the delay of the JSC in delivering the Rule 53 Record and its assertions of confidentiality over the transcript of the deliberations of the JSC following the candidate interviews.

15.2 Second, I explain why the portions of the record over which the JSC asserts confidentiality are relevant to these proceedings and may not be shrouded in secrecy.

15.3 Third, I deal with FUL's further grounds of review which additionally justify the review and setting aside of the JSC's proceedings on 2 and 3 October 2023, as sought by FUL in prayer 1 of Part B its amended notice of motion.

15.4 Finally, I conclude.

THE RULE 53 RECORD

- 16 It bears repeating, as set out in paragraphs 70 to 75 of the founding affidavit, that FUL's attorneys (Nortons Inc.) gave the JSC early notice of its intention to launch urgent review proceedings concerning the JSC's failure to fill two vacancies at the SCA at its proceedings of 2 and 3 October 2023. FUL's attorneys requested that the record of the JSC's deliberations be provided *before* the launch of FUL's application in light of the urgency of the matter and so as to expedite the matter. This reasonable request was refused by the JSC. The JSC's response and attitude was that its obligation to produce a record could only arise after FUL launched a review application in terms of Rule 53. A copy of the JSC's letter dated 23 November 2023 is attached to FUL's founding affidavit marked "JF10".
- 17 FUL accordingly launched the present review proceedings and sought to obtain the JSC's deliberations through Rule 53 of the Uniform Rules of Court.
- 18 An unsigned copy of FUL's notice of motion and founding affidavit was served on the JSC on 29 November 2023 (with the signed copy being served on 6 December 2023).
- 19 The notice of motion required the Rule 53 record to be filed by 7 December 2023. This date was set in light of the urgency of the matter given the ongoing vacancies at the SCA and the need for the vacant seats to be properly filled without delay.

- 20 On 30 November 2023, the day after the unsigned notice of motion was served on the JSC, FUL's attorneys wrote to the JSC reminding it of the fact that the record was required to be provided by 7 December 2023.
- 21 Notwithstanding the urgency of the matter, the JSC failed to file anything by the deadline in FUL's notice of motion.
- 22 On 8 December 2023, FUL's attorneys addressed correspondence to the JSC to enquire as to the contact details of the JSC's attorneys in order to enquire about why the record had not been delivered. FUL's attorneys were informed that the JSC would "*revert in due course*". A copy of this email is annexed marked "**SF1**".
- 23 On 12 December 2023, FUL's attorneys again addressed a letter to the JSC, a copy of which is annexed marked "**SF2**". The letter reiterated the importance of the record being provided without further delay so as to ensure that the matter could be heard on an urgent basis as set out in FUL's notice of motion. The letter continued by recording that a failure to provide the record would result in steps being taken to compel the production of the record in compliance with the provisions of Rule 53.
- 24 On 14 December 2023, FUL's attorneys received a letter from the secretariat of the JSC on behalf of the Chairperson of the JSC, the Chief Justice, and indicating that he had not previously been aware of the issues raised, but the JSC would revert early the following week. A copy of this letter is annexed marked "**SF3**". On 20 December 2023, a further letter was

received in which the JSC indicated that the record was ready, but that the JSC was facing difficulties in obtaining an attorney from the State Attorney's office to assist on the matter and lodge it with the Registrar. A copy of this correspondence is annexed marked "SF4".

25 On 14 December 2023, FUL's attorneys served a Rule 30A Notice on the JSC calling upon the JSC to deliver the record of decision, a copy of which is annexed marked "SF5".

26 On 9 January 2024, more than a month after the record was required to be delivered, the State Attorney addressed correspondence to FUL's attorneys under cover of which it delivered an incomplete Rule 53 Record. The record included the four "Shortlist Books" that served before the JSC on 2 and 3 October, and the transcripts of the interviews with the candidates, but *excluded* the transcript of the JSC's deliberations. A copy of the letter is annexed marked "SF6".

27 The letter apologises for the delay in delivering the record. The letter further expressly recognises that the JSC is obliged to provide a copy of the transcript of deliberations under the Constitutional Court's judgment in **Helen Suzman Foundation v Judicial Service Commission** [2018] ZACC 8; 2018 (4) SA 1 (CC) ("HSF"). Nonetheless, the letter goes on to state: "*However, that judgment also recognizes that the JSC has legitimate interests in preserving the confidentiality of its deliberations, and that those interests can be appropriately protected by a confidentiality regime, limiting the disclosure of the deliberations.*"



- 28 The letter further stated that the JSC had not yet taken a decision on whether its deliberations should be made publicly available or should be provided subject to a confidentiality regime. An undertaking was given that the JSC would confirm whether it intends to assert that the deliberations should be confidential, by 15 January 2024. The letter also recorded that in the event that the JSC decides to assert confidentiality, and absent an agreement in this regard from FUL, the JSC would “*approach the High Court for the necessary orders or directives.*”
- 29 The letter proposed an interim confidentiality regime under which the deliberations would be treated as confidential in the interim and be provided to members of FUL, its attorneys and counsel who signed confidentiality undertakings, while the JSC considered whether it wished to claim the transcript of the deliberations as confidential.
- 30 Given the already inordinate delays occasioned by the JSC’s conduct, FUL agreed to the interim confidentiality regime, without in any way conceding that there was any basis for the assertion that the deliberations were confidential. FUL did so in order to avoid further delays in the prosecution of its urgent application, and in so agreeing, FUL’s attorneys recorded FUL’s view that there is no basis at all for claiming that the deliberations of the JSC are confidential and that it would oppose any attempt to assert confidentiality over the record of deliberations.
- 31 The transcript of the deliberations was delivered to FUL’s attorneys subject to the interim confidentiality regime on 17 January 2024, and made



available to members of FUL, FUL's attorneys and counsel who had signed confidentiality undertakings.

32 After considering the transcript of the deliberations provided by the JSC, FUL maintains that there is no basis for the JSC, as an organ of state and public body, to refuse to make public any part of the record of its deliberations. The JSC's failure to file the complete Rule 53 Record and its claim of confidentiality over the transcript of its deliberations has occasioned considerable delay and prejudiced FUL and the public by preventing the urgent hearing of this application.

33 On 22 January 2024, FUL's attorneys addressed further correspondence to the State Attorney, a copy of which is annexed marked "SF7". The letter repeats FUL's view that there is no basis on which to assert any confidentiality over the transcript of the JSC's deliberations and records:

"should the JSC still persist with seeking to keep the record from open and public scrutiny, then that will be for the JSC to litigate as a matter of urgency which does not disrupt the timetable;

FUL shall accordingly be preparing its supplementary founding affidavit on the basis that transparency and open justice require that the record can be referred to, and shall aim to file a publicly available supplementary founding affidavit which references the record, by 25 January;

FUL expects to hear from the JSC also by no later than close of business today that the JSC accepts that the record can and should be openly referenced;

should the JSC nevertheless seek to keep the record secret, then it should seek to obtain an order to that effect that respects the timetable, and hence should do so before 25 January."

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

- 34 Consistent with the JSC's lack of alacrity, no response was received by 22 January. Instead, on the afternoon of 24 January 2024 (the day before this affidavit was due to be delivered), the JSC indicated that it *does* intend to assert confidentiality over certain portions of the transcript of its deliberations that it considers "*irrelevant*" to the present application. A copy of the letter in question is annexed marked "SF8". Annexed to this letter was a transcript with certain portions of the deliberations redacted. A copy of the redacted transcript of deliberations is annexed marked "SF9".
- 35 The JSC has not made out any fact-specific case for why the portions of the transcript of its deliberations should be confidential nor has it asserted any legal or constitutional justification for excluding those portions of the transcript of its deliberations from the public record of these proceedings on the basis of its unilateral assertion of "*irrelevance*".
- 36 The claim that the redacted portions are "*irrelevant*" to the application is unavailing: it is not for the JSC to determine the question of what is and is not relevant to the review proceedings, even before the supplementary founding affidavit and amended notice of motion has been filed in terms of Rule 53(4). Information is relevant if it throws light on the decision-making process and the factors that were at play in the mind of the decision-maker.
- 37 Indeed, the JSC cannot justifiably assert confidentiality over the transcript of its deliberations on the basis of "*relevance*". The transcript of the deliberations is revealing, as fully explained below, of unfair and improper assertions impugning the dignity and privacy of candidates, which have no



basis in fact. That these utterances are made and biases displayed by members of the JSC, a constitutionally-enshrined institution responsible for the appointment of judges in South Africa, is a fact that can never legitimately be shielded from public scrutiny. The Constitutional Court, in **HSF**,¹ has already held that “*the JSC cannot appropriately expect unfair or improper assertions made during deliberations to be shielded from disclosure*” in the public domain.²

38 However, given the JSC’s stance around “*relevance*”, it is necessary for FUL to file certain aspects of this affidavit confidentially, pending a determination of the question of confidentiality by the Court in due course. In the premises, FUL will file a “public” version of this affidavit, and a confidential version, to be disclosed only to the Court and to the JSC. It does so to avoid any further delays in the litigation by the JSC, and to avoid the JSC through its threatened application around confidentiality – as portended in its letter of 24 January – to continue to hold up the progress of this matter. FUL will ask for the issue of confidentiality to be determined at the outset of the hearing of this matter.

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

² *Ibid* at para 39.



The portions of the record of deliberations claimed as confidential are highly relevant to the proceedings

39 [REDACTED]
[REDACTED]

39.1 [REDACTED]
[REDACTED]

39.2 [REDACTED]
[REDACTED]
[REDACTED]

40 [REDACTED]

40.1 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

40.2 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]



[REDACTED]

41 [REDACTED]

42 The most alarming aspect of the JSC's conduct, though, is that there is no attempt to justify the assertion of confidentiality on any basis, and absent such justification the whole record is clearly relevant and damning of the impugned process.

Request for a ruling on confidentiality by the Court

43 Despite the request contained in FUL's attorney's letter of 22 January 2024:

43.1 the JSC has delayed in taking a decision on the confidentiality aspect, thus again undermining the timetable for an urgent hearing;

43.2 the JSC has elected not to bring the urgent application it now threatens, in a manner that would have allowed the timetable to be kept; and

43.3 the JSC has failed to justify the redaction of clearly relevant portions of the record, which FUL intends to reference in order to highlight highly material considerations that were not taken into account, immaterial considerations that played a part in the deliberations and decision-making process, and procedural failings that the JSC was expressly alerted to, but ignored.

44 FUL intends to write one last letter to the JSC, bringing to its attention the unsustainability of its position, and requesting that the JSC reconsider its position.

WHAT THE RULE 53 RECORD REVEALS

45 The Rule 53 record, in the first instance, confirms the grounds of review in FUL's founding affidavit. Indeed, the Rule 53 record filed by the JSC significantly bolsters FUL's grounds of review set out in its founding affidavit and fully justifies the relief sought in FUL's initial notice of motion.

46 Not only does the Rule 53 record confirm FUL's grounds of review and justify its relief, but it also makes it clear that there are a number of additional grounds of review and is revealing of a fatally flawed process.

47 In short, what the Rule 53 Record reveals is that:

47.1 The JSC failed to take into account the overwhelmingly relevant factor that the SCA is facing a skills shortage and needs "*heavy lifters*" to replace the skills that have recently been lost.

47.2 The JSC took into account wholly irrelevant factors, namely improper, baseless and unfair allegations that were made during deliberations without substantiation and without having been put to the candidate in question during the interviews.

47.3 The Chief Justice, as the chair of the JSC, acted irrationally or unlawfully in failing in his duties as chairperson of the JSC³ (i) to address, unfair and improper allegations made by Commissioners during the deliberations and (ii) to direct members of the JSC not to take into account such allegations in voting. The Chief Justice bore a duty to preserve the order of the proceedings on 2 and 3 October 2023, to take care that the proceedings are conducted in a proper manner, to forbid irrelevant discussion and improper allegations not put to candidates, and to ensure that the sense of the deliberations is properly ascertained with regard to the Criteria and Guidelines for Judicial Appointment. The duty of the chair of the JSC to enforce the Criteria and Guidelines⁴ includes overruling improper allegations and ensuring that Commissioners are warned that such allegations are not proper considerations that can be allowed to play any role in the voting or deliberations.

48 In what follows, I explain the additional grounds of review arising from the record, which form the basis for the relief sought in prayer 3 of FUL's

³ Section 1 of the Judicial Service Commission Act 9 of 1994.

⁴ Paragraph 33 of the Criteria and Guideline provides that "It is the duty of the chair of the JSC to enforce this guideline."



amended notice of motion reviewing and setting aside the JSC's proceedings on 2 and 3 October, and also forming the basis for the broader relief which is sought in Part B.

ADDITIONAL GROUNDS OF REVIEW

First additional ground: The JSC failed to take into account relevant considerations and took into account irrelevant considerations

49 It is evident from the transcript of the JSC's deliberations that the JSC took into account irrelevant considerations when making its decision as to whom to recommend for appointment to the SCA and failed to take into account relevant considerations.

Eschewing relevant considerations

50 During the deliberations, the Deputy President of the SCA, Justice Petse, who filled in for the President of the SCA, cautioned that the SCA is facing a skills shortage and urgently requires the appointment of more experienced judges.

51 The Deputy President explains the looming crisis at page 5, line 12 to page 6, line 11 of the transcript as follows:

"[I]n the past three, four years, the SCA has lost a number of experienced judges through retirement and elevation to the Constitutional Court... In total adding up to 240 years of judicial experience that the SCA has lost in the recent past. Then this brings me to the next question as to what the needs of the court at this



particular point in time are. The SCA occupies a unique position as a National Appellate Court. **It desperately needs what I would call heavy lifters, lawyers of substance.** ... Senior colleagues at the court, I have to say this, are battling under pressure. They have reached a point where it has become exceedingly onerous for them to hold the hand of the least experienced judges. What this entails is that each one of us in the SCA must be competent to a degree that each of those judges should work independently, to produce a judgment, the quality of which will not render it necessary that other judges should, in effect, rewrite the judgment. And I make good to say that within the confines of this room, **I can foresee that the crisis is looming in the horizon and unless drastic steps are taken to arrest this it may have a negative impact on the performance of the Supreme Court of Appeal** to the detriment of the litigants. This would not serve public interest.”

(Emphasis added)

52 The Deputy President of the SCA is particularly well-qualified to provide insight into the appointments process for the SCA and his characterisation of the looming crisis and the SCA's immediate needs to avert such crisis is an eminently relevant factor which should have been given due and proper consideration by the JSC as a material consideration. Failing to consider that factor, or explain properly why it was overlooked, infects the entire process with irrationality. Notably, the reasons given by the JSC as collated by the Chief Justice (and which were attached to my founding affidavit as JF7), are the only reasons that are permissibly advanced by the JSC – and further notably, there is no explanation there for why or how this materially relevant factor advanced by Petse DJP was overlooked or permissibly outweighed by the other discussions.

53 The Deputy President was also able to convey the views of the presiding judges at the SCA who would have worked with the candidates for appointment during their prior acting appointments at that Court. The

Deputy President conveyed, at page 7, lines 20 to 21, that "*Judge Unterhalter enjoys the overwhelming support of all nine presiders.*" The views of the presiding judges too, conveyed through the Deputy President, should have been taken into consideration as a weighty material factor by the JSC in light of their direct and relevant experience of the candidates – and the fact that those views of "*all nine presiders*" confirm not only Judge Unterhalter's work rate and ability but also that he is a team-player that is supported by all other members of that esteemed team of "*nine presiders*".

54 Yet, Justice Petse's warning of the looming crisis at the SCA and the unanimous support of the SCA judges who know Judge Unterhalter's judicial ability, aptitude and team-spiritedness best, was blithely ignored by the Commissioners. This is demonstrated by their failure to fill the remaining two vacancies on the SCA in circumstances where there were appropriately qualified and fit and proper candidates for appointment, who reflect the racial and gender composition of South Africa. It is further demonstrated in particular by the JSC's failure to appoint Judge Unterhalter despite his being described repeatedly as a "*heavy lifter*"⁵ – fitting the description of the kind of judge who is urgently needed at the SCA.

55 Moreover, the failure of the JSC Commissioners to take into account the Deputy President's expression of the needs of the SCA and the views of

⁵ See, as a sample, Commissioner Ngcukaitobi SC at page 38 lines 20 to 24 of the transcript; Minister Lamola at page 10 line 23 of the transcript.

presiding judges at the SCA is made plain on the transcript of the deliberations.

55.1 [REDACTED]

55.2 This outrageously incorrect view vitiates the process entirely – jettisoning the views of the SCA judges entirely as being irrelevant.

55.3 [REDACTED]

56 The problem with failing to give any or adequate consideration to the looming crisis at the SCA as outlined by Deputy President Petse is explained most appropriately by Commissioner Ngcukaitobi SC. He says, at page 34, line 24 to page 35, line 8:

[REDACTED]

⁶ With the apparent and unexplained exception of Judge Kathree-Setiloane who was the fourth judge recommended by Deputy President Petse.

[REDACTED]

57 What is more, there was no corrective or constitutional discipline imposed by the Chief Justice. Despite those warnings by eminent counsel (echoed by Baloyi SC), the JSC was permitted to continue with a process that entailed the palpable unlawfulness of overlooking what the SCA's unanimous views were through Petse DJP, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The JSC, through the Chief Justice, thus permitted a palpable unlawfulness to infect the entire process.

58 For these reasons, the process that was followed during the proceedings of 2 and 3 October was irrational, unlawful and contrary to the rule of law. It must be declared as such.

Embracing irrelevant considerations

59 The transcript of the deliberations of the JSC following the interviews of the candidates for appointment to the SCA on 2 and 3 October 2023 reveals that during the deliberations: (i) serious allegations were made against Judge Unterhalter without the allegations having any basis in fact or any substantiation being provided for the allegations; and (ii) such serious

allegations were made during deliberations without the allegation ever being put to the candidate as required by the JSC's Criteria and Guidelines. Such allegations are plainly irrelevant considerations and cannot be taken into account in deciding whom to recommend for appointment, as they have no basis in fact and were not put to the candidate.

60 Not only were such allegation taken into account, the record shows that they were treated as disqualifying factors instead of being weighed against other factors, as the JSC's Criteria and Guidelines require.

61 The following are among the irrelevant considerations that, from the record, influenced the JSC's decision not to recommend Judge Unterhalter for appointment to the SCA.

61.1 Commissioner Singh says, at page 12, lines 13 to 20: *"I have a difficulty with Judge Unterhalter. He is a great jurist. He knows a lot and, but from where I sit, and I may be wrong, when you in the SCA you are a team player and I did not get the impression in the way that he answered today that he's a team player"*.

61.2 Commissioner Dodovu says, at page 14 of the transcript, lines 20 to 21: *"Unterhalter has got this sense of entitlement and importance"*.

61.3 Neither of these allegations is at all substantiated or based on any facts that were before the JSC. Moreover, the allegations were not put to Judge Unterhalter at any point during his interview. I attach a copy of the transcript of Judge Unterhalter's interview on 3 October



2023 marked "SF10", which puts the absence of any such questions in the interview beyond doubt.

61.4 These allegations – even setting aside their baselessness – are treated as disqualifying criteria when they plainly are not and are used to disqualify Judge Unterhalter instead of being appropriately weighed against the other criteria for appointment as contained in the JSC's Criteria and Guidelines. Furthermore, as I have already said, those allegations are palpably irrational and irrelevant when weighed against the obviously rational and material views of "*all nine presiders*" of the SCA who endorsed Judge Unterhalter – and who by doing so obviously confirmed that he was a team-player amongst the jurists and judges, otherwise why would they unanimously have wished to have him join the team of SCA judges in Bloemfontein.

61.5 More worryingly, Commissioner Dodovu goes on to say at page 15, lines 17 to 20: "*We must deal with this arrogance, and it is on those basis (sic) that I will not support this candidate*". This gives the undeniable impression that the Commissioner would not make a recommendation on the basis of an impartial assessment of the candidate as against the JSC's Criteria and Guidelines, but would refuse to support Judge Unterhalter's candidacy to "*deal with*" (punish) his supposed arrogance.


61.6 Most egregiously, the transcript reveals that Commissioner Malema made serious, unsubstantiated allegations of racism against Judge Unterhalter.



61.7 Commissioner Malema says, at page 17, lines 12 to 25:

"I like the racism of the Afrikaners because they don't hide it. It does not come in a subtle way. It is open. It is arrogant as that they tell you what they want and they give it to you like that. You know what you are dealing with. But I am very sorry. This is what we are dealing with here. I will never support such an attitude and I will never succumb to subtle racism that masquerade itself as being intelligent. I don't agree with the Minister that he was trying to be clever with us. He was being himself. A person who looks down at very senior judges because they are of a different colour and that they cannot tell you what to do. We have dealt with such characters before in the JSC who felt they can go to the Constitutional Court, they can go anywhere they want."

61.8 Commissioner Malema goes on to say, at page 18, line 23 to page 19 line 8:

 ... *If anything, he came across as being arrogant as I know it all. No one is going to tell me anything, this is what I stand, despite the fact that we tried all... [indistinct]. To accept such attitude is to accept subtle attitude – I mean racism of liberals that people spoke about. They never come across as being racist and looking down at you, but come across as being intellectually superior and patronising you and making you think that, no, you are smart and all of that, only to realise that you are being finished."*

61.9 This most serious allegation of racism is made without any substantiation whatsoever and is not based on any facts before the JSC. The allegation would most certainly qualify as a "serious disqualifying allegation", which the JSC's Criteria and Guidelines require to be raised with a candidate only if "sufficient substantiation for the allegation exists" and only after the candidate has been given "an adequate opportunity to consider and address the allegation". The allegation was never put to Judge Unterhalter, but was instead

raised for the first time in deliberations, and Judge Unterhalter was given no opportunity to address it.

61.10 The allegation that Judge Unterhalter is "*racist*" appears to be the Commissioner's subjective impression not based on fact or on the material canvassed in the application or the interview. There is no basis for this assertion – nor is there any attempt to substantiate the assertion.

62 These unfair and improper allegations not only plainly formed the bases for these Commissioners' own votes, but were intended to influence other Commissioners as to their vote. Again, the JSC did not through the Chief Justice, seek to stop such unconstitutional and offensive allegations from influencing or intending to influence the Commissioners – not a word was said about them, nor was Commissioner Malema told that such allegations were improperly made, nor were other Commissioners instructed to ignore such allegations – and that, despite the JSC having been warned by present Commissioners like Ngcukaitobi SC and Baloyi SC that the process was likely to be procedurally unfair.

63 The transcript of the deliberations of the JSC, read together with the reasons provided by the JSC for its decision, lead ineluctably to the conclusion that these unfair and improper allegations were taken into account in deciding not to recommend Judge Unterhalter for appointment.

64 On this ground too, the process that took place on 2 and 3 October must be declared unconstitutional and invalid.

Conclusion on this ground of review


65 The JSC's taking irrelevant considerations into account and its failure to take relevant considerations into account renders the JSC's proceedings on 2 and 3 October irrational, unlawful and unconstitutional.

66 The only rational outcome of the JSC's proceedings on 2 and 3 October 2023 – if the JSC had considered all relevant factors and had not taken into account irrelevant factors – is the recommendation of Judge Unterhalter for appointment to the SCA.

67 Indeed, Commissioner Ngcukaitobi SC explains why – if the Deputy President's warning of the looming crisis at the SCA is taken seriously – the only rational outcome is to recommend Judge Unterhalter for appointment. He explains at page 38 lines 20 to 24: *"So if you are looking for the judges that can do the heavy lifting but who will think for the future, then we have Judge Unterhalter by far the best candidate that we have."*

Second additional ground of review: the Chief Justice's unlawful or irrational abdication of his duties as chair.

68 The Chief Justice presides at the meetings of the JSC. This is mandated by section 178(1)(a) of the Constitution.

27


- 69 The role of the Chief Justice as the chair of the proceedings is of critical importance to ensure that candidates are treated fairly and equally in the judicial appointment process. It is the duty of the chair to ensure that the JSC's Criteria and Guidelines are appropriately applied by Commissioners both during the interview process and during the deliberations stage.
- 70 At the deliberations stage, where a Commissioner departs from the JSC's Criteria and Guidelines raising improper and unfair allegations against any candidate, it is the duty of the Chief Justice to bring about a swift end to such conduct. Such conduct cannot be permitted to continue unabated without poisoning the entire procedure.
- 71 This duty is heightened where, as is the case in the present matter, serious disqualifying allegations – including accusations that are contrary to the core values of our Constitution, including dignity and non-racialism – are raised without any substantiation and without the candidate having been provided with any opportunity, let alone an adequate one, to respond to the allegations. This is in direct violation of the JSC's Criteria and Guideline, and the Constitution itself, which imposes an obligation on the JSC (and the Chief Justice, *par excellence*) to act consistently with the obligations under section 7(2) of the Bill of Rights, section 237 of the Constitution, and section 195 of the Constitution.
- 72 Moreover, if unfair and improper allegations have been made during the deliberations stage, it is plainly the duty of the chair to instruct commissioners to disregard such allegations when voting. It is the chair

who must explain the criteria that should be taken into account by commissioners in deciding who to recommend for appointment.

73 As such, the Chief Justice had a duty in these proceedings under consideration to ensure that the unfair and improper allegations, including those made against Judge Unterhalter, were appropriately addressed. As I have explained above, the Chief Justice failed in this duty. At no point did the Chief Justice seek to reprimand or prevent any Commissioner from breaching the JSC's Criteria and Guidelines or from making unfair and improper allegations against Judge Unterhalter; nor did the Chief Justice make any effort to ensure that such allegations would not be taken into account in the voting. The Chief Justice – in failing to perform his duty – allowed the JSC to arrive at a decision irrationally and unconstitutionally, and by reference to palpably irrelevant considerations.

74 Moreover, the Chief Justice should have been aware that the proceedings would be irrational and rendered unlawful in light of the unfair and improper allegations made against Judge Unterhalter by some Commissioners. He was warned by no less than two Commissioners on the JSC – both of whom are esteemed senior counsel:

74.1 Commissioner Baloyi SC explained, at page 26, lines 18 to 22, that arrogance *"is not a disqualifying factor"* and, at page 27, lines 1 to 4 that *"we will not be able to withstand scrutiny if the disqualifying criteria or factor that we use, if that is our disqualifying criteria that he was arrogant. I do not see how we will get [past] that."*

74.2 Commissioner Ngcukaitobi SC made the point forcefully at page 36 to 37 of the transcript. He says that Judge Unterhalter is the “*only judge that has been singled out for criticism*”. He explains that there is no basis for the assertions that Judge Unterhalter is not a team player, has a sense of entitlement or superiority, or is racist and that these assertions were not put to Judge Unterhalter during the interview.

74.3 He goes on to say at page 37 lines 13 to 21:

“If Judge Unterhalter was demonstrating superiority, he was demonstrating arrogance, was demonstrating racism, those are very, very serious charges. And if they are to be taken into account without a factual basis and without them being put to them. Then this body would be acting irrationally. ... One commissioner referred to defeat in the attitude. The Commission is not here to defeat anything. It is here to select the best possible judge for the country, not for ourselves. So we have no scores to settle with candidates.”

75

[REDACTED]

Conclusion on this ground of review

76 The failure of the Chief Justice to ensure the application of the JSC’s Criteria and Guidelines and compliance with the Constitution itself threatens the integrity and reputation of the JSC. It will inevitably lead to a loss of trust in the appointment procedure, which will in turn impact upon the efficacy and credibility of the judiciary. In the case of 2 and 3 October, it resulted in a failure of the process and requires this Court to declare the proceedings unlawful and invalid.

30


CONCLUSION

77 FUL accordingly asks for an order in terms of Part A and Part B of its amended notice of motion for the reasons given in its founding affidavit and supplemented above.

78 In addition, I should note that in the interim since the launching of the application, FUL's attorneys have received a letter from the Judge President of the KwaZulu Natal Division of the High Court consenting to the citing of Judge Masipa as a respondent in these proceedings. I attach a copy of this letter as "SF11".



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 CAPE TOWN on this the 25 day of **JANUARY 2024**, 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,
Claremont, 7708

SF 1

Anton Roets

From: Dimakatso Ramaisa <DiRamaisa@judiciary.org.za>
Sent: Friday, 08 December 2023 12:41
To: Anton Roets; Nina Christina Greyling; Mbali Mondlane; Ndivhuwo Tshubwana; Tebogo Phaahlamohlaka; Tshepiso Ramonyai
Cc: Michelle Rawlinson; Anthony Norton; Gomolemo Sibeko
Subject: RE: Freedom Under Law (RF) NPC / Judicial Service Commission and Others

Dear Mr Roets

Your email herein is noted. I will revert in due course with guidance on your enquiry.

Kind regards,
Dimakatso

From: Anton Roets <anton@nortonsinc.com>
Sent: Friday, 08 December 2023 09:40
To: Dimakatso Ramaisa <DiRamaisa@judiciary.org.za>; Nina Christina Greyling <nina@nortonsinc.com>; Mbali Mondlane <MMondlane@judiciary.org.za>; Ndivhuwo Tshubwana <NTshubwana@judiciary.org.za>; Tebogo Phaahlamohlaka <TPhaahlamohlaka@judiciary.org.za>; Tshepiso Ramonyai <TRamonyai@judiciary.org.za>
Cc: Michelle Rawlinson <michelle@nortonsinc.com>; Anthony Norton <anthony@nortonsinc.com>; Gomolemo Sibeko <gomolemo@nortonsinc.com>
Subject: RE: Freedom Under Law (RF) NPC / Judicial Service Commission and Others

Dear Dimakatso

Could you please provide us with the contact details of the JSC's attorneys who will be handling this matter?

Kind regards

Anton



(Disclaimer: 1) Confidentiality: This email, sent from anton@nortonsinc.com to dimakatso@judiciary.org.za on Fri, 8 Dec 2023 07:39:59 (GMT), 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 a named addressee, please notify the sender immediately by e-mail 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 constitute 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 expressed 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 sender'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: Dimakatso Ramaisa <DiRamaisa@judiciary.org.za>
Sent: Wednesday, December 6, 2023 4:16 PM
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Cc: Ronel Matthysen <RMatthysen@judiciary.org.za>; Neliswa Ngcobo <NeNgcobo@judiciary.org.za>; mjajinozuko@gmail.com; Thandiwe Ntloko <TNtloko@judiciary.org.za>; Nomtandazo Klass <NKlaas@judiciary.org.za>; mjajinozuko@gmail.com; Mxolisi Ngema <MNgema@judiciary.org.za>; Kwena Ramoroka <KRamoroka@judiciary.org.za>; Lucinda Koesnel <LKoesnel@judiciary.org.za>; david.unterhalter.law; Michelle Rawlinson <michelle@nortonsinc.com>; Anton Roets <anton@nortonsinc.com>; Anthony Norton <anthony@nortonsinc.com>; Gomolemo Sibeko <gomolemo@nortonsinc.com>
Subject: RE: Freedom Under Law (RF) NPC / Judicial Service Commission and Others

Good day

We acknowledge receipt of your email.

Kind regards,
Dimakatso Ramaisa

From: Nina Christina Greyling <ninag@nortonsinc.com>
Sent: Wednesday, 06 December 2023 16:01
To: Dimakatso Ramaisa <DiRamaisa@judiciary.org.za>; Mbali Mondlane <MMondlane@judiciary.org.za>; Ndivhuwo Tshubwana <NTshubwana@judiciary.org.za>; Tebogo Phaahlamohlaka <TPhaahlamohlaka@judiciary.org.za>; Tshepiso Ramonyai <TRamonyai@judiciary.org.za>
Cc: Ronel Matthysen <RMatthysen@judiciary.org.za>; Neliswa Ngcobo <NeNgcobo@judiciary.org.za>; mjajinozuko@gmail.com; Thandiwe Ntloko <TNtloko@judiciary.org.za>; Nomtandazo Klass <NKlaas@judiciary.org.za>; mjajinozuko@gmail.com; Mxolisi Ngema <MNgema@judiciary.org.za>; Kwena Ramoroka <KRamoroka@judiciary.org.za>; Lucinda Koesnel <LKoesnel@judiciary.org.za>; david.unterhalter.law; Michelle Rawlinson <michelle@nortonsinc.com>; Anton Roets <anton@nortonsinc.com>; Anthony Norton <anthony@nortonsinc.com>; Gomolemo Sibeko <gomolemo@nortonsinc.com>
Subject: RE: Freedom Under Law (RF) NPC / Judicial Service Commission and Others

Dear Chief Justice and Justices

Further to our email of last week (dated 29 November 2023), please use the dropbox link provided below to download the following documents:

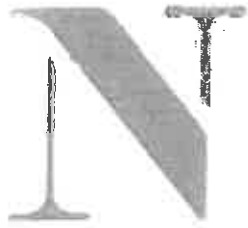
- a) The issued Notice of Motion in respect of the review application;
- b) The Founding Affidavit of Ms February (dated 29 November 2023);
- c) The Supplementary Affidavit of Anton Roets (dated 6 December 2023);
- d) The Notice of Motion in relation to an interlocutory application for condonation supported by the Supplementary Affidavit of Anton Roets;
- e) The Notice in terms of Rule 16A; and
- f) The Notice in terms of Rule 41A.

http://www.dropbox.com/scl/fo/5735utnuv40mw496kcn8i_h7rke?sswdak488akfc2n3a1z0ectfz&dl=0

We shall arrange for a hard copy of the relevant documents to be delivered to the JSC and Judge Masipa (as requested).

Kind regards

Nortons Inc



NORTONS INC.



Disclaimer: 1) Confidentiality: This email, sent from nina@nortonsinc.com to diramaisa@judiciary.org.za, on Wed, 6 Dec 2023 14:00:34 +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 diramaisa@judiciary.org.za please notify nina@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: Nina Christina Greyling

Sent: Wednesday, November 29, 2023 7:31 PM

To: 'diramaisa@judiciary.org.za' <diramaisa@judiciary.org.za>; 'Mondlane@judiciary.org.za' <Mondlane@judiciary.org.za>; 'Mtshubwana@judiciary.org.za' <Mtshubwana@judiciary.org.za>; 'Tphaahlamohlaka@judiciary.org.za' <Tphaahlamohlaka@judiciary.org.za>; 'Tramonyai@judiciary.org.za' <Tramonyai@judiciary.org.za>

Cc: 'Rmatthosen@judiciary.org.za'; Neliswa Ngcobo <NeNgcobo@judiciary.org.za>; 'mjalinozuko@gmail.com' <mjalinozuko@gmail.com>; 'Tritloko@judiciary.org.za' <Tritloko@judiciary.org.za>; 'Nklaas@judiciary.org.za' <Nklaas@judiciary.org.za>; 'mjalinozuko@gmail.com' <mjalinozuko@gmail.com>; Mixolisi Ngema <MixNgema@judiciary.org.za>; 'Kwena Ramoroka' <KwRamoroka@judiciary.org.za>; Lucinda Koesnel <LKoesnel@judiciary.org.za>; 'david@unterhalter.law' <david@unterhalter.law>; Michelle Rawlinson <Michelle@Nortonsinc.com>; Anton Roets <Anton@Nortonsinc.com>; Anthony Norton <Anthony@Nortonsinc.com>; Gomolemo Sibeko <Gomolemo@Nortonsinc.com>

Subject: Freedom Under Law (RF) NPC / Judicial Service Commission and Others

Dear Chief Justice and Justices

Please find enclosed a copy of the unsigned Notice of Motion and the accompanying founding affidavit in the application by Freedom Under Law in relation to the failure by the Judicial Service Commission ("JSC") to recommend four candidates for four vacancies on the Supreme Court of Appeal on 3 October 2023. Please use this link to access a copy of the commissioned founding affidavit as the size of the document is too large to attach to this email - https://www.docbox.com/sd/fi/9jhtbuJ.5543x5at4fv;Founding-Affidavit-and-annexures.pdf?file_id=ya12vc-d2c5xc2kk6uv61mk4&dj=0

As appears from the unsigned Notice of Motion, Part A of the application is being brought on an urgent basis with truncated time periods for the production of the record.

Our client has sought permission from the President of the SCA and the relevant heads of court of the divisions in which the candidates for appointment to the SCA who were not recommended for appointment ("the candidates") serve in a full time or acting capacity for the purposes of obtaining their consent to cite the candidates as respondents in the application given their interest in the matter as contemplated in Rule 47(1) of the Uniform Rules of Court. Once we have received the consent of the heads of court, we will issue and serve the application and include a supplementary affidavit confirming that consent has been provided by the relevant heads of court.

However, given the urgency of the matter, we wished to ensure that copies of the founding affidavit and the unsigned Notice of Motion are provided to the JSC as rapidly as possible.

We confirm that we have obtained consent from all of the candidates to serve the application (which does not seek any relief against them) electronically and in the case of one of the candidates a physical copy will also be delivered.

Kind regards

Anthony Norton / Anton Roets / Michelle Rawlinson / Nina Greyling / Gomolemo Sibeko

Disclaimer:

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URGENT

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Tphaahlamohlaka@judiciary.org.za
Tramonvaji@judiciary.org.za

12 December 2023

Dear Chief Justice and Commissioners

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 As you will be aware, we represent Freedom Under Law NPC (“FUL”).
- 2 On 29 November 2023, we forwarded an unsigned Notice of Motion and the accompanying founding affidavit to the Judicial Service Commission (“JSC”) in the application by FUL in relation to the failure by the JSC to recommend candidates for two of the four vacancies on the Supreme Court of Appeal following its interviews of various candidates on 2 and 3 October 2023. The signed version of the Notice of Motion was served electronically on 6 December 2023. The Notice of Motion provides that:

“TAKE NOTICE FURTHER THAT the first respondent is called upon, on or before 7 December 2023, to despatch the record of its decisions under review and such reasons as it may be required or desires to give to the registrar of this court”.

- 3 This date was set for the reasons explained in the founding affidavit and the previous

Competition Law Specialists | Litigation Attorneys | Regulatory Advice

Directors: Anthony Norton Anton Roets Paul Russell Michelle Rawlinson Warwick Radford Nicola Ilgner
Vice President Economics: Avias Ngwenya
Senior Associates: Nicci van der Walt Nina Greyling Melissa Steele
Company Registration Number: 2009/006902/21 VAT Registration Number: 4510252580

correspondence given the urgency of the matter. However, despite having emphasised the need for expedition in the production of the record in the founding affidavit and the preceding correspondence, we have not yet received a copy of the record or any request for an indulgence in this regard.

- 4 It will be recalled that our client had requested on 17 November 2023 that a copy of the record be provided to it prior to launching the application in order to expedite the preparation of the pleadings (to avoid the delays inherent in having to supplement the founding affidavit and Notice of Motion once the record had been received). It was noted that:

“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 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.

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 On 23 November 2023, the JSC responded to this request in the following terms:

“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”.

- 6 On 30 November 2023, the day after the unsigned notice of motion had been sent to the JSC, a further letter was sent to the JSC in which the JSC was reminded of the fact that the Notice of Motion required that the record be provided by 7 December 2023:

“Our client is open to engage with the JSC on an urgent basis including through mediation as contemplated in Rule 41A of the Uniform Rules of Court to determine whether it may be possible to resolve Part A in a constructive manner that may allow the relief sought in Part A to be achieved as expeditiously as possible. As such, we would be grateful if you would indicate before 7 December 2023 whether the JSC is amenable to such an engagement”.

“It would also be in the public interest, if the JSC does not intend opposing Part A of the application, that it indicates its position in this regard as soon as possible as the matter can then be set down on an unopposed basis. Accordingly, we invite the JSC to indicate by 7 December 2023 (being the date on which the record is to be provided in terms of the Notice of Motion) if it does not intend opposing Part A”.

- 7 It is unfortunate that the JSC has not responded to either of these requests or provided the record. As an aside, we note that our client remains open to engage constructively with the JSC should it wish to engage with our client.
- 8 However, our client is intent on proceeding expeditiously with the application and it is of considerable importance that the record is provided on an urgent basis as our client wishes to supplement its founding affidavit and, if necessary, the relief it seeks as soon as possible to ensure that this matter can be heard on an urgent basis (as set out in the Notice of Motion).
- 9 Given the importance of this matter and the fact that the JSC was forewarned on 17 November 2023 that our client was bringing an application and would require the record for the purposes of

the proceedings, our client had assumed that the record would be produced in terms of the timelines set in the Notice of Motion. Ideally, our client would not wish to have to take steps to compel the JSC to comply with the provisions of Rule 53 (read with the relief requesting that the matter be dealt with on an urgent basis).

- 10 We look forward to hearing from you on an urgent basis. Our client's rights are fully reserved. Should the record not be produced before close of business on 13 December 2023, our client will file a notice in terms of Rule 30A calling upon the JSC to dispatch the record of the decisions which are subject to the review application in terms of Rule 53 and the abridged time periods set out in the Notice of Motion.

Yours sincerely

[Unsigned due to electronic transmission.]

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

SF3



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JUDICIAL SERVICE COMMISSION

Enq: Ms Mbali Mondlane
Tel: (010) 493 2575

14 December 2023

Nortons Inc
PO Box 41162
Craighall
2024

Email: anton@nortonsinc.com

Dear Mr A Roets

Freedom Under Law // Judicial Service Commission and Others concerning the non-filling of two SCA vacancies in October 2023

The above matter refers,

By direction of the Chairperson of the Judicial Service Commission, the Chief Justice, I write to advise you that until yesterday the Chairperson was not aware of the correspondence that you had previously addressed to the Commission and that the Commission will revert to you early next week on the issues you have raised.

Yours faithfully,

Ms Mbali Mondlane
Secretariat: Judicial Service Commission

SF4



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JUDICIAL SERVICE COMMISSION

Enq: Ms Mbali Mondlane
Tel: (010) 493 2575

20 December 2023

Nortons Inc
PO Box 41162
Craighall
2024

Email: anton@nortonsinc.com

Dear Sir

Freedom Under Law // Judicial Service Commission and Others concerning the non-filing of two SCA vacancies in October 2023

1. I refer to my letter to you dated 15 December 2023.
2. By direction of the Chairperson of the JSC, I advise that one of two members of the JSC who are members of the Litigation Committee will contact you or your client in the next few days to talk about a possible mediation in this matter.
3. I also wish to advise you that the record is ready but we are struggling to get the State Attorney to allocate us an attorney who can look at it and confirm that it is in order and then lodge it with the Registrar. We started last week to try and get the State Attorney but we have not been successful so far. We continue to try and get an attorney from the State Attorney's Office. We will advise you as soon as we know which attorney has been allocated to us.
4. Your kind cooperation will be highly appreciated.

Yours faithfully,

Ms Mbali Mondlane
Secretariat: Judicial Service Commission

the Registrar of the above Honourable Court, the record of proceedings which resulted in the decisions under review as defined in the Applicant's Notice of Motion together with such reasons as they are required or may desire to give on or before 7 December 2023.

TAKE NOTICE THAT the Applicant hereby requires the First Respondent to file its record of proceedings in the above matter in terms of Rule 53(1)(b) with the registrar of the above Honourable Court within 10 days hereof, failing which, the Applicant will apply for an order before the above Honourable Court to compel the First Respondent to comply with the provisions of Rule 53(1)(b) by filing the record of proceedings with the registrar of the above Honourable Court, alternatively for an order to strike out any opposition by the First Respondent to the relief sought.

Dated at Johannesburg on this the 14th day of December 2023.



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Brooklyn Bridge Office Park,
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Ref: LK/js/NRT-002

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

AND TO: THE FIRST RESPONDENT
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AND TO: JUDGE DAFFUE
Free State Division of the High Court
Corner Fountain & President Brand Street
Bloemfontein
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AND TO: JUDGE MASIPA
Acting Judge of the Supreme Court of Appeal
Cnr Mirriam Makeba & President Brand Streets
Bloemfontein
Free State
Service per email as agreed: Dr_Masipa@judiciary.org.za

And:

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

AND TO: JUDGE MJALI

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Nr 74 Cnr Victoria & Frere Road
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AND TO: DEPUTY JUDGE PRESIDENT NHLANGULELA
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AND TO: JUDGE SMITH
Eastern Cape Local Division of the High Court, Makhanda
104 - 106 High Street
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AND TO: JUDGE UNTERHALTER
Acting Judge of the Supreme Court of Appeal
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09 JANUARY 2023

Enquires: MR KL GUMEDE

My Ref: 4835/2023/Z42

Email: kl.gumed@sa.gov.za

Your Ref: NEW MATTER

**NORTIONS INCORPORATED
54 MELVILLE ROAD
ILLOVO
JOHANNESBURG**

Dear Mr Roets,

**RE: FREEDOM UNDER LAW (RF) NPC // THE JUDICIAL SERVICE COMMISSION
AND 9 OTHERS**

1. First, I would like to apologise for the delay in filing the Rule 53 Record. As I indicated to you previously, the JSC provided it to us in December 2023. However, it was difficult to brief counsel over the holiday period. We were only able to brief counsel on 4 January 2024. It was necessary for counsel to consider both the application and the Rule 53 Record to ensure it was complete before it could be filed.
2. The Record accompanying this letter contains everything that forms part of the Rule 53 Record except the transcript of the JSC's private deliberations following the

candidates' interviews. The JSC intends to provide your client with a copy of that transcript as it is obliged to do under the Constitutional Court's judgment in *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC). However, that judgment also recognizes that the JSC has legitimate interests in preserving the confidentiality of its deliberations, and that those interests can be appropriately protected by a confidentiality regime, limiting the disclosure of the deliberations.

3. However, the JSC has not yet been able to take a decision whether those deliberations should be made publicly available, or should be provided subject to a confidentiality regime. That is an unfortunate consequence of obtaining instructions from a multi-member body over the holiday period when many members are not available.
4. Our client will, by 15 January 2023, confirm whether or not it intends to assert that the deliberations should be kept confidential. If it does, it will first seek your client's agreement, failing which it will approach the High Court for the necessary orders or directives. If not, it will immediately provide your client with the deliberations.
5. If your client requires immediate access to the deliberations, I am instructed to immediately tender a copy of the deliberations on the following interim basis:
 - 5.1. The deliberations will not form part of the public court file, but will be kept separately and confidentially;

- 5.2. You will provide us with a list of the attorneys in your firm, your counsel, and the members or employees of your client who require access to the deliberations;
 - 5.3. Each of those persons shall sign a confidentiality undertaking which requires them to ensure that no other person who has not signed the confidentiality undertaking has access to the deliberations, and not to disclose the content in publicly filed court documents;
 - 5.4. On receipt of those signed undertakings, we will provide you with a copy of the deliberations; and
 - 5.5. Accepting the deliberations on this basis will not constitute an acceptance by your client that the deliberations should remain confidential, and it will be entitled to contest their confidentiality if the JSC elects to claim confidentiality.
6. We hope your client accepts this offer in good faith. The JSC does not intend to hide its deliberations. It will provide them to your client. The only issue is whether they should also be made public. That is an issue it requires a short additional period to consider. It cannot provide them without restrictions until it has taken that decision.
 7. The JSC recognizes that its delay in providing the Record will likely make it impossible for this matter to be heard on 31 January 2024. The issue of confidentiality needs to be resolved, your client will need to supplement its founding papers, our client will need to answer, your client will need to reply, and the parties will need to prepare heads of argument. It does not seem possible for that to be



completed in time for a hearing on 31 January 2024. It may, in any event, be inappropriate for this matter to be heard in urgent court.

8. We therefore suggest that we make an urgent, joint approach to the Deputy Judge President for a special allocation of a date in the second half of February 2024 for the matter to be heard. If you are amenable to that approach, we suggest the parties seek to agree on a timetable and propose it to the Deputy Judge President. If that is not possible, the parties can request that the Deputy Judge President case manage the application. That may, in any event, be necessary if there is an interlocutory dispute about confidentiality.
9. Please let me have your response to the above proposals on both the confidentiality regime, and the approach to the Deputy Judge President for a special allocation at your earliest convenience. If you accept the proposed interim confidentiality regime, our office will provide you with draft confidentiality undertakings.

Yours Faithfully

(electronically signed)

MR KL GUMEDE
For: STATE ATTORNEY (PRETORIA)

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**The Office of the State Attorney
Attention: Mr K L Gumede
Salu Building
316 Thabo Sehume Street
Pretoria
(Ref: 4835/2023/Z42)**

By email: LuGumede@justice.gov.za

22 January 2024

Dear Mr Gumede

Re: Freedom Under Law (RF) NPC / The Judicial Service Commission and Nine Others (Case number: 129593/2023)

1. We refer to your letter dated 16 January 2023 enclosing a confidentiality undertaking which you required us, our counsel team, and our client to sign whilst your client considers whether it wishes to claim the transcript of the deliberations as confidential.
2. The majority of the signed confidentiality undertakings were provided to you on the same day as we received your letter (16 January 2024), with a request that the transcript of deliberations be provided to us immediately, and on the basis that the transcript would only be provided to those members of our client and the legal team which had already signed the undertakings (and only provided to those who had not at that stage signed the undertakings once they had done so and once their signed undertakings had been provided to you).
3. Notwithstanding the above and the urgency of the matter, we only received the transcript of the deliberations the following day.

Competition Law Specialists | Litigation Attorneys | Regulatory Advice

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Vice President Economics: Avias Ngwenya

Senior Associates: Nicci van der Walt Ninu Greyling Melissa Steele

Company Registration Number: 2009/006902/21 VAT Registration Number: 4510252580

4. Furthermore, we note that in your letter of 16 January 2024 you record that you are in agreement with our proposed timetable for the further conduct of this matter as set out in our letter of 15 January 2024. However, as explained in that letter, that timetable was premised on us receiving the transcript of the deliberations by the close of business on 15 January 2024. Accordingly, given that we only received the transcript two days later, we propose that the timetable set out in our letter of 15 January 2024 be amended as follows:
 - 4.1 the applicant will file its supplementary founding affidavit by Thursday, 25 January 2024;
 - 4.2 the JSC will file its answering affidavit by Monday, 5 February 2024;
 - 4.3 the applicant will file its replying affidavit by Wednesday, 14 February 2024;
 - 4.4 the applicant will file its heads of argument by Wednesday, 21 February 2024; and
 - 4.5 the JSC will file its heads of argument by Monday, 26 February 2024.
5. This would allow for the matter to still be heard towards the end of the week of 26 February 2024, which you indicated in your letter of 16 January 2024 is suitable for you and your counsel.
6. If you are in agreement with the above, we will address a letter to the Deputy Judge President requesting that this matter be case managed and proposing the above timetable for the further conduct of this matter.
7. Secondly, in relation to the confidentiality of the transcript, our client believes that there is no basis on which to assert any confidentiality in the transcript, and will resist any efforts by the JSC to further delay the hearing of the matter on the basis of any claimed confidentiality. This is particularly given the delays already occasioned by the JSC's failure to properly file the record and its continued delay in seeking to protect such claimed confidentiality. In those circumstances, we are instructed to record the following:
 - 7.1 should the JSC still persist with seeking to keep the record from open and public scrutiny, then that will be for the JSC to litigate as a matter of urgency which does not disrupt the timetable;



- 7.2 FUL shall accordingly be preparing its supplementary founding affidavit on the basis that transparency and open justice require that the record can be referred to, and shall aim to file a publicly available supplementary founding affidavit which references the record, by 25 January;
- 7.3 FUL expects to hear from the JSC also by no later than close of business today that the JSC accepts that the record can and should be openly referenced;
- 7.4 should the JSC nevertheless seek to keep the record secret, then it should seek to obtain an order to that effect that respects the timetable, and hence should do so before 25 January.
8. FUL, and the public, cannot continue to be prejudiced any further by the JSC's repeated failures to act expeditiously and openly in regard to the record.
9. We look forward to receiving your response by the close of business today.

Yours sincerely

[Unsigned due to electronic transmission.]

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

SF8



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24 JANUARY 2023

Enquires: MR KL GUMEDE

My Ref: 4835/2023/Z42

Email: klgumede@sa.gov.za

Your Ref: NEW MATTER

NORTIONS INCORPORATED
54 MELVILLE ROAD
ILLOVO
JOHANNESBURG

Dear Mr Roets,

**RE: FREEDOM UNDER LAW (RE) NPC // THE JUDICIAL SERVICE COMMISSION
AND 9 OTHERS**

1. Thank you for your letter of 22 January 2024, and your letter to the Deputy Judge President of yesterday.
2. I do not intend to respond to every allegation in those letters. My failure to do so should not be construed as an admission that any criticism of my client's conduct is warranted.

3. I apologise again for the delay in conveying the JSC's decision on the confidentiality of the transcript. The litigation committee of the JSC met last night and has resolved that:
 - 3.1. The transcript of the relevant portions of its deliberations should be made publicly available; but
 - 3.2. The portions of the transcript that are irrelevant to your client's application should be confidential.
4. I attach a redacted copy of the transcript that reflects the portions that the JSC asserts must remain confidential. You will see the redactions are minor.
5. Please let me know as soon as possible whether your client accepts the JSC's confidentiality claim over those limited portions of the transcript.
 - 5.1. If it does, then we propose that the redacted version is used by all parties and the matter proceeds as normal.
 - 5.2. If your client does not accept the JSC's confidentiality claim, then the JSC will launch an application to keep those portions of the transcript confidential. We propose that the process for resolving the dispute about confidentiality is best resolved in a case management meeting.
6. I note that in your letter of 22 January 2024 you state that, unless the JSC obtains a court order prior to 25 January 2024, your client will openly file its supplementary affidavit referring to all portions of the transcript. As I have explained, the JSC has now consented to the disclosure of those portions that have not been redacted in

A handwritten signature in black ink, appearing to be 'J. K.', located in the bottom right corner of the page.

the attached copy. But it has not consented to the disclosure of the redacted portions.

7. The undertakings that you, your client, your colleagues and your counsel signed were very clear. They specifically prohibit you from referring to the content of the deliberations in court filings without either the JSC's consent, or a court order. I refer you to paragraph 4 and 5.1
8. If you disclose the portions of the transcript that the JSC has not consented may be disclosed without a court order permitting you to do so, you will breach your undertakings. The JSC provided the transcript to you and your client only on the basis that its content would be disclosed only under the circumstances permitted in the undertakings. It trusted that you and your client would abide by their agreement. To now release the content of deliberations provided to you subject to a confidentiality undertaking would be an act of extreme bad faith.
9. The JSC will take all necessary steps to enforce its rights under those agreements. It will also consider referring the legal professionals involved to the relevant professional bodies.
10. I trust you will be guided accordingly.
11. With regard to the proposed timeline:
 - 11.1. If your client agrees to keep the redacted portions of the transcript confidential, the JSC has no difficulty with the proposed timeline.
 - 11.2. However, if your client does not agree and intends to refer to the redacted portions of the transcript, then there are two options:



11.2.1 The parties file separate open and confidential versions of their papers, and the matter proceeds according to the timetable; or

11.2.2. The confidentiality issue will need to be resolved first. How and when it will be resolved should be determined by the DJP in a case management meeting. That will, inevitably and unfortunately, delay the hearing of the matter.

12. Once I hear from you on your client's position with regard to the redacted transcript, I will write to the DJP setting out the JSC's position.

13. I would appreciate a response by close of business today.

Yours Faithfully,

(Unsigned due to electronical transmission)

MR KL GUMEDE
For: STATE ATTORNEY (PRETORIA)



SF9



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

JUDICIAL SERVICE COMMISSION (JSC)

INTERVIEWS HELD AT THE CAPITAL ON THE PARK SANDTON

2 – 6 OCTOBER

CHIEF JUSTICE ZONDO

Chief Justice Zondo	Mr Malema (virtual)
Deputy President Petse	Prof Marumoagae
Adv Ngcubaitobi SC	Mr Mmoiemang
Mr Notyesi	Mr Dodovu
Mr Nyambi	Ms Lucas
Mr Singh	Adv Poswa-Lerotholi
Adv Baloyi SC	Mr Xaba
Adv Steinberg SC	Mr Notyesi
Judge President Mlambo	Ms Matolo-Dlepu
Ms Shabangu-Mndawe	Mr Malema (virtual)
	Mr Barnard (virtual)
	Ms Breytenbach (virtual)



Gauteng Transcribers

07 Protea Street | Doringkloof | Soetdoring Office Park Office G101 | Ground Floor
 Tel: (010) 006 6124 (HNB) | (012) 006 5398 (PTA) | Fax: 086 742 7088
 Email: info@gaupr.com

[Handwritten signature]

CERTIFICATE OF VERACITY

I, the undersigned, hereby certify that, *in as far as it is audible*, the foregoing is a **VERBATIM** transcription from the soundtrack of proceedings, as was ordered to be transcribed by Gauteng Transcribers and which had been recorded by the client.

Case No/Description

JSC Interviews October 2023

Client Ref

JSC Interviews October 2023 –
DELIBERATIONS ON SCA
INTERVIEWS

RECORDED AT:

Sandton

FORUM DATE:

03-10-2023

ORDER TO TRANSCRIBE:

Transcribe soundtrack as per order

TRANSCRIBER:

Y KLIEM

SOUNDTRACK: Date received:

03-10-2023

DATE COMPLETED:

25-10-2023

NO OF PAGES TRANSCRIBED:

48

INFORMATION:

Commission Interviews

PLEASE NOTE:

1. *Verbatim transcript, no syntax or grammar changes effected.*
2. *Unknown names typed phonetically.*
3. *Parties speaking simultaneously.*
4. *Unclear enunciation/mumbling/swallowing of words.*
5. *[Indistinct] are caused due to connection interruptions*

Y Kliem

Gauteng Transcribers

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[Handwritten signature]

INTERVIEWS HELD ON 3 OCTOBER 2023

[12:35]

CHIEF JUSTICE ZONDO: Commissioners, let's start deliberations on the SCA. I give Justice Petse the opportunity to lead the discussion.

DEPUTY PRESIDENT PETSE: [Microphone off]

CHIEF JUSTICE ZONDO: That's fine, that's fine.

DEPUTY PRESIDENT PETSE: By way of a prelude, Chief Justice, there are few introductory remarks that I would like to make. First, one must ask where the Supreme Court of Appeal fits in, in the hierarchy of the courts. The Supreme Court of Appeal is a National Appellate Court whose decisions are binding on the High Courts and the lower courts and even the Supreme Court of Appeal itself. And this is also, but first by section 20 of the Superior Courts Act albeit in a different context which provides that whenever there are decisions on a question of law, a decision on a question of law is given by a court of a division which is in conflict with a decision on the same question of law given by a court of any other division, the Minister being a reference to the
10 Minister of Justice and Correctional Services may submit
20 such conflicting decisions to the Chief Justice, who must cause the matter to be argued before the Constitutional Court or the Supreme Court of Appeal, as the case may be, in order to determine the said question of law for guidance. And for what I know, the jurisdiction or jurisprudence of the

Constitutional Court tells us that the Constitutional Court is extremely loath to entertain and deal with cases as a court of first instance and last instance. And I would imagine that in such instances, the Chief Justice would then refer the matter to the Supreme Court of Appeal at the court of first instance and allow it to have its say and possible from there then the matter could go to the Constitutional Court as the apex court.

One other point which I need to make is that the
10 jurisdiction of the Constitutional Court is, in a way, circumscribed in terms of the provisions of the Constitution, Section 167 of the Constitution (3) says that:

20 "The Constitutional Court is the highest court in the Republic and may decide constitutional matters and any other matter if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of a general public importance, which ought to be considered by that court."

On this score, the jurisprudence of the ConCourt tells us again that for a matter to be considered to be arguable or to raise an arguable point of law, it must have some degree of merit in argument and further that a point of law must have some prospects of success. This is what Paulsen and

Slipknot tells us which then means that in the majority of cases, the Supreme Court of Appeal has the final say because the majority of cases decided by the Constitutional Court where the litigants decide to take the matters to the Constitutional Court, the Constitutional Court... I would dare say that 60% of those matters, leave to appeal is refused simply on the basis that the matter does not engage the jurisdiction of the Constitutional Court apart from the fact that in some instance they would, over and above that, be the question of lack of prospects of success. As you would have observed during the course of the interviews, I alluded and indeed kept on harping on the fact that in the past three, four years, the SCA has lost a number of experienced judges, through retirement and elevation to the Constitutional Court and each one of those judges boasted a minimum of 15 years on the bench. In total adding up to 240 years of judicial experience that the SCA has lost in the recent past.

Then this brings me to the next question as to what the needs of the court at this particular point in time are. The SCA occupies a unique position as a National Appellate Court It desperately needs what I would call heavy lifters, lawyers of substance. One candidate said that the court needs a giant who can hit the ground running. Senior colleagues at the court, I have to say this, are battling under pressure. They have reached a point where it has become exceedingly

onerous for them to hold the hand of the least experienced judges. What this entails is that each one of us in the SCA must be competent to a degree that each of those judges should work independently, to produce a judgment, the quality of which will not render it necessary that other judges should, in effect, rewrite the judgment. And I make good to say that within the confines of this room, I can foresee that the crisis is looming in the horizon and unless drastic steps are taken to arrest this it may have a negative impact on the performance of the Supreme Court of Appeal to the detriment of the litigants. This would not serve public interest. We all know that litigation is expensive. Lawyers charge excessive fees, which the ordinary man in the street cannot afford. When litigants are dissatisfied with a judgement of a single judge in the High Court and come before the SCA on appeal, they take comfort in the fact that they will be appearing before five judges who, hopefully with their collective wisdom, might be persuaded to find in their favour. All of whom must therefore bring their minds to bear on the task at hand. So it is important that in recommending the judges for appointment to that court, we must bear those considerations uppermost in in our minds.

At the risk of stating the obvious, the JSC interviewed ten candidates for the SCA. I represent the court, mandated by the President of that court. And this is her preference

based not only on the discussion I had with her last week but also taking into account ..[intervenes]

[REDACTED]

20 DEPUTY PRESIDENT PETSE: With the benefit of the input of all but one of the presiders who, despite her undertaking to do so, did not revert to me with their inputs. And these are the candidates that I would recommend to the Commission. Judge Unterhalter enjoys the overwhelming support of all nine presiders. Next in line is Judge Kathree-Seiloane, Judge Smith and Judge Siwendu to fill the four vacancies at the SCA. Judge Daffue, he performed poorly during his interview, apart from the, you know, shortcomings that I highlighted when he appeared before the Commission.

And similarly with Judge Kgoele, although she would not admit her shortcomings. She is nowhere near the four candidates that I recommend to the Commission. Equally, with Judge Masipa. She was allocated judgements and because of the poor quality of those judgments, she ended up having to cowrite those judgments with other colleagues. Judge Mjali as well, apart from the fact that she only acted at the SCA for one term and there is nothing both in her track record and everything and the way she performed yesterday
10 that would support her fraternities. The same with Judge Nhlangulela. He said he needs some more acting skills. He has the potential. Then when it comes to Judge Phatsoane, one has to emphasise that she does not – the fact that she was appointed as a deputy judge president in the Northern Cape Division is not the major reason for excluding her at this stage, but the fact that she came here not once, but not twice but four times and got the note on the fourth occasion and she has only been in that position effectively for 18 months. She still has the benefit of the age
20 in her favour and one cannot to rule the possibility that at some point once she has put systems in place to advance that division for her to be allowed to ascend, either to the Supreme Court of Appeal or the Constitutional Court. She is a great prospect, one must say. So effectively those are the candidates that I present to the members of the Commission

for consideration.

CHIEF JUSTICE ZONDO: Thank you

DEPUTY PRESIDENT PETSE: And I must say that I feel storied about Judge Unterhalter for the reasons that I canvassed with him during his interview

CHIEF JUSTICE ZONDO: Thank you.

DEPUTY PRESIDENT PETSE: Thank you, Chief Justice and commissioners.

CHIEF JUSTICE ZONDO: We have to do a proper job, but
10 try not to stay for too long in the light of the hour. For what it is worth, I may mention that I think I thought that in the light of the fact that you have emphasised the number of senior and experienced judges you have lost recently, I thought that would be a motivation to limit the number of candidates you take from this lot to those who really have experience, because you have lost experienced judges. One would think that you want experienced judges to replace those.

My own view is that I would need a lot of persuading
20 to fill all four positions. I was concerned about the issue that cropped up with Judge Unterhalter today, but in the end I would recommend that he be one of those who should be appointed. I would also say Judge Kathree-Setiloane should be appointed. Those two I have some doubts about Judge Smith in the light of certain questions, but I might be

persuaded. I thought that many of the candidates may need to be given more to gain more experience at the High Court, before they go to the SCA. I mean, two of those I would be glad to know, Judge Masipa and Judge Siwendu. I think that they are some of those who probably need to get more time at the High Court before they could be considered. Sometimes when you throw somebody who has a good potential to early into certain positions you might not do them a favour. I do not want to add with regard to the others. That
10 is my view. As I say, with regard to Judge Smith, maybe I could be persuaded, but the ones that appear to be clear for me are those two judges, Judge Unterhalter and Judge Kathree-Setiloane. Thank you. Commissioner Singh. Oh, I will come back to you.

COMM. SINGH: All right, the Minister first.

MINISTER LAMOLA: Oh. No, thank you, CJ. I think I do agree with the list of the Deputy President and with the same provisions you had with regards to Judge Unterhalter. I feel like it tried to be too clever when it was not necessary. He
20 could have just tell you the question in a more succinct and precise and no... Ja, but I think with what the DJP is saying that in terms of the heavy lifting and the issues he raised with him with regards to the number of judgments per term, I think I will be persuaded by him.

I think with Siwendu, I also agree, but Kgoele, I also




felt that - I think there are issues that has been raised of in terms of the judgment and so forth, but I felt like she was able to explain that those, is it chairpersons or heads of panels, they have never raised these issues with her about the issue of judgement writing or the style and all that. That she felt that the if there was such a concern from the court, it should have been raised her, not that it must be raised here. I am not sure how does the DP President deals with that but I will still put Siwendu above her because I think

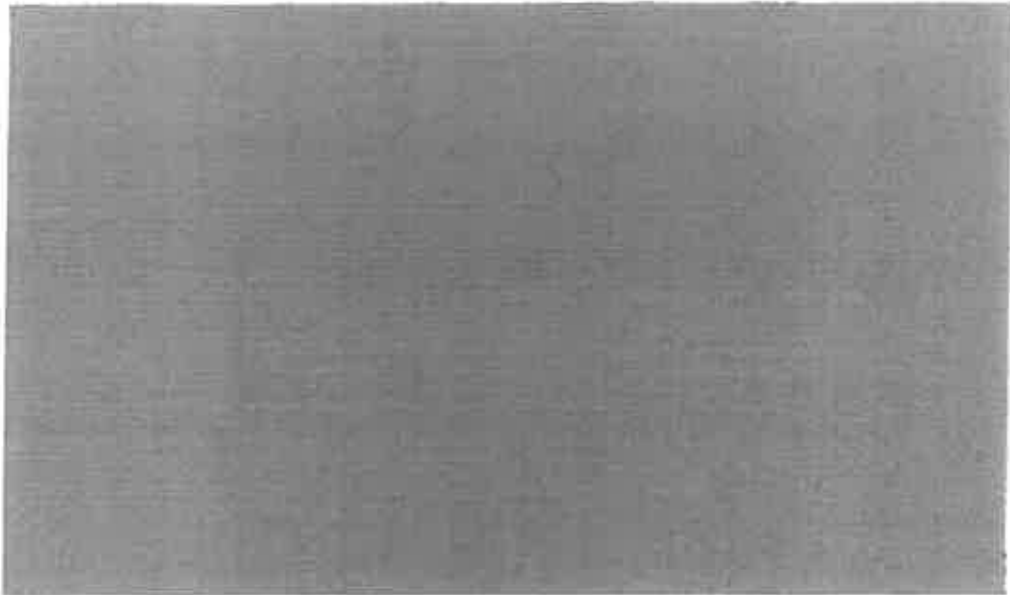
10 Siwendu had shown a grasp of the law on overall and she was able to clarify a number of issues when she was put to - when she was asked a number of questions and it does look like the Supreme Court of Appeal delas with some of those matters that she said she is well-vested with. Thank you, CJ.

CHIEF JUSTICE ZONDO: Thank you. Commissioner Singh.

COMM SINGH: No, thank you very much, Chief Justice. And thank you to the DP and the Minister. I'll just start off from where he left with regard to Judge Kgoele. I thought she performed well and if there were any deficiencies, it was not

20 of her own making and that she should have been corrected wherever she was but I thought she performed well, just like the Minister thinks. But I want to premise my remarks on the others, Chief Justice, by saying that for us as commissioners here. I mean, we have to base our decisions and preferences on the interviews and on the documents that were before us.





10 Having said that, Chief Justice. Judge Setiloane, I
agree. Smith. Yes, he had some shortcomings, but certainly
I agree with Judge Smith. Siwendu. I have a difficulty with
Judge Unterhalter. He is a great jurist. He knows a lot and,
but from where I sit, and I may be wrong, when you in the
SCA you are a team player and I did not get the impression
in the way that he answered today that he's a team player.
And I wouldn't like to see the SCA being saddled with
somebody that may not be this kind of team player, which is
my impression from what he said. We could have finished
20 that interview in half an hour but we went on and on and on,
and I was listening to it for a simple thing until Mr Ngcukaitobi
came to our rescue and said: Remember you are not a senior
counsel here. You are a judge. So I will have my personal
doubt of recommending Judge Unterhalter on the basis of him
not being a team player from what I saw today, but the other

four I would certainly, you know, place my faith in them. Setiloane, Smith, Siwendu and Kgoele. Thank you.

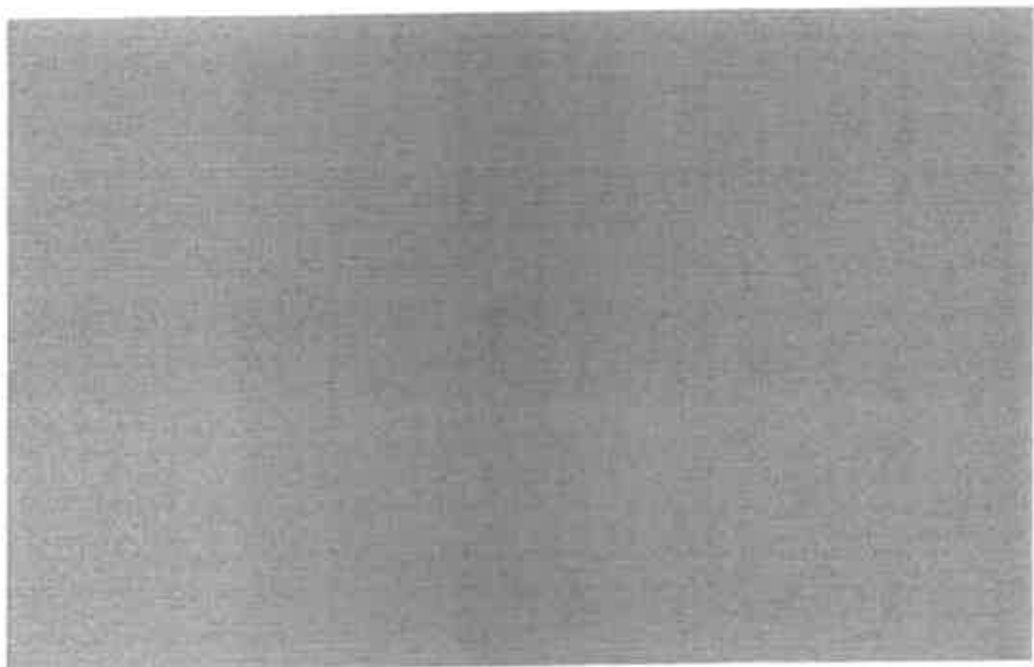
CHIEF JUSTICE ZONDO: Thank you.

COMM MALEMA: Chief Justice.

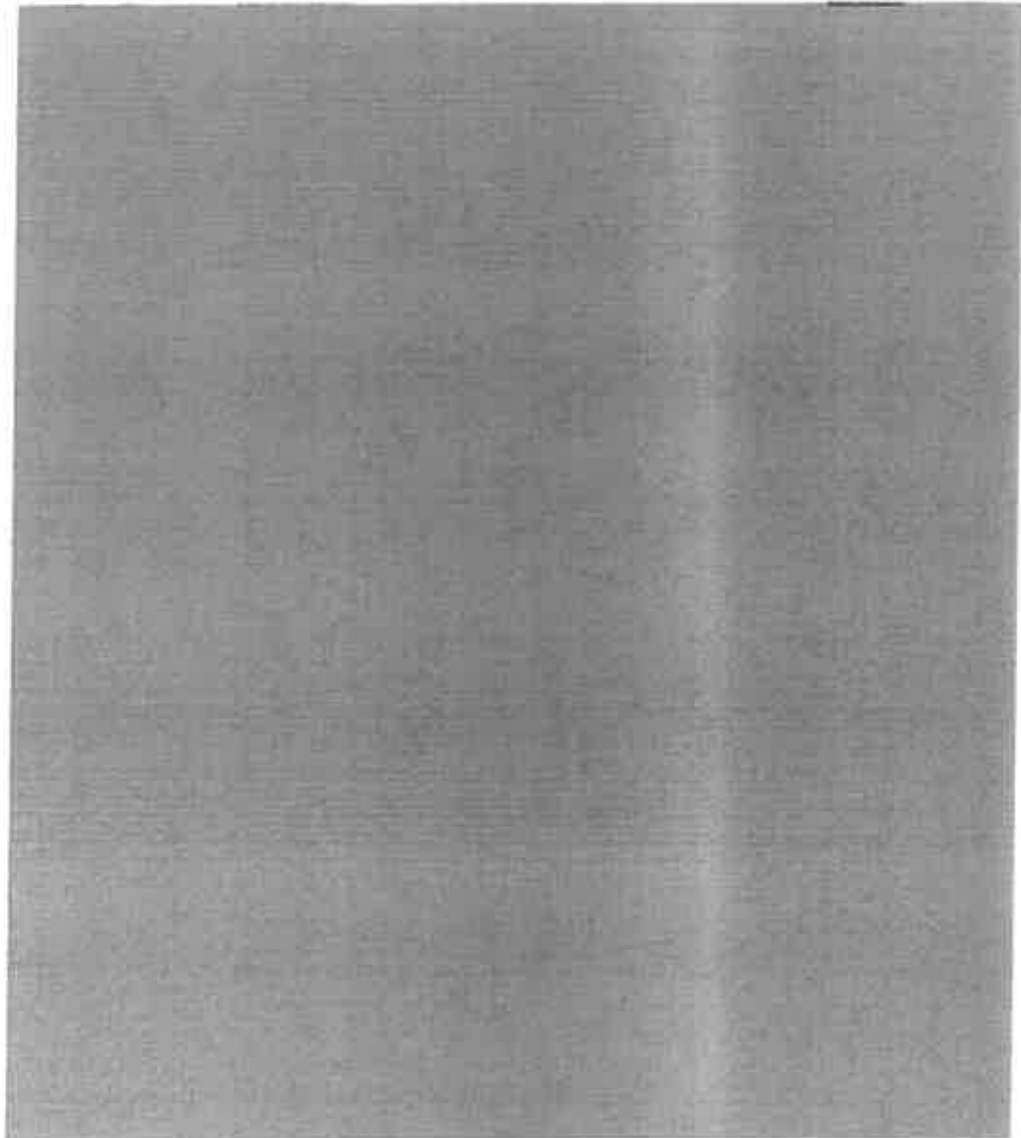
CHIEF JUSTICE ZONDO: Yes, before you, Commissioner Malema, let me allow Commissioner Dodovu and then I will come to you, Commissioner Malema.

COMM DODOVU: Thank you very much, CJ. CJ, my track record is very clear when it comes to making decisions or
10 making recommendations after the interviews and the track record encapsulates the fact that I always listen carefully to the head of the court and the recommendations he puts forward. I always do that because I respect that, that understanding and protocol. But sitting here, I am worried about two things based on the Deputy President has said.

20



10



20 But having said that. I agree with Deputy President on the three candidates and those candidates are ...[indistinct], and Smith. Unterhalter has got this sense of entitlement and importance. I must say this in this meeting. Firstly, I have never – I am five years now, I have never had a person who before we start the interview wants to address us and that would be unprecedented that a candidate comes to us who wants to address us before we start. And you correctly

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intervened in that particular respect. We afforded him an opportunity to speak to us and to try and clarify the issues that he said in the previous interview. We afforded him that opportunity because we did not want those issues to influence our thinking and how we must view him when we present himself before the interview. And for me, he not only shot himself in the foot, not only that, but what ...[indistinct] that he displayed, for me it leaves much to be desired. It is something that we must not tolerate. And then just a basic
10 thing – and I was about to say to you, Chief Justice, that for the first time with my basic training of law, I mean basic, I know that this is – there is something wrong here that you cannot be ...[indistinct] You cannot preside over the matter that was presided before and he wanted to raise certain arguments and say that these are the matters of the law. I was going to be – everything that I had known was going to be obliterated. Now this allegation was defeat. We must deal with this arrogance, and it is on those basis that I will not support this candidature. I rather put ...[indistinct].


20 Do you know what happened yesterday when Kgoele was interviewed? And she raised two fundamental points. The first thing was that nobody even the objections, nobody alerted him or her about the issue that she writes bad. For me it is unfair for us to confront her in a particular way because if you confront her in that particular way, the next

question would be; if we realise that she cannot write well, we should have coached her, we should have rectified that, we should have held her to that particular situation. That is the first point that she raised and for me that is fundamental. But the second point that she raised was to say, these allegations that I cannot write well are just too general. I want specific cases, I need to be told which case or which – yes, case that I did not write well, and so on and so forth. And that thing was not there. And for me, I think that was

10 really unfair. But be that as it may. She interviewed very well, in my view. And as a senior judge, for me, I think she must be elevated. I propose that ...[indistinct] the Deputy President has said, I accept ...[indistinct] has presented and the only one that I have is Unterhalter and I propose that we must include this black African woman ...[indistinct] in his place. And I think it will be a good thing. Apart from this, we have ...[indistinct] that we place for that. Her gender is okay, her race is okay in that sense. And I have looked at the composition of this particular court at this moment. I

20 think it will send a very, very strong message, more especially with Kgoele. He is experienced, and we all know that. For me, if we put her in and substitute Unterhalter, it will be done. Thank you very much.

CHIEF JUSTICE ZONDO: I am warning up to Kgoele because of what you said, but we will see. There is no other



indication.

COMM MOLEMELA: No, Molemela.

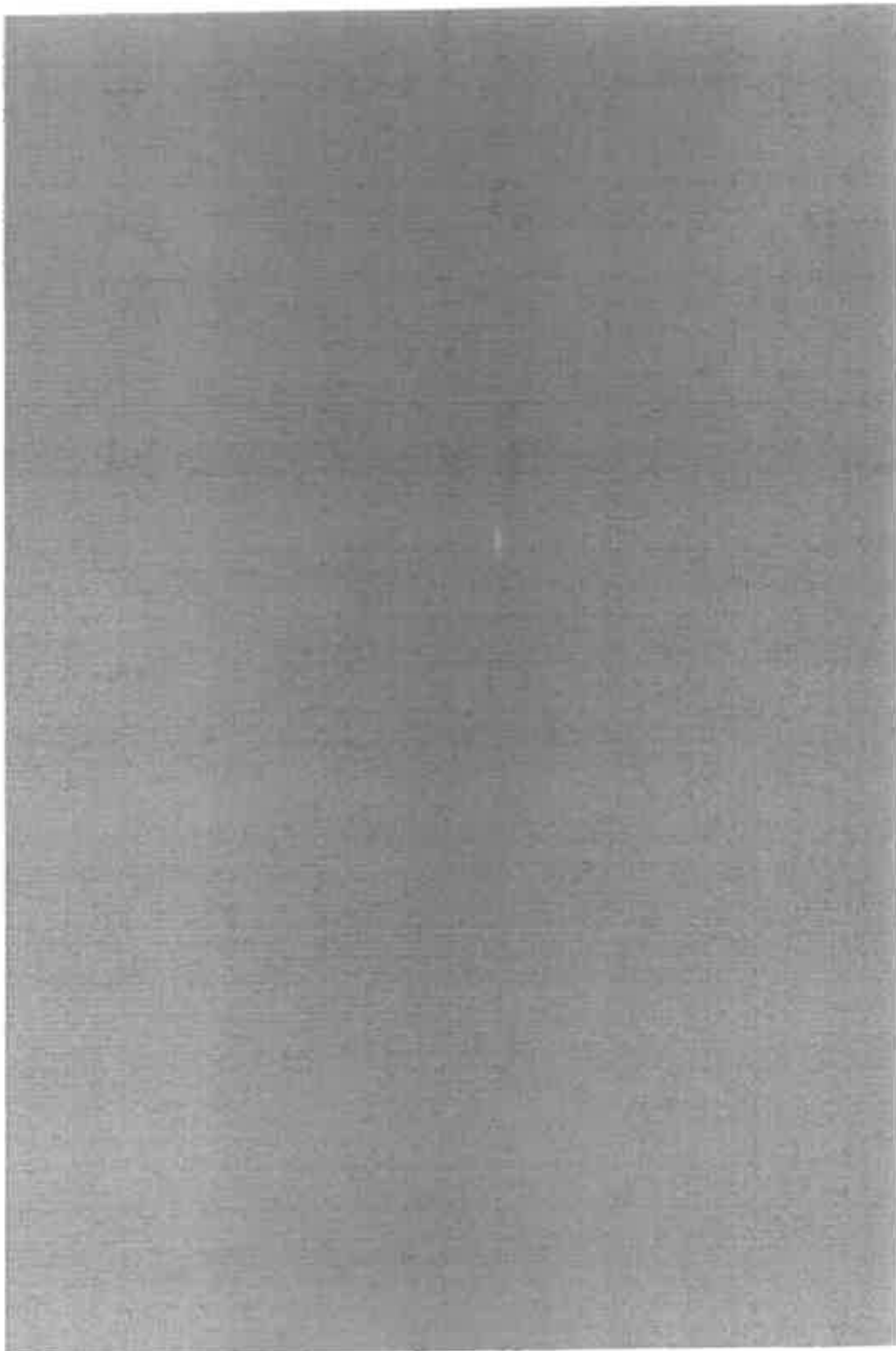
CHIEF JUSTICE ZONDO: Oh, Commissioner Malema.

COMM MOLEMELA: No, thanks. Thanks very much, Chief Justice. I want to agree with the last speaker on your intervention when you stopped Judge Unterhalter when you started speaking and saying he wants to address us. A well-experienced judge who has been before us before many times. Because of a sense of entitlement and superiority
10 attitude, that is how it starts, that you will address us because we are of a less intellect and he is going to make us understand through address. I like the racism of Afrikaners because they don't hide it. It does not come in a subtle way. It is open. It is arrogant as that they tell you what they want and they give it to you like that. You know what you are dealing with. But I am very sorry. This is what we are dealing with here. Now I will never support such an attitude and I will never succumb subtle racism that masquerade itself as being intelligent. I don't agree with the Minister that he was
20 trying to be clever with us. He was being himself. A person who looks down at very senior judges because they are of a different colour and that they cannot tell you what to do. We have dealt with such characters before in the JSC who felt they can go to the Constitutional Court, they can go anywhere they want. They are the best of the best, which they are

being offered the JSC.


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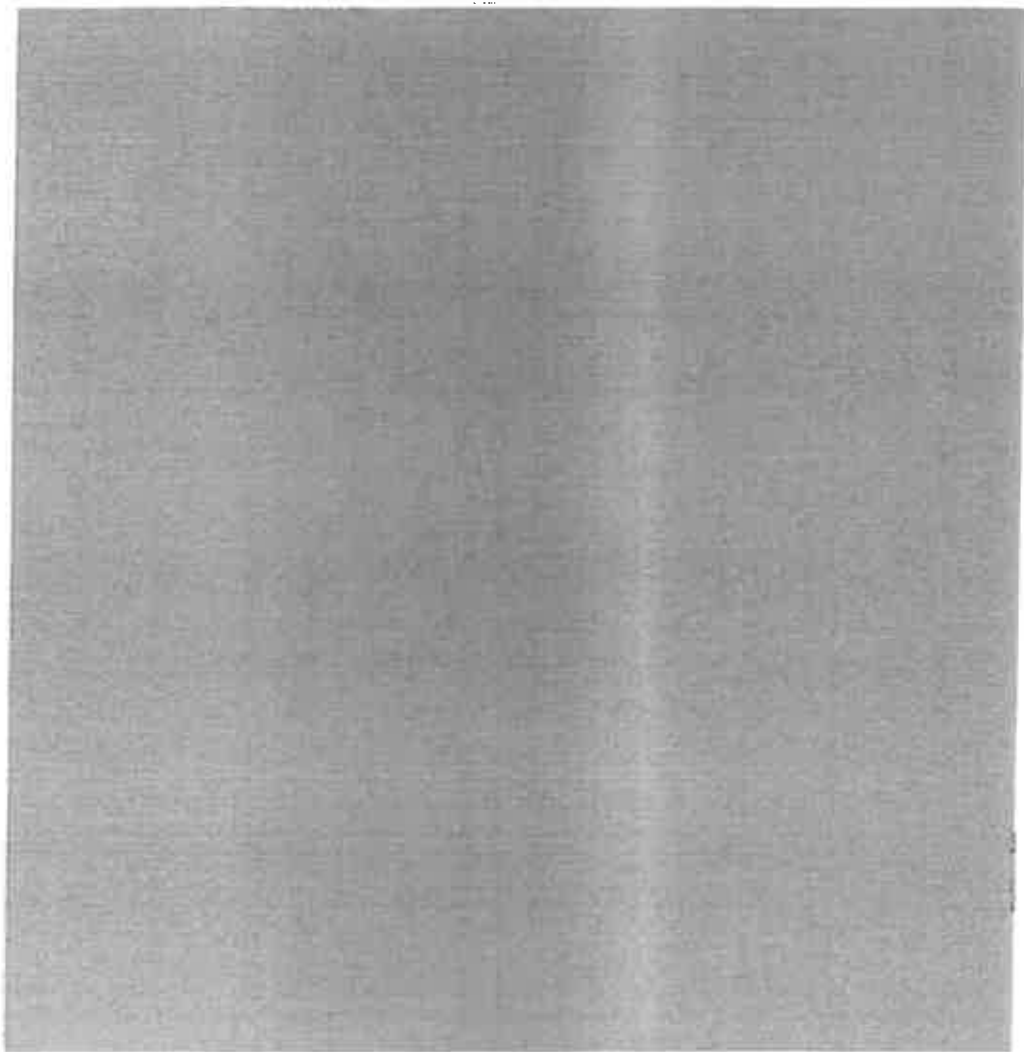
If anything, he came across as being

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arrogant as I know it all. No one is going to tell me anything, this is what I stand, despite the fact that we tried all ...[indistinct] To accept such attitude is to accept subtle attitude – I mean racism of liberals that people spoke about. They never come across as being racist and looking down at you, but come across as being intellectually superior and patronising you and making you think that, no, you are smart and all of that, only to realise that you are being finished. So that's what I wanted to say about him, 

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A handwritten signature or set of initials in black ink is located in the bottom right corner of the page. The writing is cursive and appears to be a stylized 'J' followed by some other characters.

[REDACTED]

Thanks, Chief Justice

CHIEF JUSTICE ZONDO: Thank you, Commissioner
Molemela [REDACTED]

[REDACTED]

10

DEPUTY PRESIDENT PETSE: Thank you Chief Justice. [REDACTED]

[REDACTED]

20

CHIEF JUSTICE ZONDO: Okay, all right. Are you done?

DEPUTY PRESIDENT PETSE: But at the end of the day, the recommendation is based on what transpired in the interviews, and of course, you know the judgements and

everything else that was submitted to the Judicial Service Commission. [REDACTED]

[REDACTED] Thank you, Chief Justice.

CHIEF JUSTICE ZONDO: So I think there is nobody who has doubt that the views that matter, the views of the commissioners and maybe the views of those who have put in comments to influence the commissioners as to what decision they take. Commissioner Notyesi. Oh, after Notyesi it will be Commissioner... Ja, I am sorry, I should have
10 started with you, but let us allow him to finish. Then I will come to you.

COMM NOTYESI: Chief Justice, mine is a quick one. I do want to note this. I am following to what was said by – I am not too sure whether it was Commission Dodovu. These interviews to some candidates was unfair particularly those candidates who were asked about their judgments. First, those presiders, they have arrived like any other member of the Society to file an objection against the candidate, but now the candidates were confronted with the judgments that they
20 are said that they were corrected, they were substandard, and all, but they do not. And we as the JSC too did not have the benefit of the judgment such question different from other questions that we will regard as ambush? That we should ...[indistinct] look onto these candidates. And with that, I am tempted with to say, some of the – there were proper

questions. I mean, the questions on legal aspects where candidates really could not perform. I think we should not press too much on what those candidates when they are writing as sitting in that court other than what the judgments that are here we should emphasise on. And I am just raising that because we need as the JSC to have a definite response to this to say anything that has not been placed before the JSC should not be relied upon. But I do understand what the JP Petse is saying in terms – I mean what Deputy President
10 Petse is saying, that he bases his assessment on this.

Reverting to the question of Judge Unterhalter. He is a good judge. I mean he is a jurist. But of course, as they say, what comes out from him, from this deliberation, one cannot take away, I mean, this issue of the appearance of arrogance, humanity/humility. You can see, he is a – his view is that, actually, despite the fact that this is just an obvious, it is just logical question of logic, but this view is that, well, there are legal interpretations. I am not too sure to what extent that impacts on him but that is, I just want to mention
20 that regarding my vote, I am not too sure

CHIEF JUSTICE ZONDO: Thank you

Commissioner Marumoagae

PROF MARUMOAGAE: Thank you very much, CJ. On my list I have two people. Let me let me start day so that I make my submissions very clean I have Judge Kgoele and

Judge Setiloane. I just forgot the surname now. Kathree-
Setiloane. Those are the judges that I have. In the last
interviews a point was made and correctly so, that an
interview is a system that we have chosen to interview
candidates and really go into their work and reflect on it. And
even look at the interviews objectively, at least from where I
am sitting. Out of all these judges, on the basis of the
interview itself, I think Judge Kgoele did better on all of them
in terms of the interview. She was confronted with tough
10 questions. In the interview she was not prepared. She really
was not prepared at all. And she was correctly dealt with. In
this interview she really was prepared. She anticipated the
questions that were going to come and she responded to the
questions blow by blow. All the questions that the DP put to
her she dealt with them extensively and satisfactorily. And
one thing that we must point out is, she is an experienced
judge. She is not a judge who just started yesterday. She is
an experienced judge. As a judge, she is even more
experienced than Judge Unterhalter, as a judge. And that is
20 a fact.

Now there are only an issue that Commissioner Baloyi
raised with her in terms of; you have a lot of judgements when
you are part of a panel and you do not have much in terms of
your own and you cannot – which is not a fair view of your
ability to write and all those. She dealt with that and said;

look, my judgment are on SAFLII. If anyone wants to really to understand how I write because I have written so much on my own, you can actually get them there. And I want to dispel this that she does not write well. Yes, perhaps ...[indistinct] of producing a judgment in the split ...[indistinct] just maybe the drafts were not ...[indistinct] We do not know. We do not have the drafts here. But the judgment that she has written on her own, those judgments are proper, most of them. And I think, in all fairness, if an interview is a process by which
10 we are actually appointing people, of course, we cannot disregard there are needs of the courts and the experience and all those things, which we cannot – which are important issues, but we should not use these things negatively to discard people who would ordinarily be able to be elevated because I think from an interview point of view, she did very well.

In as far as Judge ...[Indistinct] is concerned. I thought she also did very well and for she was a clear candidate. Those are the two that I will submit. As far as how that list
20 gets to be completed, I would defer to other ...[indistinct] but for me those are the two that I would put on my list. Thank you.

CHIEF JUSTICE ZONDO: Thank you. Thank you, Commissioner. Commissioner Baloyi.

COMM BALOYI: Thank you, CJ. CJ, I think what became

apparent during the interviews is that the SCA lacks, and maybe because there has not been the recognition that that was necessary, a mechanism to give feedback to acting judges. And obviously it is a gross unfairness to candidates that they come here and they are presented with comments and in many cases where they cannot answer them. Judge Masipa; We were better off because the DP has worked with her, so he was able to speak directly to the issue. The others, they could not answer which is understandable.

10 But I do not know – I am not convinced that is a good enough of a reason to let that candidate slip in and I am not convinced because I have to accept that when the DP raises these issues it is done in good faith. I do not question him when he says but you were given work to do and this is the feedback. How he gets here is a subject for criticism and maybe it means that we must also improve our systems. We must require that candidates should come with their first judgement, first draft. So maybe that is an improvement on the system. But if we accept that the Head of Court, in this

20 case (the DP ...[intervenes]

[background speaking – unclear]


COMM BALOYI: Well this works, so I suppose I can carry on.

CHIEF JUSTICE ZONDO: Ja, carry on.

COMM BALOYI: So I think and I accept and I think that has to be the point of departure, that we must accept the good

faith of the DP when he raises these issues that are concerns about your trusting ability or skills because we have no reasons to counteract it. We do not like how it came about it, but we must accept, he is the Head of Court and he provides us with guidance on those kinds of issues. Now that is the Court of Appeal. For many people it is the last court of instance. It makes law, and I do not think we should easily be dismissive of concerns that are raised by heads of court that these acting appointments have shown people not be
10 ready yet, okay. That is one. Two; the lack of experience and skill. That is a big issue. And three, that as a result of that, presiding officers end up carrying a lot of work or a lot of burden. I do not think issues and then putting – and recommend candidates that we are not sure about when the Head of Court says there are problems about them. So I would not be dismissive, I will be persuaded to - I'm persuaded to give them due weight, those concerns.

The second one is, we have to be mindful that humility and arrogance are not a criteria. In fact, we have many,
20 many judges who are terribly arrogant who are on the bench, but that is not a disqualifying factor. It doesn't disqualify them. Yes, maybe if he had read the room better, he would have been more minded to be more modest and speak in a way that does not offend us, right. But when you look at what is the criteria for that court, especially for that court, but for



any court for that matter, it cannot be and we will not be able to withstand scrutiny if the disqualifying criteria of factor that we use, if that is our disqualifying criteria that he was arrogant, I do not see how we will get pass that. But apart from that, it is not of itself and it does not in my view outweigh the other factors. It should not outweigh the factors that I have referred to that are listed by the Head of Court, and those are factors that we have to take into account.

10 Lastly, before I say who I think who I would like to support is. On the conflict issue. I do not think it is a black and white issue. Otherwise, these applications would not be happening in court every day and the would not be dismissed every day. Applications are made recusals. Presiding officers refuse them. There is an opponent, right. So the fact that he does not give us an answer that we want, right, of itself. And in fact, in fairness to him, what he does concede, eventually is: Well, some cases would be straightforward. Others are much nuisance position. So the issues of the one is conflicted or not cannot be answered in
20 one straight line. And in my view there is nothing wrong with that as a lawyer. I am speaking as a lawyer. There is nothing with that answer that says there are cases where, that is a valid criticism, that you should not be sitting. In fact, even amongst us here, when people do not sit, when commissioners do not sit it creates a debate amongst us

whether that is a valid ground for recusal. So the line is not that straight on this issue.

So for all those reasons, my proposal or my submission is, for those reasons, Judge Unterhalter should not be disqualified because none – at least the ones in my consideration, the ones that I have referred to, none of them is a valid reason. Two, I think Kathree-Setiloane does not create too much debate. She struggled She struggled too with the question raised by Commission Ngcukaitobi. But
10 when you look overall at the experience and her performance, she is an appropriate candidate. So that makes it two for me. Three. Siwendu. I am comforted by the GCB when it says the judgment of the SCA show maturity. But she also confronted that criticism, right. She said she does not know what they are talking about. But importantly she said; I am a work in progress. In fact, I like a candidate like that. in my sitting here, but the problems we had with candidates where candidates who will come and say, I know it, I am fine, I am good for this. And I remember the speaker had concerns
20 about some candidates So you do not contemplate that you have room for improvement. No, she says; I am a work in progress. But the work that we have in front of us and the way she presented, I do not see why we would not recommend her. I am not persuaded by Mr Smith. I am not. perhaps he needs more time to add. If a vacancy is to be

kept out to say and it is between the four that the DP started with, I would keep the vacancy that would otherwise go to Mr Smith. None of the candidates – the other candidates, Kgoele and the rest of them, I think they should take the opportunity to act, especially Judge Kgoele, I think it is a valid comment. And on judgments, why we do not have her judgments in front of us, and she was not the only one that answered that way, she said; Well, the question is confusing. Right. But it does not seem to have confused all of the judges
10 because the other judges gave us their individual judgments where they wrote alone and where they wrote for the SCA and for a full bench. We have got a mix of that.

Now with Kgoele, and it is not just her, similarly the other candidates. We get what we called committee judgments. I have no way of evaluating her. Of saying that criticism that was raised is not a valid criticism. I have no way because of the selection of judgments that she had. And it would be unfair to commissioners to expect that when we get these applications we must and scroll the internet and
20 SAFLII and look up the judgments written by Kgoele. The system does not work that way. It is not intended to work that way. They get given the opportunity to give up their judgment for a reason. If we have more time in our hands, we will go and search, but on the basis of what she gave us. And again, I have to say, it is not her but I emphasise her

because her name just came up. The others have been considered to be disqualified. It is that on her judgment that she gave us. I have no – unfair as it was to her – I have no way of those criticisms are unfounded or those comments are unfounded. She did not give us. She gave us only one judgment and that is the *Bishop* judgment. The rest of the judgments are written by her with other people. So my list would be minus Smith, would be what the DP had proposed. Thank you, CJ.

10 CHIEF JUSTICE ZONDO: It may be doubtful whether you can look at other judgments other than those that have been given to us. We are... Oh, Commissioner Nyambi, I hope we can allow that you be the last one.

COMM NYAMBI: No, I have raised long ago, Chief Justice.

CHIEF JUSTICE ZONDO: Oh, okay. Who is talking now?

COMM NYAMBI: It is Siya, Chief Justice.

CHIEF JUSTICE ZONDO: Oh, okay.

COMM NYAMBI: I had ...[intervenes]

CHIEF JUSTICE ZONDO: I am sorry. I did not see you but
20 that light also...

COMM NYAMBI: Oh, okay.

CHIEF JUSTICE ZONDO: Ja.

[Parties intervene each other – unclear]

CHIEF JUSTICE ZONDO: So if it is Commissioner Nyambi and then Commissioner Ngcukaitobi, can we stop there?

COLLECTIVE RESPONSE: Yes.

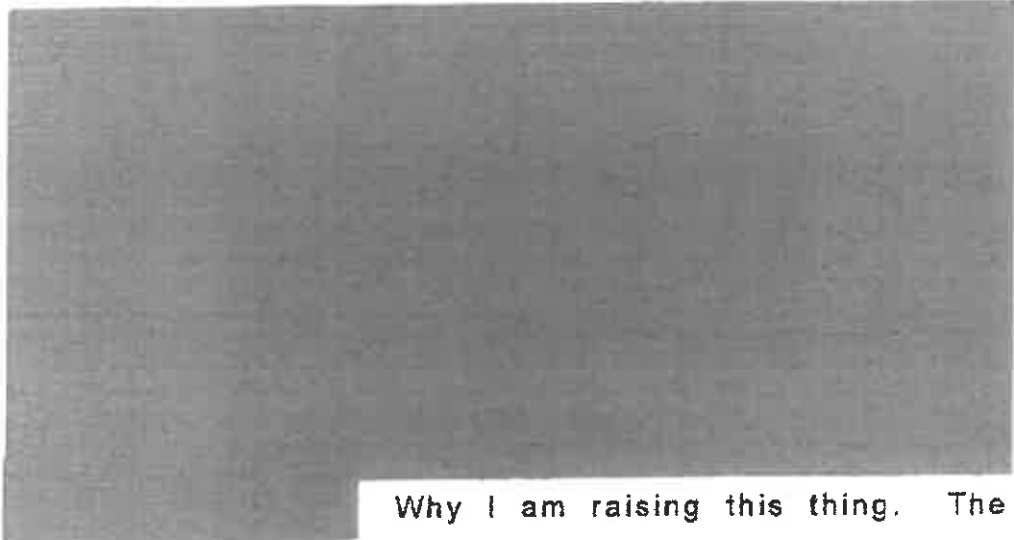
CHIEF JUSTICE ZONDO: Okay, all right, thank you.
Commissioner Nyambi.

COMM NYAMBI: Thanks, CJ. Even though some of the
points were covered by Honourable Singh and Honourable
Dodovu, I want to suggest that, so that you are consistent as

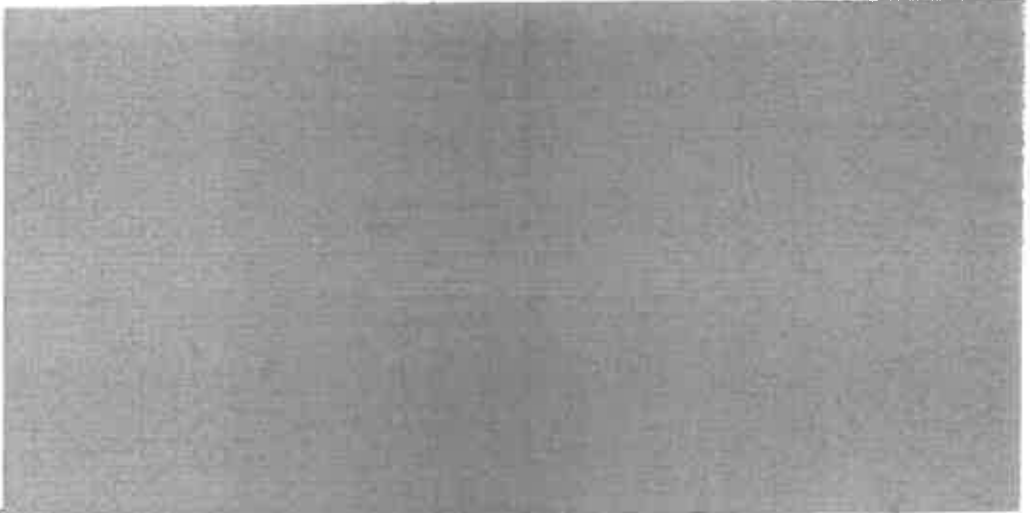
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Why I am raising this thing. The likelihood is that once the attitude that some commissioners
10 will be married to names will end up appointing zero when we
will complicate the situation and not assist the division. And
DP was very clear that there is crisis looming in the horizon.
I can confirm that. When we started with our meeting, I am
still in the dark about the explanation that was done when we
were dealing with the SCA. That is why I am not surprised
about these challenge that we're getting now



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Maybe that can assist the

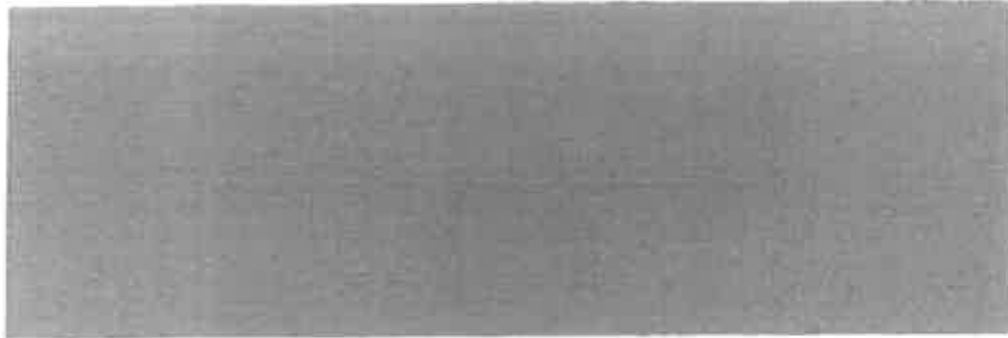
process so that once we get to the path of voting, we are not creating a crisis for the division but we are assisting. That is my submission.

CHIEF JUSTICE ZONDO: Thank you, Commissioner Nyambi Commissioner, Ngcukaitobi.

COMM NGCUKAITOBI: Thank you, Chief Justice. There are part of what Commissioner Nyambi said that I agree with and parts of what Commissioner Baloyi, I agree with. So emphasise those and then explain my own views. So there
10 are two things, Chief Justice, I propose we separate. The one is a structural problem.

20





There is also another problem of talent, not because of anything that anybody there has done. People have left because they have reached retirement age. The Deputy President spoke about a looming crisis of skills. I hear you
10 ...[indistinct] this is a problem for the division. It is a problem for the country because the Supreme Court of Appeal is actually the busiest court in the country and it is more important even than the Constitutional Court because it is mopping up all of the mess that is going on in the division and acting judges, they give judgments without any ...[indistinct] It is the Supreme Court of Appeal. So if we need experience in general levels of law, not constitutional experience, we must concentrate that experience in the Supreme Court of Appeal.

20 So the Deputy President is absolutely correct when he warns us about the looming crisis, a structural crisis. A crisis in the system. The system is falling apart. I have sat only – this is my fourth interview. It is the first time I have hear the head of the Court saying there is a looming crisis on the horizon especially a court like the Supreme Court of Appeal.