IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case no.: 26886/21

In the matter between

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION Applicant

and

JUDICIAL SERVICE COMMISSION	First Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
FAYEEZA KATHREE-SETILOANE	Third Respondent
NARANDRAN JODY KOLLAPEN	Fourth Respondent
RAMMAKA STEVEN MATHOPO	Fifth Respondent
MAHUBE BETTY MOLEMELA	Sixth Respondent
BASHIER VALLY	Seventh Respondent
DAYANITHIE PILLAY	Eighth Respondent
DAVID NAT UNTERHALTER	Ninth Respondent
ALAN CHRISTOPHER DODSON	Tenth Respondent

SUPPLEMENTARY FOUNDING AFFIDAVIT

I, the undersigned,

PARMANANDA NAIDOO

state under oath that:

1. I deposed to the founding affidavit, and am similarly authorised to depose to this affidavit. Its contents are within my knowledge, unless the context indicates otherwise. Any legal submissions are made on the advice of CASAC's lawyers.

INTRODUCTION: A SHAM SELECTION PROCESS

2. This is a supplementary affidavit, in terms of Rule 53 of the Uniform Rules of Court. After studying the record, and in particular the record of "deliberations", it is now abundantly clear that the JSC fundamentally misunderstood its function. It failed to articulate any standard by which it was evaluating the candidates. It did not appear to consider itself as bound by the standards mentioned in the Constitution. Its primary function, when assessing and selecting candidates, is to deliberate. Yet the record shows that there were no deliberations at all. A pre-selected list was produced by Chief Justice Mogoeng Mogoeng. He never explained how, where, when, why or with whom he had prepared such list. The list itself was never subjected to an examination against any standard. The deliberations, such as they may exist, can properly be described as a sham. Below, I explain why CASAC maintains its grounds of review and supplement these to the extent necessary. In fact, to this day, we are still in the dark as to why the JSC recommended the people on the list. The deliberations were meant, in part, to answer that question. They do not. Nor

does the letter from the Chief Justice to the President (which I will discuss further below).

3. As will be apparent from the reading of the transcript, the whole deliberative process was so designed, and had the effect, that there was no deliberation at all.

4. The Rule 53 record is on Caselines. A transcript of the JSC's deliberations starts at page 5-3676 (volume 'P' of the Rule 53 record).

5. The irrationality and arbitrariness of the entire procedure followed by the JSC is demonstrated by the following features.

5.1 Within minutes of the commencement of the deliberations, the Chief Justice presented a list of five judges (on page 5-3678). He did not explain why this was not done by the JSC as a whole. Nor did he explain whether or not he had discussed it with any other member of the JSC and if so whom. Egregiously, he did not explain why these candidates were chosen. At a minimum one would have expected that there would be reasons and explanations why the names on the list appear. For the three candidates who did not make his list, Chief Justice Mogoeng (over only a single page of the deliberations, page 5-3679):

5.1.1 in the case of Judge Unterhalter, unlawfully invents a rule (which was never disclosed upfront) that says that a person with less than three years on the bench cannot be appointed;

5.1.2 in the case of Advocate Dodson SC, provides a short, subjective summary assessment of his career and again applies the above-mentioned invented rule, and states that Advocate Dodson SC has been "out of judicial action for a very long time"; and

5.1.3 in the case of Judge Pillay, dismissively treats her with silence.

5.2 There was no discussion and deliberation of the Chief Justice's list. In particular, the JSC did not deliberate on each candidate. Nor did the JSC compare the candidates to determine which candidates should be shortlisted over others. In other words, the JSC did not perform its constitutional duty to *deliberate* and *evaluate*.

5.3 The JSC's failure to do so is particularly apparent in light of contrary views being voiced that supported candidates who were not on the Chief Justice's predetermined list (see pages 5-3683 to 5-3684).

5.4 The record of deliberations shows that a vote was irrationally and unlawfully taken without any deliberation. This appears from p 5-3688 of the deliberations, where Commissioner Malema observes that "they have taken the ballot papers". Any discussions or deliberations that come after that point are irrelevant because they could not have affected how commissioners voted. The JSC's decision must, therefore, be judged according to the first ten pages of the deliberations alone, because those pages are the sum total of the discussions before the JSC voted (pages 5-3678 to 5-3688). If this is what happened, it is impossible to reconcile it with the standards of rationality. It would mean that commissioners chose candidates by

vote only. One of the reasons for a deliberative body is to enable commissioners to apply their minds to the strengths and weaknesses of candidates, to persuade each other and to consider the constitutional requirements. A vote without any deliberation means there is no application of the mind. It means each commissioner approached the task with a closed mind and that their minds were made up before the deliberations even commenced.

5.5 Nothing in those ten pages shows that the JSC followed a rational and fair process. The Chief Justice presented a pre-determined list, and the JSC voted without any deliberations on each individual.

5.6 After the JSC voted, Judge President Mlambo queried whether the JSC was "establishing a firm principle here that someone who is not a Judge but who is an advocate, no matter how experienced and able, is disqualified to apply to the Constitutional Court directly" (page 5-3688). Judge President Mlambo asked a similar question in relation to the number of years that judges should serve as judges before being eligible: "...are we establishing a principle that as a judge you may qualify to apply to the Constitutional Court directly, but three years is a very short time for one to avail himself" (page 5-3689). These questions are asked *after* the event.

5.7 The answer to Judge President Mlambo's questions appears to be that this is "dealt with on a case by case basis" (page 5-3692). But the JSC never actually applies this "case by case" standard to each candidate. The JSC never, for example, considered whether a

candidate's relative lack of judicial experience is outweighed by other features. The JSC applied an unlawful and inflexible rule: those with less than three years' experience on the bench need not apply. This was never disclosed upfront. It is unlawful to disqualify a candidate on the basis of criteria which are never disclosed and apparently not even known among the commissioners themselves.

5.8 Next, there is a lengthy discussion about whether the upcoming vacancy of the Chief Justice's seat should be advertised through the JSC (pages 5-3693 to 5-3705). This was irrelevant to this process. But—bizarrely—the JSC spent more time discussing this than engaging with the candidates for these two vacancies.

5.9 After that tangent, Commissioner Xaba raised the Chief Justice's interaction with Judge Pillay, which I canvassed in full in the founding affidavit (pages 5-3708 to 5-3732). Importantly, nothing in the deliberations addresses or ameliorates the unfairness of Judge Pillay being ambushed during her interview, as I showed in the founding affidavit. It remains unclear why the JSC devoted the lion's share of the deliberations on Judge Pillay's friendship with Minister Gordhan. It was impermissible and unfair, and strayed far from the JSC's mandate into naked political character assassination. And for his part, the Chief Justice offered no explanation. He said it was "necessary to clarify the position" and that the "need arose in the course of the questioning". He then completely shut down the debate—*all debate*—by summarily announcing that he "cannot take it beyond that" and tallying the votes. It is notable that the questions which were raised

with Judge Pillay in the interview which were designed to character-assassinate her percolated through in the deliberations. But there is no attempt by Chief Justice Mogoeng to withdraw the comments.

6. These are not the proper deliberations of a body performing its constitutional mandate with diligence and care. When read with the summary of the interviews in the founding affidavit, a clear inference emerges from the deliberations: the several objectionable elements in the interviews prejudiced candidates to such an extent that the deliberations became a meaningless formality.

7. The JSC is trusted with one of the most important jobs of all: appointing judges. The JSC's mandate is to satisfy itself that a candidate for judicial office is appropriately qualified, fit and proper, and suitable for appointment. It must also compare suitable candidates to determine, on rational and reasonable grounds, who should make the shortlist and who should not.

8. The JSC fails its mandate when it skips over just about every candidate. It fails its mandate when its interviews traverse illegitimate and irrelevant questions about geopolitics. It fails its mandate when it fails to sift out frivolous complaints from the public and fails to give candidates notice of other complaints. It fails its mandate when it traverses issues that have already been dealt with and decided by the proper disciplinary bodies. It fails its mandate when it allows its processes to be used for proxy wars over petty party politics. It fails its mandate when it imposes rigid disqualification tests, like a self-imposed years-on-the-bench requirement. And the JSC fails its mandate when it completely fails to deliberate but blindly accepts a predetermined list somehow compiled by the Chief Justice.

THE DELIBERATIONS WERE A SHAM AND IRRATIONAL

9. The JSC's deliberations represent the primary part of the JSC's process, where the JSC acts as a deliberative body. The deliberations ought to act as direct evidence of the reasons for the JSC's decision and the process of reasoning that the JSC followed.

10. Here, though, CASAC, the public, and this Court cannot determine the standards that the JSC took into the account in determining its shortlist, including the reasons why Judge Mathopo, Judge Molemela, Judge Kathree-Setiloane, Judge Kollapen, and Judge Vally were ultimately recommended for appointment as judges of the Constitutional Court. The corollary is also true: the deliberations do not have any reasons for why Judge Unterhalter and Judge Pillay did not make the shortlist. In the case of Advocate Dodson SC only Chief Justice Mogoeng's subjective and surface-based assessment of his judicial career is given as the reason (which takes up only 7 lines of the transcript) with no reasons by any of the others members being provided as to why he does not make the shortlist.

11. The lack of deliberations are an issue because the JSC was obliged to adopt open and transparent decision-making. There is no indication from the record that a spirit of rigour and candour was promoted or adopted in the deliberations.

12. The JSC convened to deliberate on 13 April 2021 (page 5-3678). At the outset, the Chief Justice notes that the entire committee has participated, and that he will attempt to guide the process. He says at pages 5-3678 to 5-3679:

Chief Justice Mogoeng:

Okay. Let me try ... We have all participated. Let me try and guide the process. I will not be, I will not be long. I am going to give you a list of the people that I think we need to recommend. And to the best of my understanding it is five names that have to be submitted.

I initially thought it was seven and I do not know why. I would say the list to submit is that of Judge Mathopo, Judge Molemela, Judge Kathree-Setiloane, Judge Kollapen and Judge Valley. I will briefly say why we should exclude those that I think we should exclude.

Advocate Dodson has been out of judicial action for a very long time. But even then he was a Judge of the specialist court that focuses on a very narrow area of the law for only five years. And ever since he has been an advocate and I did not get that sense when he was involved in as an advocate would be put him in good stead for the purpose of the position that he has applied for.

Judge Unterhalter is a very able Judge, but he has only just arrived. Three years. And I think he can afford to wait. There will be vacancies coming. Let him wait and then we will see at that stage.

I do not think we should encourage a situation where colleagues wait for as long as they want to in practice, come in and shortly thereafter are elevated not to the second highest court in the land even, but to the highest court in the land.

So I think we must discourage this kind of behaviour. But otherwise as a lawyer, as a constitutional lawyer for that matter, he a very solid, solid,

solid candidate. And Judge Pillay I won't not say much really. I do not think Judge Pillay should be part of that list.

I would leave it to those who want her to be on the list if there are any to substantiate why they believe that she should be. Colleagues I thought I must be that brief to afford colleagues the opportunity to come up with an alternative list. If such a list has been thought of …

13. Commissioner Nyambi then confirms what the reader can only assume was a predetermined stance that the Chief Justice's list would be the list ultimately sent to the President. He says the following at page 5-3681:

Commissioner Nyambi

Thank you CJ. After your input and in view of the time and the plan of today as we are meant to be starting at half past I will need start and repeat what you have said. But save to say that the reason that you advance in excluding the candidates you have excluded, I am aligning myself with that position and it is assisting.

I thought it will assist not unless maybe we are entertaining something contrary to what you have presented to us to have a discussion. So I will support that if it is possible with the colleagues to consider the issue of just entertaining a contrary view, not unless there is a strong view about any other of those that you have excluded on the reason that you advanced to us …

14. Approval of this suggested procedure is then echoed by Commissioners Singh, Lamola and Breytenbach (pages 5-3681 to 5-3682). Save for his reservation

regarding the inclusion of Judge Kathree-Setiloane on the list of recommendations, Deputy President Petse also states that he endorses the names put forward by the Chief Justice (page 5-3682). Commissioners Mpofu and Schlemmer state on record that they are "covered" (page 5-3682) and "satisfied" (page 5-3683) before Commissioner Cane raises the only dissenting voice, which is the closest that the JSC comes to actually deliberating on candidates (pages 5-3683 to 5-3684):

Commissioner Cane:

Thank you Chief Justice. Good morning colleagues. It is unusual for me to find myself so out of alignment with the rest of you. So I must give you my views, although I do not expect to be able to persuade you. But I would not want you to be surprised.

In my view the comments given by the GCB and Judge Vally's intemperateness with the counsel in court are adverse. And I am concerned about that aspect of his failure or propensity to avoid dealing with the substance of matters.

I think it is a difficulty that concerns me. And it was a report given as a product of a general consensus from advocates practising before him. He knew him. It was not an isolated report that was reflected. So I found that I have that reservation in regard to him.

In regards to Advocate Dodson and Judge Unterhalter I fully appreciate the Chief Justice's reluctance. I do find that both candidates have a great deal of appeal to me in that they would bring a different perspective to

that court. And I think that having one of them there would certainly enrich it.

I have served with Advocate Dodson on the disciplinary committee where he is dealing with largely administrative issues and challenges pertaining to auditors who have found themselves on the wrong side of their profession.

His care, his fair mindedness and his competence have impressed me enormously. And I think that all of the work he has done over the years do qualify him for a position on the Court. I share your hesitation that he comes from the Bar directly, but I think that is an oversimplification of his history and that one needs to recognise the other judicial work that he has been involved in throughout his career, often without, as an act of public service.

In relation to Judge Unterhalter, three years on the bench is quite a long time for a senior person who comes quite late in his career.

He brings a great deal of experience, also in an international forum, to bear and to offer. And I would not like to overlook what he could contribute to the Court. So I would urge you to reconsider those two people.

Other than that I am in alignment certainly with Judge Molemela and certainly with Judge Mathopo that they also be put up. Thank you Chief Justice.

15. By page 5-3685, the deliberations are done. This is not a coincidence. When the Chief Justice introduced his list, he did not want it to be discussed. That is made clear by three things. First, he refused even to recognise that he had to give actual *positive* reasons for the names on his list. Second, instead of inviting deliberation on his list, he asked for alternative lists "[i]f such an alternative list has been thought of" (page 5-3680). Third, immediately after Commissioner Cane gives her reasons for objecting to Judge Vally, and her objections to the exclusion of Judge Unterhalter and Mr Dodson, the Chief Justice does not invite discussion of Commissioner Cane's concerns. Instead, he shuts down the possibility of such a discussion by saying, immediately after Commissioner Cane:

> "*Thank you very much Commissioner. Colleagues, are we ready to vote*?" (page 5-3685)

16. Commissioner Malema follows the Chief Justice by saying "[l]et us vote." Commissioner Notyesi says he "second[s] voting". It falls to Commissioner Madonsela to ask whether commissioners were "in agreement" with the Chief Justice's list. Commissioner Malema immediately shuts this down by saying "we still vote". He is supported in this by Commissioner Schlemmer who says "we must vote". Commissioner Malema then repeats his desire for a vote. At this insistent demand for a vote, Commissioner Madonsela relents, saying "okay" (page 5-3685).

17. The conclusion is inescapable that it was not part of the Chief Justice's plan, in chairing the deliberations, to have any discussion on any of the candidates on his list. That is why when the first substantive issue is raised by Commissioner

Cane, it is immediately met (by the Chief Justice himself) with a demand for a vote. In this he is then followed by other commissioners, just as he was followed by the commissioners in indicating their happiness with his list.

18. Judge President Mlambo, who had a question plainly relevant to the deliberations (discussed below), said that his question could wait and be raised after the vote, even though that question was avowedly one of "principle". Judge President Mlambo must have realised that there was no stopping the momentum for voting. When Commissioner Tshepe wondered whether Judge President Mlambo's question should not be immediately addressed since it was one of principle, Commissioner Malema said "we have voted", even before the Chief Justice could answer Commissioner Tshepe (page 5-3686).

19. There was therefore a reviewable collective failure by the JSC, in its eagerness to adopt the Chief Justice's list without discussion, in its insistence on voting before discussion, and in its failure to give reasons for voting the way it voted.

20. The deliberations show that the JSC blindly followed the Chief Justice and had made up their minds either on the basis of the interviews, or perhaps even before. The corollary of this is that the interviews—and the prejudicial and unfair aspects of the interviews that I catalogued in the founding affidavit—were decisive. This is evidenced in part by the fact that Judge Pillay did not receive a single vote (the tally of votes is at page 5-3732), presumably in the light of how her interview went.

21. Most of the commissioners fettered their discretion and followed the Chief Justice's lead, or had made up their minds on the basis of the interviews. In what follows I address how the JSC did not deliberate at all but rather voted on

a predetermined list without deliberating on each candidate, how the JSC applied an impermissible years-on-the bench requirement, and how the JSC did not justify its irrational and unfair party-politics interrogation of Judge Pillay.

The JSC failure to deliberate

22. The JSC's practice of distilling reasons for a decision from deliberations is indication enough that JSC deliberations are of relevance to the decisions ultimately made. They clearly bear on the lawfulness, rationality and procedural fairness of the decision. The question is whether the record reflects a rational connection between the decision, deliberations, and the reasons given in favour of the shortlisted judges.

23. A reading of the record shows that the JSC did not deliberate at all. It voted on a pre-determined list without deliberating on each candidate. The Chief Justice put forward his list to the commissioners and the deliberations were done within moments of him doing so when the committee decided to vote (and most of those moments are consumed by the lone dissenting voice of Commissioner Cane). Almost all of the commissioners fell in line with the Chief Justice with no discernible reason why they had resolved to submit the names of the shortlisted judges.

The JSC created and applied a rule without prior notice to candidates

24. During the voting process, Commissioner Mlambo says (at page 5-3685) that he will "go with the flow" in terms of process and that he seeks clarification about the principle the JSC is setting. Commissioner Mlambo precedes his concerns by saying:

Commissioner Mlambo:

Chief Justice, I go with the flow in terms of the process. I just need to ask for some clarification. Maybe I will wait until after the vote. It has nothing to do with this process. I just need clarification about the principle we are setting here.

25. He continues at p 005-3688:

Commissioner Mlambo:

...

I just want to raise an issue which I think is of interest to us as heads of courts. I represent JP's here.

I just need to understand that we are establishing a firm principle here that someone who is not a Judge but who is an advocate, no matter how experienced and able, is disqualified to apply to the Constitutional Court directly. I think that is the first issue I need to understand so that we know what happens.

Allied to that, some of us have roles that we offer to academics to come and act. Is that principle also applicable to academics that unless they have been appointed to a High Court they cannot apply directly to the Constitutional Court? I just need to understand that. Thank you CJ.

...

One more thing … Sorry. I am sorry. The last thing is, and that is the one that relates to Judge Unterhalter, is are we also establishing a principle that as a judge you may qualify to apply to the Constitutional Court directly, but three years is a very short time for one to avail himself.

And if so, what is the allowable period? Right. I know that Judges Vally and Setiloane have been on the bench, and Judge Kollapen have been on the bench for more than eight years at least, each. Are we establishing the benchmark there or lower?

It is only those things that I need clarification on. That is why I said they have nothing to do with the voting. Thank you CJ.

26. What this shows quite clearly is that there are no rules or standards. The decisions are made as the JSC goes along. Judge President Mlambo is a senior judge. If he did not know what rule or principle was being followed, then it is clear that no rule existed. This absence of evaluation criteria conduces to arbitrary decision-making.

27. After being given the floor by the Chief Justice, Commissioner Malema explains his understanding as follows at (pages 5-3690 to 5-3691):

Commissioner Malema:

The question of whether people apply directly or not does not arise, because people have applied already directly and we have accepted them and we have interviewed them. So that issue does not arise.

So it is within our right to be reluctant to appoint a person who comes directly from the chambers into the Constitutional Court and when such

observation is made it does take away the right of anyone to still vote for those people.

No one has said here that people who have applied directly should not be voted for. And that is why Commissioner Cane can still motivate and persuade us to vote for the same people. So the issue really Chief Justice, does not arise.

It goes again to the issue of three years on the bench. They have applied. We accepted them. So whether they qualify or not, it does not arise, because we accepted their applications. We have interviewed them and they were shortlisted. It is within any member's right to say:

> *'You know what? Three years for me it does not work for me. If you have been there for five years or 12 years or whatever years you get a tick from me'.*

But if a motivation that says three years is not enough and I agree with it, it does not mean it is a principle. Tomorrow I might be persuaded differently on a person who has actually never sat on the bench, not even three years. There could be a strong motivation.

So it is not necessarily JP a principle. It is a motivation. And it is the motivation that seeks to push us to a particular direction or to the other direction. If you agree with it you vote for it. If you do agree with it you vote for it. If you do not agree with it you do not vote for it.

So it would have been a principle if we had said he is disqualified from even being voted for on the basis of having served three years. Thank you CJ.

28. Deputy President Petse then seconds this contribution by Commissioner Malema, stating the following at pages 5-3692 to 5-3693:

Commissioner Petse:

So I just wanted to say that I associate myself with the sentiments expressed Commissioner Malema. It should be … This would best be dealt with on a case by case basis. Look at the facts, peculiar facts of each case and then decide once candidates have been shortlisted and interviewed.

29. Commissioners Magwanishe (pages 5-3692 to 5-3693), Schlemmer (pages 5-3693 to 5-3694), and Mpofu (pages 5-3694 to 5-3695) also "align" (page 5-3692), "agree" (page 5-3693), or "agree with everything that has been said" (page 5-3694) by Commissioner Malema and Deputy President Petse. Judge President Mlambo seems to be content with the clarification provided when he says the following at page 5-3695:

Commissioner Mlambo:

…

Probably what mislead me was the motivation. Because the motivation used to not have like Dodson on the list is because he has got insufficient judicial exposure, experience.

So probably that is what misled me. But I accept the motivation that it is a case by case approach. Thank you very much Chief Justice.

30. What is most striking about this years-on-the-bench discussion is that it arises as a debate only *after* the votes have been cast. It adds nothing to the outcome of the deliberations (and ultimately counted for nothing given that the votes were already cast when it arose). I have set out the after the fact discussion here merely as an attempt to gain insight into what factors were taken into account to support the Chief Justice's contention (that most of the commissioners fell in line with) that the JSC should not "encourage a situation where colleagues wait for as long as they want to in practice, come in and shortly thereafter they are elevated not to the second highest court in the land even, but to the highest court in the land" (page 5-3679).

31. The years-on-the-bench requirement is an invalid and irrational consideration, at least as the JSC used it: as a disqualification. It is not a principle that is constitutionally or statutorily sourced and says nothing of candidates' suitability for appointment. A candidate should not impermissibly be disqualified because of it. In the current matter, its rationality as a requirement cannot be determined because it arose as an after the fact justification once the votes were cast and Commissioner Mlambo sought clarification on the point. From the deliberations, it was the only basis for the JSC declining to shortlist Judge Unterhalter and one of two reasons for the JSC declining to shortlist Advocate Dodson SC (his alleged experience in only a narrow area of the law being the other).

32. I also note that the Chief Justice expressed a view, in regard to Judge Unterhalter, that he "can afford to wait" because there "will be vacancies

coming". What might happen in the future is irrelevant. The JSC must make its decision on candidates now; it fails to perform its mandate if it, in effect, defers considering a candidate until some unknown future date based on what may or may not happen in the future. What if the candidate does not apply the next time around? The JSC in the next round is in any event not bound by the decision that a candidate waits for the next round of applications. Deferring appointment of a candidate is not permissible. A candidate is entitled to a decision on his or her application: if he or she is rejected, it should be on a permissible basis. It is not a permissible basis that the candidate can wait.

33. So too is the notion that a candidate who qualifies for appointment on the criteria set out in the Constitution should nevertheless not be appointed because of insufficient time on the High Court. Appointment to the Constitutional Court is not a reward for long service. The Chief Justice acknowledged that Judge Unterhalter was otherwise qualified for appointment (in his words, "he is a very solid, solid, solid candidate" page 5-3679). Not even the five candidates on the Chief Justice's list attracted this praise from him. Yet they were appointed and Judge Unterhalter was not. There is a further constitutional reason why this line of reasoning is not permissible. Section 174(5) of the Constitution permits appointments to the Constitutional Court of people who are not judges:

> *"At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court."*

34. If Judge Unterhalter had applied directly from the bar, it could not have been said against him that he was never a judge and rejected on that basis. Yet

because he is a judge, it is now said that he was not a judge for long enough. This is irrational.

The JSC did not justify its party-politics interrogation of Judge Pillay

35. No reasons were put forward by the Chief Justice for the exclusion of Judge Pillay from his proposed list. We are only left with the following remarks from the Chief Justice (at page 5-3680):

> *The Chief Justice:*
>
> *... And Judge Pillay I won't say much really. I do not think Judge Pillay should be part of that list. I would leave it to those who want her to be on the list if there are any to substantiate why they believe that she should be ...*

36. Later in the deliberations Commissioner Xaba raises "a matter of public concern" that was raised by the Chief Justice (at pages 5-3708 to 5-3709).

> *Commissioner Xaba:*
>
> *...*
>
> *Yesterday Chief Justice, when we were interviewing Judge Dhaya Pillay a matter of public concern was raised by the public.*
>
> *I am not sure whether the candidate was put on notice, was notified by yourself that this matter was going to come up the way it came up. And*

it so happened that the matter that the Chief Justice raised happened about two, three years ago.

And it was left unattended until two or three years later. I would have understood if the candidate in question was not part of your family of Judges that you are head of Chief Justice. It was someone from outside maybe you could have raised it in the manner that you have raised.

But considering that you, the matter was kept for this long and suddenly it sprung up on her, one wonders why you did not find a way one, confirming if she was aware that Minister Pravin approached you in and said what he said.

And whether she agrees or Minister Pravin was acting on her with her you know, approval. CJ, that is my concern. Or at least if it perturbed you so much that you felt it was unethical of a Minister to come and approach you in the manner that he did, that you did not see it fit to raise it with the President and say:

> *'Your member of cabinet approached me in the manner that he approached and raised the matter, and I take strong exception to it and it is unethical and I give you rime to deal with the matter'.*

I do not know how you relate, how the two heads of branches of government relate and how you relate with your own members. Because if it is not her, maybe next time it will another member of the bench who gets treated the same way that she was treated.

I felt that you could have, the matter could have [been] handled differently than the way it was handled. Thank you so much. That is my feeling CJ.

37. Commissioner Notyesi then states that the question arose after Judge Pillay was asked about her friendship with Pravin Gordhan, and that it would have been remiss of the Chief Justice not to raise his encounter with Minister Gordhan in the light of questions asked to Judge Pillay regarding her friendship with Minister Gordhan and how Judge Pillay blew "hot and cold over it until these questions [came] up" (pages 5-3710 to 5-3711). Commissioner Malema makes similar submissions in alignment with Commissioner Notyesi at pages 5-3711 to 5-3714 of the record. And Commissioner Mpofu too at pages 5-3717 to 5-3719 (the entire exchange regarding the party-politics interrogation of Judge Pillay can be found at pages 5-3708 to 5-3733).

38. Incidentally, it is worth noting that Commissioner Notyesi's assessment that Judge Pillay blew "hot and cold" over the question of her friendship with Mr Gordhan and is simply inaccurate. The first time she was asked about her friendship with Mr Gordhan by Commissioner Singh she said "*Mr Gordhan. I've known Mr Gordhan for a very long time. We're both from Durban and we're both actvists from Durban. And its hard not to know Mr Gordhan*" (page 5-2680). The second time she is asked about it is by Commissioner Malema ,where he says "*What's your relationship with Mr Gordhan*" and she replies " *I have answered that. I am a friend of his. We've been friends*" (page 5-2704). There is nothing "hot and cold" about these answers - Judge Pillay unequivocally stated that they are friends and so his justification for Chief Justice Mogoeng seeking further clarity on this issue holds no water.

39. Pause here and ask, *why does all this matter?* The JSC devoted the lion's share of Judge Pillay's interview to her friendship with Minister Gordhan. There is no discernible reason from the deliberations why that is a relevant consideration.

40. Commissioner Lamola echoes Commissioner Xaba on this point at pages 5-3714 to 5-3715, where he expresses his "unease" with the anecdote being raised by Chief Justice Mogoeng. Notably, Commissioner Mmoiemang says the following about how the JSC "must not be burdened by some of the current politics that are beginning to involve that to a certain extent revolves around certain members having positions by virtue of political ramifications in the country" (page 5-3717):

> *Commissioner Mmoiemang:*
>
> *Thank you Chief Justice. I also agree that I think what is important is to make a distinction between the two, the two issues. I think the issues raised by the Honourable Xaba is categorically clear to say given the position of the Chief Justice and the person that approached him as a member of the cabinet appointment by the head of the executive, the protocol dictates that in that kind of situation a different approach should have been taken in terms of ascertaining the nature of the question.*
>
> *And if the Chief Justice had a sense that it was meant to influence, to unduly influence the process, then definitely it is a matter that should have been taken up with the President. And I think the second point that I want to raise is that constituency is important so that as a discussion of this nature does not arise.*

If we agree, if we agree that these two questions plus a follow-up, I think it is important that that approach must be respected by all commissioners. Because whatever we do it is a reflection on the character of this structure. And I had a sense that the Chief Justice to a certain extent allowed Judge Pillay to be a sitting duck of abuse.

And I think from where I come from it must be expected by virtue of the hegemonic position that the ruling party enjoys in our, in certain sectors of society by virtue of [indistinct]. There will be people that are occupying the position in the executive that has a history. That has a history.

And therefore at a certain point you must expect that there will be people that have shared battle trenches together. And therefore there is nothing wrong in those former activists having had an interaction during their battle trenches.

So I just … There is nothing wrong in Judge Pillay knowing Minister Pravin Gordhan because they shared the battle trenches together. But because of how our struggle has evolved, some of us will be in the Legislature, some of us in the Judiciary, some of us will be in the Executive. So there is nothing wrong. And we must not be burdened by some of the current politics that are beginning to involve that to a certain extent revolve around certain members having position by virtue of political ramifications in the country. Thank you Chief Justice. [Emphasis added]

41. Following this discussion (which, again, occurred *after* the votes were cast), the Chief Justice explains his reasoning behind asking Judge Pillay about her alleged interaction with Minister Gordhan at pages 5-3732 to 5-3733:

> *The Chief Justice:*
>
> ...
>
> *Colleagues, let us round it up. I appreciate the concerns expressed, but I really think there is no issue here. And there nothing more I am going to say. There really is not any issue here from where I sit.*
>
> *It was necessary to clarify the position in line with the question that was asked by Honourable Singh flowing from the protestations by members of the public to the appointment of Justice Pillay. I did not sit here, come with some information, wanting to ambush the Judge. No.*
>
> *The need arose in the course of the questioning as other commissioners have indicated. So I cannot take it beyond that. I think must read out the results of the voting and then we must entertain candidates from the SCA*
>
> ...

42. Respectfully, attempts by the Chief Justice and some commissioners to justify the party-politics interrogation of Judge Pillay during the interviews are inadequate, and were an ambush despite protestations from the Chief Justice to the contrary (page 5-3732). What is clear is that Judge Pillay was a victim of a political attack for no discernible reason. Indeed, political party affiliation is an irrelevant consideration (of course, Judge Pillay was interrogated not even about that, but about her friendship with Minister Gordhan). In the current

matter, questions speaking to political affiliation were irrelevant and politically motivated. They should have no place in the recommendations for this reason because they do not speak to whether a candidate is fit and proper to hold judicial office.

WHAT THE JSC'S DELIBERATIONS DO *NOT* SHOW

43. The previous section set out several reviewable irregularities that appear from the JSC's deliberations. Equally important is what is *not* apparent from the deliberations.

44. The common thread that runs through this section is that the JSC did not do its job. It did not deliberate on each candidate. Instead, the Chief Justice immediately presented the rest of the JSC with a pre-determined shortlist. The Chief Justice did not explain why some candidates made his list but others did not. The deliberations show no comparative assessment of each candidate's suitability for office.

<u>The JSC did not apply the Constitution's standard for appointing judges, nor any discernable standard</u>

45. The Constitution assigns the JSC with a gatekeeper function. To be a superior court judge, a candidate must be "appropriately qualified" and "fit and proper". The JSC must, through its interview process, test each candidate according to those criteria. It must then, applying some discernable standard, decide which of the suitable candidates it should recommend for appointment.

46. The JSC has not developed a standard. That is, apart from minimum requirements for appointment, the JSC has no framework for evaluating

candidates to determine which are suitable for appointment. Without one, the JSC's process is not procedurally rational. It is not procedurally rational because the JSC cannot discharge its evaluative and deliberative function without there being objective markers to guide its process.

47. The need for a standard or framework is important because the JSC's role is, in the end, a *comparative* one. Compare the JSC's role to the role of the United States Senate in the appointment of federal judges. There, the President nominates one name for one vacancy. The Senate's role is, at bottom, to give that one nominee an up-or-down vote. The Senate does not have to decide *between* candidates; it only has to decide on *a* candidate. Things work differently here. One important difference is that the JSC is, more often than not, faced with more candidates than there are places on the shortlist. This introduces a comparative aspect to the JSC's work. The JSC's role is not confined, unlike the role of the United States Senate, to looking at each candidate to determine whether he or she is suitable for judicial office. The JSC must also compare and weigh the candidates *against each other* to determine who gets a spot on the shortlist.

48. How does the JSC go about this comparison? How does the JSC decide that Judge Hercules should get a spot on the shortlist, but that Judge Hermes should not? The JSC's deliberations from this round do not say, and, to the best of my knowledge, the JSC has *never* said.

49. What must the standard be? This Court need not prescribe one; it is ultimately for the JSC to develop one in the first instance. But the Constitution has at least

one clue: section 174(2) requires the JSC to consider "[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa".

50. The JSC has other guidelines at its disposal, including guidelines developed by the late Chief Justice Ismail Mohamed in 1998 (which the JSC appears to have adopted again in 2010).

50.1 At a special sitting held in September 2010, the JSC resolved, after a lengthy debate and a review of the guidelines that had been adopted in 1998, to publish the criteria used when considering candidates for judicial appointments. The media statement reporting on the adoption of this resolution is attached as "**SA1**"

50.2 These criteria are:

50.2.1 Is the nominee a person of integrity?

50.2.2 Is the nominee a person with the necessary energy and motivation?

50.2.3 Is the nominee a competent person, which encompasses technical competence and capacity to give expression to the values of the Constitution.

50.2.4 Is the nominee an experienced person, which encompasses technical experience and experience in regard to values and needs of the community.

50.2.5 Does the nominee possess appropriate potential?

50.2.6 Symbolism. What message is given to the community at large by a particular appointment?

51. There are still other sources for the JSC to drawn on to develop an appropriate evaluative and comparative framework. In 2013, the Democratic Governance and Rights Unit prepared a report on judicial selection, which I attach as "**SA2**". Amongst other things, the DGRU notes that a key safeguard to ensuring judicial independence is that "each JSC member must exercise an independent mind based on a candidate's qualities as revealed by the record and interview." This necessarily requires, first, that the JSC considers and deliberates on each candidate, and, second, that there be some framework that the JSC uses—or, more accurately, that each member of the JSC uses—to compare one candidate against another.

52. There are then the Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers, which the Southern African Chief Justices' Forum adopted in October 2018. I attach the Lilongwe Principles and Guidelines as "**SA3**". There are fifteen "underlying principles". Two principles stand out:

52.1 Principle (vii): "[o]bjective criteria for the selection of judicial officers should be pre-set by the selection and appointment authority, publicly advertised, and should not be altered during that process"; and

52.2 Principle (xiii): "[t]he final selection (decision) to recommend for appointment shall be fair, objective and based on weighing the suitability of the candidate for appointment against the criteria set for that appointment."

53. Elaborating on Principle (xiii), the Lilongwe Principles explain that "best practice" is for the "development of a ranking and scoring process for assessing candidates." This involves the "selection and appointment authority … meet[ing] before the interview process to decide mathematical weightings of the various criteria according to the needs of the position for appointment, and the needs of the judiciary as a whole." The purpose for doing is to "creat[e] substantive reasons for their recommendations."

54. The record of the JSC's deliberations show no discernable framework that the JSC used to evaluate and compare candidates. The JSC's process was procedurally irrational.

The JSC did not consider the constitutional standard of suitability for office

55. A related failure—and a symptom of the JSC not having a framework in place to discipline its process—is that the JSC did not consider each candidate's suitability for office.

56. The deliberations do not show that the JSC considered each candidate. Nor do the deliberations show that the JSC weighed candidates against one another to determine which should, and which should not, make the shortlist.

57. Instead, as it appears from page 5-3678, the Chief Justice announced a list of five candidates. There was no discussion of, and deliberation on, each candidate. As for the three candidates who were not shortlisted, the Chief Justice says a few words about each of Advocate Dodson SC and Judge Unterhalter (on pages 5-3678 to 5-3679), and even less about Judge Pillay (at page 5-3679).

58. In truth, there was no deliberation over candidates at all. Commissioner Cane SC set out her support for Judge Molemela, Judge Mathopo, Advocate Dodson SC and Judge Unterhalter (at pages 5-3683 to 5-3684), and highlighted adverse comments about Judge Vally submitted by the General Council of the Bar (at p 5-3683). There was no debate in response.

59. The deliberations also reveal no reasons for why the JSC shortlisted some candidates but not others. There was, in other words, no comparative evaluation.

60. Most candidates were barely mentioned *at all*.

60.1 Judge Kollapen was mentioned just four times. Three of those four were simply when the Chief Justice recited the shortlist (pages 5-3678 and 5-3733). The fourth time was in Judge President Mlambo's question about judicial experience (page 5-3689). This means the JSC did not deliberate about Judge Kollapen *at all*. To be sure, Judge Kollapen may be eminently qualified and suitable for appointment. That is not the point. The point is that the JSC is required to evaluate and deliberate on each candidate. The JSC failed to do that.

60.2 Advocate Dodson SC was also mentioned just four times. The Chief Justice dismissed his candidacy out of hand based on what can only be seen as an inflexible rule against appointing advocates directly to the Constitutional Court (despite that rule being nowhere in the Constitution or in statute) (page 5-3678). Commissioner Cane SC spoke in support of his candidacy (pages 5-3683 to 5-3684), and his name came up again in Judge President Mlambo's question (page 5-

3695). But there is no way to tell from the deliberations why Advocate Dodson SC did not make the shortlist.

60.3 Next, look for deliberations about Judge Kathree-Setiloane. And again, assume she is Judge Hercules. Why did she make the shortlist? There is no way to tell. Apart from her name appearing in the Chief Justice's shortlist, the voting tally, and the final shortlist, her name appears just once and it appears in a statement *against* her candidacy: Deputy President Petse said he was "happy" with the names that the Chief Justice proposed (why, we do not know) "subject to a reservation in respect of Judge Kathree-Setiloane for the reason that I articulated during the interview." I already dealt with this impermissible and unfair objection in the founding affidavit. Judge Kathree-Setiloane was impermissibly and unfairly asked questions about her "temperament". The message is clear: while male judges are lauded for being assertive and decisive no-nonsense judges, female judges are accused of being bossy and temperamental (and, based on our courts' rejection of the no-difference principle, the JSC cannot shrug off this line of questioning by pointing to Judge Kathree-Setiloane still making the shortlist). That aside, the JSC did not debate Judge Kathree-Setiloane's candidacy, and there is no way to know why she made the shortlist.

60.4 The same goes for Judge Mathopo and Judge Molemela. Again, assume the very best in their favour. Why were they shortlisted over other candidates? Again, no way to tell. Besides a fleeting mention by

Commissioner Cane SC, their names appear only when the shortlist is announced at the beginning and announced again at the end.

60.5 Judge Vally gets only a few more mentions, but, like Judge Kathree-Setiloane, they are made in motivations *against* his candidacy (page 5-3683). How did the JSC reconcile those negative comments with its shortlisting of Judge Vally? There is no way to tell from the deliberations.

61. The JSC should not leave it to guesswork for the public (and reviewing courts) to determine the reasons for its shortlisting of some candidates over others. The JSC is a deliberative body, yet the record reveals no deliberations at all.

The JSC approached the interviews with a closed mind

62. This lack of engagement with, and deliberation on, each candidate also means that the deliberations do not show the JSC bringing an open mind to bear on each candidate. Had the JSC done so, there would have been a careful discussion on the merits and demerits of each candidate, as well as a weighing up of candidates relative to one another.

63. None of that is apparent from the deliberations. Instead, the JSC appears to have simply accepted, without critical evaluation, the list that the Chief Justice put forward.

64. The JSC's voting is indicative of a failure to apply an open mind (the votes are recorded at p 5-3733). Judge Pillay, for example, received zero votes. This was no doubt because the irrelevant questions about her relationship with Minister

Gordhan unfairly derailed her interview. In the deliberations, the Chief Justice's attempt to explain his line of questioning is, in truth, no explanation at all.

65. I explained in the founding affidavit that the ambush of Judge Pillay was unfair and irrational. The deliberations show that the JSC approached her candidacy with a closed mind, either before even the interviews, or at least before the deliberations.

66. Commissioner Malema's characterisation of this application in the media only confirms these prejudicial preconceptions. Commissioner Malema described this application as "[i]n essence, Casac is fighting for [public enterprises minister] Pravin Gordhan's friend, who was rejected by an open and transparent process of the JSC, to be reimposed on the judiciary" and that the EFF viewed this application "as a racist attempt to continue the influence of the Indian cabal on the judiciary". Mr Malema's hostility continued, "Casac called for my removal in the JSC because I asked unpleasant questions. But since I arrived there, which is what you are not telling them, I've been asking questions the same way I asked that Indian lady. What is so special about that Indian judge? The only speciality is that she is friends with the president of the Natal Indian Congress, Pravin Gordhan". A media report of Mr Malema's statements is attached as "**SA4**".

67. Commissioner Malema's characterisation of this application is deeply regrettable. But it is also entirely consistent with the way he, and some others on the JSC, treated Judge Pillay during her interview and closed their minds to her candidacy during the deliberations. It was unfair and it irredeemably tainted the entire process.

The JSC did not provide the President with reasons for each of the shortlisted candidates

68. The JSC plays an important role in a broader process for selecting judges. For the Constitutional Court, the JSC sends a shortlist to the President. Unlike judges of other courts, the President then has a choice: he can either choose from the shortlist, or he can send the shortlist back to the JSC for supplementing.

69. Either way, the President has a decision to make. Even if he is happy with the shortlist (the initial one or a supplemented version), he needs to decide which candidate or candidates to choose from the list to fill the vacancy or vacancies. The President cannot make that decision if the JSC does not provide him with reasons for appointing each candidate. Those reasons should emerge from the JSC's interviews and deliberations.

70. Here, the JSC provided the President with barebones biographical and standard CV information on each of the shortlisted candidates. The JSC's letter to the President is item Q of the JSC's record (starting at page 5-3737 on CaseLines)

71. The whole point of the JSC's deliberative process is to give the President an all-things-considered assessment of each candidate so that the President has some basis to make these difficult decisions. The JSC shrugged this off and gave the President abridged CVs.

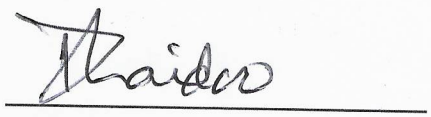
72. The reason the JSC could muster only garden variety bios is obvious: the JSC did not discuss each candidate in its deliberations, so there was no full

exchange of each candidate's strengths and weaknesses. There was nothing of substance to report to the President (besides biographical information that was already known before the interviews and deliberations) because the JSC, by its own faulty process, learnt nothing of substance. The end result is that the JSC has disabled the President from exercising his powers under section 174(4) of the Constitution.

CONCLUSION

73. The JSC's decision to list the third, fourth, fifth, sixth, and seventh respondents as nominees for appointment to the Constitutional Court should be declared unlawful and set aside. (I note that at some points in the founding affidavit, I mistakenly referred to the shortlisted judges as "the third, fourth, fifth, sixth, and ninth respondents". This formal error was caused by a reordering of how the respondents were ultimately cited. The shortlisted judges are the third to seventh respondents.) The decision should then be remitted to the JSC for reconsideration.

74. CASAC accordingly asks for an order in terms of the notice of motion. If CASAC is not substantially successful, it should get *Biowatch* protection from costs.



PARMANANDA NAIDOO

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at RONDEBOSCH on this the 13 day of July 2021, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

AR 716403-6 SGT NGCWU L.P

COMMISSIONER OF OATHS

Full names: NGCWU LISA

Address: RONDEBOSCH SAPS, CHURCH STREET, RONDEBOSCH

Capacity: SERGEANT

SUID-AFRIKAANSE POLISIEDIENS
STASIEBEVELVOERDER
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RONDEBOSCH, K.P/C.P.
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