

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 8647/13

In the matter between:

THE HELEN SUZMAN FOUNDATION

Applicant

and

JUDICIAL SERVICE COMMISSION

CAPE TOWN/KAAPSTAD
WES-KAAP HOË HOF

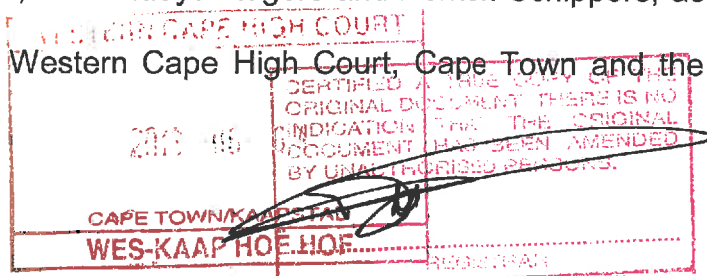
Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the applicant intends to make application to this Honourable Court on a date to be determined for an order against the respondent in the following terms:

1. a declaration that:

1.1 the decision taken by the respondent, *alternatively* its members, under section 174(6) of the Constitution, to advise the President of the Republic of South Africa ("**the President**") to appoint the Honourable Madame Justices Judith Innes Cloete and Babalwa Pearl Mantame and the Honourable Mr Justices Mokgoatji Josiah Dolamo, Owen Lloyd Rogers and Ashton Schippers, as judges of the Western Cape High Court, Cape Town and the



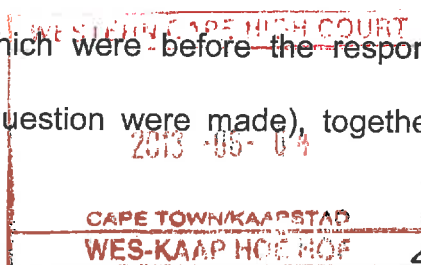
decision not to advise the President to appoint Ms Nonkosi Saba and Messrs Jeremy John Gauntlett and Stephen John Koen (collectively, "**the Decision**"), was unlawful and/or irrational and invalid;

- 1.2 *alternatively*, the process followed by the JSC before making the Decision was unlawful and/or irrational and invalid;
2. the applicant is awarded costs, including the costs of counsel; and
3. ordering such further and/or alternative relief as this Honourable Court may deem meet.

TAKE NOTICE FURTHER THAT the attached affidavit of **FRANCIS ANTONIE**, together with the annexes thereto, will be used in support hereof.

TAKE NOTICE FURTHER that, under Rule 53(1)(a) of the Uniform Rules of Court, the respondent is called upon to show cause why the aforementioned decisions should not be reviewed and corrected or set aside.

TAKE NOTICE FURTHER that under Rule 53(1)(b) of the Uniform Rules of Court, the respondent is required within 15 days after receipt hereof to dispatch to the Registrar of this Honourable Court the record of the proceedings sought to be reviewed and set aside (including all plans, correspondence, reports, memoranda, documents, evidence and other information which were before the respondent at the time when the decisions in question were made), together with such reasons as the



ORIGINAL DOCUMENT DEPOSITED
 IN THE OFFICE OF THE REGISTRAR
 OF THE WESTERN CAPE HIGH COURT
 CAPE TOWN
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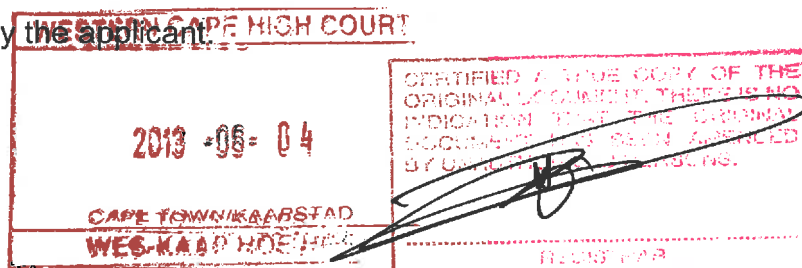
respondent is by law required to give or desires to make, and to notify the applicant that it has done so.

TAKE NOTICE FURTHER that within 10 days of receipt of the record from the Registrar, the applicant may, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of its notice of motion and supplement its founding affidavit in terms of Rule 53(4) of the Uniform Rules of Court.

TAKE NOTICE FURTHER that the applicant has appointed Webber Wentzel as its attorneys of record and the address at which they will accept service of notices and other process in these proceedings is c/o Webber Wentzel, 15th Floor, Convention Tower, Heerengracht, Foreshore Cape Town.

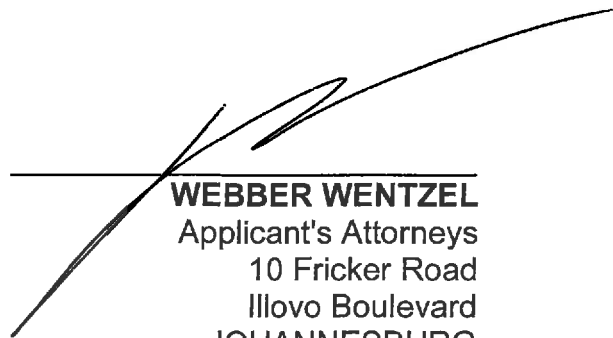
TAKE NOTICE FURTHER that if the respondent intends to oppose this application, it is required, under Rule 53(5):

- (a) within 15 days after the receipt of this notice of motion or any amendment thereof, to deliver notice to the applicant that it intends to oppose and in such notice to appoint an address within eight kilometres of the office of the Registrar at which it will accept notice and service of all process in these proceedings; and
- (b) within 30 days after the expiry of the time referred to in Rule 53(4), to deliver any affidavit it may desire in answer to the allegations made by the applicant.



TAKE NOTICE FURTHER that if no such notice of intention to oppose be given, application will be made to this Honourable Court for an order in terms of the notice of motion on **9 JULY 2013** at 10h00 or so soon thereafter as counsel may be heard.

DATED AT CAPE TOWN ON THIS 4TH DAY OF JUNE 2013



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TO: **THE REGISTRAR**
High Court
CAPE TOWN

AND TO: **JUDICIAL SERVICE**
COMMISSION
Respondent
Constitutional Court of South Africa
Constitution Hill
Braamfontein
JOHANNESBURG

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:

In the matter between:

THE HELEN SUZMAN FOUNDATION

Applicant

and

JUDICIAL SERVICE COMMISSION

Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

FRANCIS ANTONIE

do hereby make oath and state that:

1. I am an adult male of full legal capacity and am the Director of the applicant. I am duly authorised by the applicant to depose to this affidavit on its behalf.

2. The facts contained herein are, to the best of my knowledge and belief, true and correct and, unless the contrary appears from the context, are within my personal knowledge. Where I make submissions of a legal nature, it is done on the advice of the applicant's legal representatives.



PARTIES

3. The applicant is the Helen Suzman Foundation ("**HSF**"), a non-governmental organisation whose objectives are "*to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights.*"
4. The respondent is the Judicial Service Commission ("**JSC**"), a body created by section 178 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"), vested with the powers assigned to it in the Constitution and by national legislation. The JSC is situated at the Constitutional Court, Constitution Hill, Braamfontein.

JURISDICTION

5. This Honourable Court has jurisdiction to hear this matter under the Constitution and sections 19(1)(a) and 19(1)(b) of the Supreme Court Act, 1959.

RELIEF SOUGHT

6. This is a founding affidavit in an application under Rules 6 and 53 of the Uniform Rules of Court. In this application, the HSF is seeking, *inter alia*, an order declaring unlawful and/or irrational and invalid:
 - 6.1 the decision taken by the JSC, under section 174(6) of the Constitution, to advise the President of the Republic of South Africa to appoint the Honourable Madame Justices Judith Innes Cloete and Babalwa Pearl Mantame and the Honourable Mr



Justices Mokgoatji Josiah Dolamo, Owen Lloyd Rogers and Ashton Schippers ("**the successful candidates**") as judges of the Western Cape High Court, Cape Town ("**WCC**"), and the decision not to advise the President to appoint Ms Nonkosi Saba and Messrs Jeremy John Gauntlett and Stephen John Koen ("**the unsuccessful candidates**") (collectively, "**the Decision**");

6.2 *alternatively*, the process followed by the JSC before making the Decision.

7. The HSF submits that this matter is now ripe for determination by this Honourable Court. The reasons provided by the JSC, as delineated below, together with certain recent public statements by, *inter alios*, the Chief Justice of the Republic of South Africa and the spokesperson for the JSC, Mr Dumisa Ntsebeza SC, provide this Honourable Court with the necessary context to consider the relief sought in the Notice of Motion accompanying this affidavit.

FACTUAL BACKGROUND

8. On 17 October 2012, the JSC interviewed eight candidates for appointment as judges of the WCC to fill five vacancies at that Court. The JSC advised the President to appoint the successful candidates as judges of the WCC and, on 7 February 2013, the President appointed them as such (see annex "**FA1**").



9. The other persons who were interviewed for appointment by the JSC, but did not make the JSC's shortlist for appointment, were the unsuccessful candidates. The successful and unsuccessful candidates will be referred to, collectively, as "**the Candidates**".
10. On 23 October and 5 November 2012, former Deputy President of the Supreme Court of Appeal, the Honourable Mr Justice LTC Harms, sent letters via his attorneys to the JSC, requesting reasons for the JSC's decision not to recommend Mr Gauntlett for judicial appointment. Mr Justice Harms had nominated Mr Gauntlett for appointment as a judge of the WCC in a letter dated 19 August 2012. Copies of these letters are annexed hereto marked "**FA2**" to "**FA4**". At the time of deposing to this affidavit, I was unable to procure the original letters from Mr Justice Harms or his attorneys. I have made every effort to obtain the originals or copies thereof. I will continue to do so in order to make them available to this Honourable Court in due course, if it so wishes.
11. On 6 November 2012 ("**the first JSC letter**"), Mr Sello Chiloane, the Secretariat of the JSC replied to this request for reasons on behalf of the JSC. In its letter, a copy of which is annexed hereto marked "**FA5**", the JSC said the following:

"It can therefore be concluded that the reasons for [Mr Gauntlett] not mustering the required number of votes were:

- 1. concerns or doubt as to whether he is possessed of the humility and judicial temperament; and*



2. *the appointment of two white males would do violence to the provisions of section 174(2) of the Constitution.*"

12. The first JSC letter elicited a further letter from Mr Justice Harms' attorneys, a copy of which is annexed hereto marked "FA6", which the JSC responded to by way of a letter dated 16 November 2012 ("**the second JSC letter**"), which is annexed hereto marked "FA7". In the second JSC letter, Mr Chiloane stated that the reasons given in the first JSC letter were "*collated by the Chairperson from the contributions made by Commissioners during the deliberations that preceded the voting.*" Further, Mr Chiloane observes that these Commissioners "*mandated*" the Chairperson to collate these reasons.
13. In that same letter, Mr Chiloane concluded that "*[w]e believe that this letter, as well as the previous one, has now given you all the necessary information and trust that the matter is now closed.*" As such, the first and second JSC letters reflect in their totality the reasons why the JSC decided not to recommend Mr Gauntlett. They canvass fully the factors taken into account by the JSC when exercising its power under the Constitution to advise the President on judicial appointments.

ISSUES

14. This application raises the following legal issues:



- 14.1 What is the correct interpretation of sections 174(1), (2) and (6) of the Constitution?
- 14.2 How must the JSC exercise its power under section 174(6) when advising the President on judicial appointments?
- 14.3 Did the JSC consider irrelevant factors or fail to consider relevant material factors before making the Decision and/or misconstrue its power under section 174(6) when making the Decision?
- 14.4 If so, what is the appropriate relief?

SECTION 174 OF THE CONSTITUTION

15. Section 174 of the Constitution, which governs the appointment of judicial officers, provides in relevant part:

"(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

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

....

(6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission."

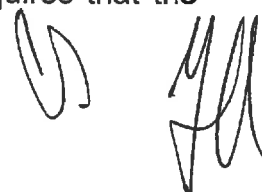


Section 174(1): Jurisdictional requirements

16. Section 174(1) limits the range of people who are eligible for appointment as judicial officers. Although any person may be appointed as a judicial officer, such persons must also meet certain stipulated criteria. Only "*fit and proper*" and "*appropriately qualified*" people "*may*" be appointed as judicial officers (candidates for appointment to the Constitutional Court must also be South African citizens). Thus, these stipulated criteria serve as jurisdictional requirements for judicial appointment.

Section 174(6): Duty to advise the President

17. Under section 174(6) of the Constitution, the President is required to appoint judges of the High Court "*on the advice of the [JSC]*".
18. Not everyone who satisfies these jurisdictional requirements will automatically be appointed as a judge. Indeed, many more persons will fulfil these requirements than there are spaces available. Of these, the JSC must then decide who it should advise the President to appoint. The JSC thus must exercise its discretion in advising the President. The critical question is how this discretion may lawfully be exercised.
19. Although the Constitution does not explicitly provide a list of factors that must be considered by the JSC when advising the President, this does not mean that its discretion is unfettered. Like all exercises of public power, the principle of legality requires that the

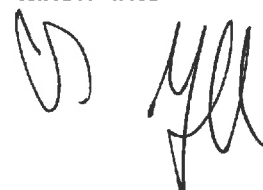


JSC must act lawfully and rationally. This applies both to the process that it follows when deciding on how to advise the President, as well as the advice that it ultimately gives.

20. It may not, therefore, act on whim or fancy. Moreover, its decisions cannot be based on arbitrary or irrelevant factors, nor may the JSC confine itself to a truncated list of factors, whilst failing to consider other material, relevant factors. Further, it must not, because of an incorrect interpretation of the constitutional provision that empowers it to act, misconstrue the nature of its power.
21. If it does any of these things, it acts unlawfully and/or irrationally and the exercise of its power, including any decisions that it makes, will consequently be inconsistent with the Constitution and invalid.

Section 174(2): Race and gender


22. Traditionally, the factors considered relevant by the person or body empowered to appoint judicial officers were relatively limited. Technical competence, which includes demonstrated analytical ability and knowledge of the law, was always at the forefront. Others, such as sound judgment and an ability to communicate effectively (to other lawyers) were also deemed relevant, if perhaps subsidiary, attributes of a good judge.
23. More recently there has been a shift in emphasis so as to include a broader consideration of factors. Other individual qualities of candidates, not traditionally deemed relevant, are now taken into



account (some of these are discussed below). Also, institutional factors relating to the operation of the judiciary and the legal system, or social factors tied to history, are material to the question of which candidate would be most suitable for appointment. A factor that our Constitution has prescribed as relevant, as codified in section 174(2), is the need for the judiciary broadly to represent the racial and gender demographics of South Africa.

The purpose of section 174(2)

24. Section 174(2) seeks to give effect to two principal purposes, one corrective and the other institutional.
25. First, the injunction created by section 174(2) is meant to account for South Africa's unique history and to correct the inequalities wrought by a system of discrimination and exclusion. In a sense, it serves as an "affirmative action" provision, which seeks to remedy imbalances in the judiciary. There is no doubting the importance of this purpose, which our courts have recognised as not only constitutionally required, but also socially desirable.
26. Second, an essential feature of a successful legal system is that it is considered legitimate by the people over whom it presides. For it to be so considered, justice must be seen to be done by those who adequately represent or reflect society. Where this is not the case, and the judiciary is primarily constituted by a particular gender, or a particular race, citizens may lose respect for the judiciary and the



law, which in turn undermines the legitimacy, moral force and efficacy of the legal system.

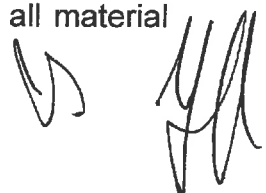
The role of section 174(2) in the appointment of judges

27. Bearing in mind the importance of section 174(2) to the appointment of judges, it is submitted that there are only two possible interpretations of the role that this subsection is meant to play in the decision-making processes of the JSC.
28. First, after the jurisdictional requirements in section 174(1) have been satisfied, race and gender may operate as decisive factors. If there is a racial and/or gender imbalance on the bench, the JSC is obliged to advise the appointment of that candidate who best redresses this imbalance. An alternative interpretation is that race and gender constitute two of many considerations that must be taken into account by the JSC when it exercises its discretion in advising the President. The need for greater racial and gender equality must be considered alongside other factors, such as a candidate's technical competence, temperament and communication skills.
29. It is clear, both textually and when regard is had to the purpose of section 174(2), read in the context of section 174 and, more broadly, the Constitution as a whole, that the second interpretation is to be preferred.

30. From a textual perspective, regard must be had to the words "*must be considered*" in section 174(2). To consider something means to "*take it into account*" and "*considered*", the past participle of "*consider*", means to "*think carefully about something before making a decision*". Both tenses of the word cannot be reconciled with the first interpretation proffered above, as it does not allow for the JSC to apply its collective mind in any meaningful way. Rather, it would be required to act in a mechanical fashion: once satisfied that the bench does not reflect the racial and gender composition of the country, it would be obliged to advise the President to appoint the candidate that would best ameliorate the divide between the two.
31. Further, it is difficult to conceive of how such an approach to the appointment of judicial officers would comport with the Constitution, which avowedly aims for more than just one end. To adopt the first interpretation would be to allow the JSC to ignore all other factors that go towards appointing someone who would be a good judge, thereby undermining the rule of law and the legal system as a whole.
32. Although section 174(2) codifies essential and necessary factors that must be taken into account when deciding on whom to appoint as a judicial officer, it cannot operate in a way that permits the JSC to discard other material, relevant factors.

THE EXERCISE OF DISCRETION UNDER SECTION 174(6)

33. As noted above, the power under section 174(6) is a discretionary one, which must be exercised after taking into account all material



and relevant factors, including the race and gender of the candidates. Two questions arise from this interpretation of section 174. First, what factors must be taken in account by the JSC when exercising its discretion? Second, how must it take these factors into account?

Relevant factors

34. Although there should not be a closed list of relevant factors, the following must always be taken into account by the JSC:

- 34.1 Knowledge of the law is vital. To apply the law, a judge must necessarily have a good working knowledge and understanding of the law.
- 34.2 Her acknowledged area of legal expertise, depending on the needs of a particular bench, bears on the question of how much value she will add to the judiciary if she is appointed.
- 34.3 She must also have the ability expeditiously to assimilate unfamiliar aspects of the law, to enable her effectively to deal with the varied types of disputes that come before her.
- 34.4 She must have the requisite analytical ability, which relates both to an understanding of the issues before her and an ability to apply the law to these facts.

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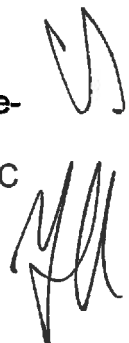
- 34.5 She must display not only intellectual integrity, but she must also be impartial and objective in her approach to each and every case that she hears.
- 34.6 To command the confidence of the public, a good working knowledge of social, political and economic reality is essential. Judges in 'ivory towers', who know nothing apart from what they read in law reports and text books, do little to instil such confidence.
- 34.7 Related to the public's confidence in the judiciary, is the issue of diversity, including race and gender. If the judiciary is not perceived by the public as broadly reflecting society as a whole, it will lose the public's confidence and will as a result lose its legitimacy and efficacy. To this end, the JSC must necessarily cast its net wider, and specifically seek out viable candidates for judicial appointment from areas, both professional and geographical, that historically were ignored or maligned.
- 34.8 She must also have a good temperament. A judge must be calm and she must be sensitive to the emotional state of the litigating parties.
- 34.9 This, however, does not mean that she must tolerate inept counsel or allow her court to degenerate into disorder or disruption. In this way, a certain degree of robustness and forthrightness is equally important.

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- 34.10 She must be able to communicate effectively with her colleagues, in writing and in person, with ordinary members of the public when called upon to do so, and individual litigants when matters are heard.
- 34.11 The public image of a judge is also relevant. She should not make rash or unguarded comments, which denigrate the standing or the integrity of the judiciary in the eyes of the community.
- 34.12 She must have empathy, compassion and knowledge of local communities.
- 34.13 Lastly, administrative efficiency, particularly in the High Courts, is an essential attribute of any candidate who is seeking judicial appointment: matters must be heard and judgments must be delivered.

How must they be taken into account?

35. None of these factors, including the race and gender of a particular candidate, will be decisive in all cases. Rather, they form part of a basket of relevant considerations, in respect of which the JSC must meaningfully apply its mind when advising the President on appointments. The JSC is not permitted to pick and choose. All are relevant and all are material.
36. Further, it is impossible to assign each relevant consideration a pre-
- determined weight that can be used on every occasion that the JSC



exercises its power under section 174(6). This is because the importance of an individual factor will always be relative to the other factors, and their individual importance in the cumulative assessment of all relevant factors depends on the particular context and circumstances of a given case.

37. Thus, for example, the importance of race and gender to the appointment process will depend on the extent of the racial and gender imbalance on the bench in South Africa at a given point in time. In a case where the bench is overwhelmingly dominated by white males, the importance of appointing black and female candidates to the bench will be greater than in a case where there is improved demographic representation, albeit that the bench does not broadly reflect the racial and gender composition of South Africa. Similarly, the importance of one candidate's technical competence relative to another will depend on other factors such as the same two candidates' relative judicial temperament or writing skills.
38. This is not to say that certain factors, all things being equal, may not generally carry more weight than others in particular circumstances. So, for example, the technical competence of a candidate or their race and gender may sometimes be deemed to be more important factors than his or her temperament or public image. Rather, it rejects an approach that affords primacy to one factor, or allows one factor automatically to exclude consideration and evaluation of other relevant factors.

39. To summarise, when exercising its power under section 174(6), the JSC is required to consider meaningfully all factors relevant to the appointment of judicial officers. It must do so in a way that does not have the effect of elevating one of these factors as decisive. Further, in every case, the JSC must compare each candidate for appointment with each of the other candidates, and must weigh up their respective strengths and weaknesses, whilst recognising that the relative importance of the different factors may vary in different appointment processes.

GROUNDINGS OF REVIEW

40. In the first JSC letter two reasons were given for the decision not to recommend Mr Gauntlett for appointment as a judge of the WCC. They concerned doubts about his "*humility and judicial temperament*" and the belief that appointing "*two white males*" to the WCC would do "*violence*" to the provisions of section 174(2) of the Constitution.

Failed to consider relevant factors

41. Whilst temperament and race and gender are material relevant factors that must be considered by the JSC when exercising its power under section 174(6), there are many others that must be considered as well. There is no evidence that the JSC considered the many relevant factors delineated above.



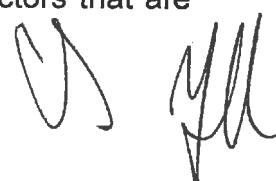
42. Despite being called on to give their full reasons for the decision, the JSC makes only a passing reference to Mr Gauntlett's "*excellence and experience as a lawyer*". There is no evidence of any meaningful engagement with the substantive content of his apparent skill and experience, or effort to balance these attributes and other relevant factors that favour his appointment against those that would count against him being appointed.
43. Indeed, apart from this passing reference, there is no evidence that the JSC considered any other factor in even the most superficial way. No mention was made of: his knowledge of the law; his capacity to assimilate new areas of the law; his legal and factual analytical ability; his intellectual integrity, impartiality and objectivity; his ability to command the public's confidence; his general knowledge of everyday life; his communication skills; his public image; or his administrative efficiency.
44. Moreover, there is no suggestion that the JSC engaged in a comparative analysis of the respective strengths and weaknesses of the Candidates. Rather, it appears merely to have considered the race and gender of the Candidates and the racial and gender composition of the WCC, decided that more than one white male could not be appointed to the WCC and then preferred Mr Justice Rogers over Mr Gauntlett and Mr Koen in making the Decision. The deciding factor between Mr Gauntlett and the candidate ultimately appointed appears to have been temperament and humility.

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45. The failure to consider all material relevant considerations, in a meaningful, comprehensive and comparative manner, tainted the entire decision-making process with unlawfulness and irrationality, thus rendering the Decision unlawful and irrational.

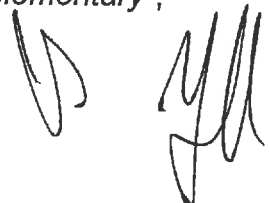
Error of law / JSC misconstrued its powers

46. The language used in the first JSC letter betrays a legally flawed understanding that it had in relation to the exercise of its power. The JSC is blunt in stating that the appointment of two white males to the WCC "would do violence" to section 174(2). This is a clear misconception of the role of section 174(2), as set out above. The non-alignment of the racial and gender demographics of the judiciary with those of the country can never serve as an insuperable impediment to the JSC advising the appointment of a white and/or male candidate (in any jurisdiction). Race and gender were applied in this case in a way that forestalls consideration of other relevant factors. This approach is similar to the approach adopted by the JSC on previous occasions, including the facts traversed by the Supreme Court of Appeal in the case of *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA).
47. The JSC elevated this factor listed in section 174(2) to a level of importance that it precluded appointment of more than one white male to the WCC. This is apparent from the first and second JSC letters. And it did this before considering any other factors that are

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relevant to the appointment of judicial officers. It appears to have considered the composition of the WCC and then concluded that because that judiciary did not broadly reflect the racial and gender composition of South Africa, it would not be lawful for it to advise appointment of more than one white male. This constitutes an error of law.

48. In any event, it is unclear on what basis the JSC considered that appointing two white males to the WCC bench would do violence to the Constitution.
49. Having misconstrued its powers and having made the Decision based on an error of law, the JSC acted unlawfully.
50. The JSC's misunderstanding of its power under section 174 is augmented by the "*Summary of the criteria used by the judicial service commission when considering candidates for judicial appointments*", agreed upon by the JSC in a Special Sitting on 10 September 2010 ("**the JSC criteria**"). A copy of the JSC criteria is annexed hereto marked "**FA8**".
51. On the face of the document, the JSC criteria distinguish between the factors of race and gender, which it groups together with the jurisdictional requirements of section 174(1), on the one hand, and relevant factors which it calls "*[s]upplementary criteria*", on the other.
52. Describing these other factors, which are plainly material and relevant to the exercise of its discretion, as "*[s]upplementary*",

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demonstrates that the JSC on a systemic level fails to understand the nature of its discretionary power. The factor in section 174(2) is simply one of the factors which the JSC is obliged to consider and does not assume pre-eminence. Moreover, the section 174(2) factor and the "supplementary" factors serve a completely different purpose to the section 174(1) requirements, and become relevant only once these requirements are satisfied, namely, when the JSC exercises its power under section 174(6).

RELIEF SOUGHT


53. No argument has been made regarding the substantive correctness of the Decision. Nor have the relative merits of the individual Candidates been traversed. This is because this case is not about the Candidates, but about the legal process that was followed by the JSC when reaching the Decision. Ensuring that the correct process is followed in the future is critical to the development of the South African judiciary and the national interest of South Africa as a constitutional democracy.
54. It is for this reason that the HSF seeks only an order declaring the Decision unlawful and/or irrational. It does not ask that the Decision and the appointment of the successful candidates be set aside and for it to be referred back to the JSC for re-determination, not least because of the potential practical consequences which would flow from this.



55. The applicant has argued a nuanced case, which relates principally to the manner in which the JSC engages in its decision making process. To recapitulate, section 174(1) of the Constitution prescribes the jurisdictional requirements which must be met before the JSC exercises its discretion under section 174(6). This discretion must be exercised rationally and requires a holistic consideration of a myriad of factors, none of which are exhaustive or determinative of the question of what makes a good judge. These factors include race and gender, as captured in section 174(2), the considerations set out in paragraph 34 and the factors delineated in the JSC criteria, the relative importance of which depends on the circumstances of a given process of appointment.
56. What is unacceptable and contrary to the JSC's constitutional mandate is the elevation of certain relevant factors to a position of primacy over, or worse, to the exclusion of, other relevant factors. Such elevation or exclusion will result in a guillotine effect, ultimately undermining and sabotaging the final decision and consequently all judicial appointments.


WHEREFORE, the HSF prays that this Honourable Court grant the order sought in the notice of motion to which this affidavit is attached.





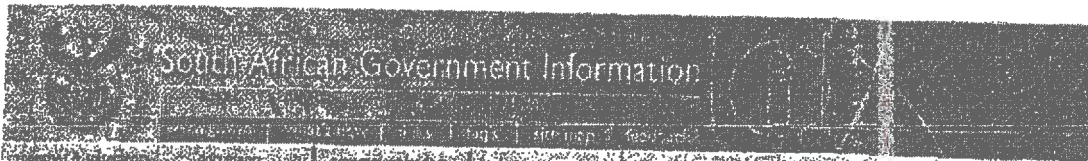
DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Illovo on this the 50th day of MAY 2013, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS
 Full Names:
 Business Address:
 Designation:
 Capacity:

CRAIG ARTHUR SCOTT
 COMMISSIONER OF OATHS
 PRACTISING ATTORNEY EX OFFICIO
 SUITE 6, FRICKER ROAD
 ILLOVO, SANDTON 2146
 TEL: 011 268-5916



"FA1"

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President Jacob Zuma appoints Judges to various court divisions

7 Feb 2013

President Jacob Zuma has appointed twelve Judges to the various Divisions of the High Court, upon the recommendation of the Judicial Service Commission and with effect from 15 February 2013.

The following Judges have been appointed:

- The Honourable Mr Justice Achmat Naaim Jappie as Deputy Judge President of the KwaZulu-Natal High Courts, Pietermaritzburg and Durban;
- Adv. Murray John Lowe SC, as a Judge of the Eastern Cape High Court, Port Elizabeth;
- Ms Buylwa Majiki as a Judge of the Eastern Cape High Court, Mthatha and Port Elizabeth, based at the High Court, Mthatha;
- Adv. David Stephanus Fourie SC as a Judge of the North and South Gauteng High Courts, Pretoria and Johannesburg;
- Ms Judith Innes Cloete as a Judge of the Western Cape High Court, Cape Town;
- Mr Mokgoatl Josiah Doiamo as a Judge of the Western Cape High Court, Cape Town;
- Ms Babalwa Pearl Mantame as a Judge of the Western Cape High Court, Cape Town;
- Adv. Owen Lloyd Rogers SC as a Judge of the Western Cape High Court, Cape Town;
- Adv. Ashton Schippers SC as a Judge of the Western Cape High Court, Cape Town;
- Honourable Mr Justice Basheer Waglay as Judge President of the Labour Courts;
- Honourable Mr Justice Dimpheletse Seun Stanley Moshidi as a Judge of the Electoral Court; and
- Honourable Mr Justice Willem Lötter Wepener as a Judge of the Electoral Court.

These appointments were made after due consideration of all the factors and circumstances which were brought to the attention of the President, in the course of making his decision.

"I wish to congratulate the new appointees and wish them well in the discharge of their mandate of giving full expression to the letter and ethos of our Constitution, as we strive together to create a democratic society where the rights of all persons are respected and protected," said President Zuma.

Enquiries:
Mac Maharaj
Cell: 079 879 3203

Issued by: The Presidency
7 Feb 2013

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Handwritten signatures and initials

"FA2"

PO Box 96 028 * Waterkloof Village 0145 * Pretoria * South Africa
Louis.Harms@gmail.com - +27(0)74 104 0212

19 August 2012

The Secretary

Judicial Service Commission

Johannesburg

By email to: Mr Sello Chiloane (chiloane@concourt.org.za)

Dear Sir

Nomination of Adv Jeremy Gauntlett SC for appointment to the Western Cape High Court

I hereby wish to nominate Adv Gauntlett for the abovementioned appointment.

I have known him as counsel who appeared regularly before the SCA and he is known as someone who has always been prepared to defend human rights under all circumstances, and fearlessly, from South-West Africa (as it then was), through the Trojan Horse case (and many others), in Zimbabwe, before the SADC Tribunal, and, more particularly, in South Africa.

Much more need not be said because his CV speaks for itself. Having received recognition elsewhere for his outstanding record, time has come, I respectfully submit, for appropriate local recognition by means of a judicial appointment, and I have no doubt that his contribution to the Western Cape High Court will be stellar.

Sincerely

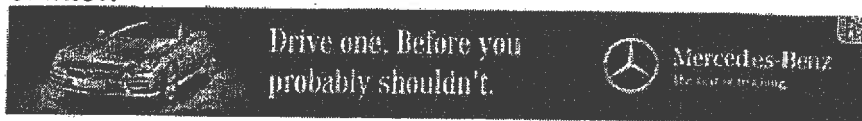


LTC Harms

"FA3"

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OPINION



Justice Louis Harms challenges JSC over Gauntlett's non-appointment

Matsepes Attorneys - JSC
25 October 2012

Lawyers for former SCA DP say refusal to appoint top advocate irrational and legally assailable

Letter from Matsepes Attorneys on behalf of Justice Louis Harms, former Deputy President of the Supreme Court of Appeal to the Chief Justice Mogoeng Mogoeng, October 23 2012:

23 October 2012

PER E-MAIL:

Dear Chief Justice

RECOMMENDATIONS OF THE JSC REGARDING APPOINTMENTS TO THE WESTERN CAPE BENCH

1. We act for Mr Justice Louis Harms, the former DP of the SCA. As you know, our client is the proposer of Jeremy Gauntlett SC as a candidate for the Western Cape High Court.
2. We are instructed that eight shortlisted candidates were interviewed last Wednesday (17 October 2012) by the JSC in Cape Town.
3. According to apparently well-informed media reports, five of the candidates are to be recommended by the JSC for the appointment to the Western Cape High Court. They are Cloete AJ, Dolamo AJ, Mantame AJ, Rogers SC and Schippers SC. Gauntlett SC is not to be recommended. You are obviously in a position to confirm the accuracy of these reports. Our client regards the consequences of not acting on the veracity of these reports to be so deleterious to the proper administration of justice in the country that he has instructed us to address this letter to you at this stage.
4. Our client regards the omission of Gauntlett SC to be irrational and accordingly legally assailable as per the reasoning of the SCA in the recent litigation between the Cape Bar Council and the JSC. The preferring of Dolamo AJ over Gauntlett SC is in particular irrational and inexplicable given what emerged during the interview of Dolamo AJ.
6. The recommendation by the JSC appears on the available information to be prima facie irrational and unconstitutional. It would, with respect, similarly be unconstitutional for you to act on the JSC's recommendation in these circumstances and appoint Dolamo AJ as a judge. Our client would therefore urge you to refer the recommendation of Dolamo AJ back to the JSC, together with a request that the JSC provide its reasons for recommending Dolamo AJ and not recommending Gauntlett SC.
7. Should you not be prepared to refer the recommendation of Dolamo AJ back to the JSC, our client requests that you do not act on the JSC's recommendation and appoint Dolamo AJ as a judge until our client has had a reasonable opportunity of instituting an application to review and set aside the JSC's recommendation of Dolamo AJ.
8. We look forward to hearing from you as a matter of urgency.

Yours faithfully

MATSEPES INC.

RB CLOETE

"FA4"

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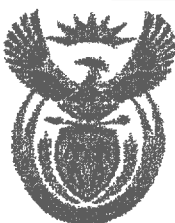
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Why we didn't appoint Jeremy Gauntlett - JSC

Sello Chiloane
07 November 2012

Commission says selecting two white males would've done violence to constitution, top advocate lacked humility

Letter from RB Cloete of Matsepe's Incorporated to Sello Chiloane, Judicial Services Commission, November 5 2012

FOR ATTENTION: MR SELLO CHILOANE

The Secretariat of the Commission
Judicial Service Commission

Dear Sir

RECOMMENDATIONS OF THE JSC REGARDING THE APPOINTMENTS TO THE WESTERN CAPE BENCH

We refer to our letters of 23 and 25 October 2012.

In your response of 25 October you indicated that it would be 'inappropriate' for the reasons to be disclosed then, in view of the fact that the chairperson would address a media event the next day. No other basis was indicated as to why the reasons would not then be forthcoming.

The reasons were not furnished publicly at the media event. Instead it was indicated that the consent of Mr Gauntlett to the disclosure of reasons relating to him would be sought. We do not accept that the consent of Mr Gauntlett (or Mr Dolamo, to whom we assume a similar request was directed, given the terms of our request of 23 October) had to be obtained before the JSC could provide reasons. We do in any event understand that Mr Gauntlett assented, on the same day he received the request (29 October).

The delay in furnishing the reasons is a matter of concern. Is it to be inferred that in reaching its decisions on 17 October, the JSC as a body did not record the reasons by which the decisions were arrived at? It would appear that the delay is to be ascribed to the fact that reasons are now being prepared ex post facto, when the JSC is not in session.

In the circumstances, we must ask to receive the reasons for the decisions of 17 October (in the respects indicated in our letter of 23 October) by Wednesday 7 November 2012.

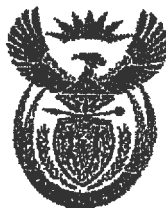
Yours faithfully

MATSEPES INCORPORATED

R.B. CLOETE

"FAS"

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Johannesburg
2017



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REPUBLIC OF SOUTH AFRICA
JUDICIAL SERVICE COMMISSION

Enq: Sello Chiloane
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Mr R B Cloete
Matsapes Inc
P O Box 256
Bloemfontein
9300

Per E-mail: almag@matsepes.co.za

Dear Mr Cloete

**RECOMMENDATIONS OF THE JSC REGARDING APPOINTMENTS TO THE WESTERN
CAPE BENCH**

We acknowledge receipt of your letter sent via email dated 23 October 2012.

I was requested by the Chairperson of the Judicial Service Commission (Commission) to respond as follows:

Eight (8) candidates were interviewed for five (5) vacancies on the Western Cape High Court. The candidates were: Ms J I Cloete, Mr M J Dolamo, Advocate J J Gauntlett SC, Mr S J Koen, Mrs B P Mantame, Advocate O L Rogers, Ms N Saba and Advocate A Schippers SC.

The following candidates were recommended for appointment:
Ms Cloete,

Mr Dolamo,

Ms Mantame

Advocate Rogers, and

Advocate Schippers.

The recommendations were determined through the normal voting procedure (secret ballot) of the Commission, the successful candidates having received a majority vote

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(50% plus one or more of votes cast). Advocate Gauntlett SC failed to muster the required number of votes so as to be recommended for appointment.

Voting takes place after the Commissioners have deliberated on the candidates' strengths and weaknesses, the needs of a particular court and the requirements imposed by section 174(1) and 174(2) of the Constitution. The question that is answered at the voting stage is: Which of the candidates found to be fit and proper¹ should the Commission recommend for appointment? Commissioners, therefore, vote for candidates that they want to be recommended for appointment. Each Commissioner thus exercises an independent vote. This is what happened in relation to these interviews for the Western Cape High Court.

As to Advocate Gauntlett SC, his excellence and experience as a lawyer were acknowledged. A concern was raised, however, that he has a 'short thread' and that he can be acerbic at times. Some Commissioners accepted his assurance that as a Judge one is removed from the immediate combative situation that counsel usually find themselves in, but strong reservations were also expressed as to whether, as part of his attributes, he has the humility and the appropriate temperament that a Judicial Officer should display.

Another very important consideration was the demographic composition of the Western Cape High Court Bench. It was argued that considering the number of white male Judges in that Court as compared to other races was such that were two white males to be appointed (at that stage the focus was on Advocates Gauntlett SC and Rogers SC) the Commission would be doing violence to the provisions of section 174(2) of the Constitution. Of course to some Commissioners those provisions were no obstacle to the appointment of two white males.

¹ All the candidates interviewed were found to be fit and proper.

These were the considerations that occupied the minds of Commissioners when they were called upon to vote. It can therefore be concluded that the reasons for Advocate Gauntlett SC not mustering the required number of votes were:

1. concerns or doubt as to whether he is possessed of humility and judicial temperament; and
2. the appointment of two white males would do violence to the provisions of section 174 (2) of the Constitution.

It is correct that Mr Dolamo's disciplinary complaints were raised during the Commission's deliberations. However, most of the complaints were considered to be relatively 'old' and most were decided in his favour. Furthermore, the Commission took account of a letter from the Law Society of the Northern Provinces attesting to the fact that Mr Dolamo was a member in good standing with them. He could therefore not be disqualified in the face of such a letter.

The long delay in delivering a reserved judgment on an application for leave to appeal was viewed against the background that then he was acting and still learning. He was however described by some Commissioners as popular with fellow Judges and generally a good Judge.

Yours sincerely,



Sello Chiloane
Secretariat: Judicial Service Commission
Date: 06/11/2012

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MATSEPES

FORMERLY ISRAEL SACKSTEIN MATSEPE
Attorneys / Prokureurs / Advokate

"FA6"

References / Verwysings:

Ours/Ons: Mr Cloete/M-L/CH2621

Yours/U:

E-MAIL: maloud@matsepes.co.za

9 November 2012

FOR ATTENTION: MR SELLO CHILOANE

The Secretariat of the Commission
Judicial Service Commission
Private Bag X1
Constitution Hill
Braamfontein
JOHANNESBURG
2017

Dear Sir

**RECOMMENDATIONS OF THE JSC REGARDING THE APPOINTMENTS TO THE
WESTERN CAPE BENCH**

We wish to thank you for your letter dated 6 November 2012 in which the reasons for the rejection of Adv Gauntlett as judge of the High Court and the recommendation of Mr Dalamo were given.

We were unable to respond earlier because we could not obtain instructions from our client who was at the time overseas.

Our client would wish to avoid litigation and accordingly requests some clarification regarding both the status and content of what have been advanced as the reasons of the JSC. This is sought also to enable our client, and others who may wish to apply for appointment or wish to nominate

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DIRECTORS: ROIK BARRY CLOETE B.A., LL.B., Pg.D.C.L., THU VINCENT MATSEPE Dip.Law., B.Proc., DEEM A. HONIBALL B.Proc.,
LEPOND JOHNSA LEKALE B.Proc., LL.M., FREDERICK J. BENDEAL B.Proc.,
ASSISSED BY: SCHMIDT K. HAKO LL.B., YOLANDA MIMME B.Arch., LL.B., OTTIE ANTON NOORDMAN LL.B.,
MOBALA D. MOKGOLA LL.B., VIVETTE KOCK LL.B., MICHELLE PETRU JANNE VAN RENSBURG BA., LL.B., WALDA IRMA VENTER B.Proc.

someone, to assess whether there is any purpose in so doing if the candidate is a white male.

First, our client wishes to know whether the reasons given appear from the record of the proceedings. And then, too, our client wishes to know whether the reasons were issued by you with or without reference to all the members of the Commission.

Second, two reasons relating to Adv Gauntlett were given. As to the first, namely that relating to the character of Adv Gauntlett, which appears to be a self-standing reason, our client wishes to know whether this means (notwithstanding the contradictory footnote in the letter under reply that all candidates were found to be fit and proper persons for appointment) that the JSC is in fact of the view that in the case of Adv Gauntlett his personality is such that he is not a fit and proper person to be appointed as a judge.

We would then like to know on what basis the Commission felt that the views of the President of the Court of Appeal of Lesotho, and his predecessor, under whom Adv Gauntlett had served for 14 years, amongst others, should be dismissed based on what was stated. to be a perception of 'some' members of the Bar and without any further specificity such as to enable the JSC to assess its factual foundation.

If the conclusion was reached on any facts established during the interview, our client would ask to be informed as to what these were.

Our client would also ask where, in its agreed and published formulation of required judicial attributes, 'humility' is mentioned. If, as our client understands to be the case, it is not, our client is concerned to know on what basis this notion was introduced as a measure for appointment in relation to one candidate.

As an aside, our client is quite surprised by the fact that the JSC was prepared to nominate him for the position of Deputy President of the SCA and that the President was prepared to appoint him to that position where it was generally known that the description of Adv Gauntlett applied equally to him (and to others who have graced and are gracing the Bench).

If that is not what is meant by the first reason kindly inform us how Adv Gauntlett could redeem himself in order to become a fit and proper person. It would otherwise not make any sense to nominate him again, even if there is no other white male candidate for a particular vacancy.

Turning then to the second reason, what plan or other measure has the JSC adopted in order to give effect to section 174(2) of the Constitution and what are the provisions thereof? It would appear from its formulation that the JSC

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has decided as a matter of principle that not more than one white male may be appointed to any particular court at any given point in time. Is there any instance in the last say ten years where any other principle, practice or rule of thumb was not followed? Once again, the answers are also important for future candidates and nominators for obvious reasons.

Could it also be clarified whether it is the JSC's approach that what should be reflected in appointments is not diversity but representativity – the latter, more particularly, on the basis that this month's census reports a 'white' population of some 8% of the total (some 4% of the total being white male)? If 'representativity' is indeed applied by the JSC in appointments, is its target accordingly that no more than one of the 29 WCC judges should be white males?

As regards Mr Dolamo, our client asks if it is correctly to be understood from the 'reasons' that his non-disclosure of disciplinary contraventions – which had to be elicited by Commissioners – was not at all taken into account in considering either whether he was fit to be appointed, or should otherwise be appointed in preference to others, including Adv Gauntlett?

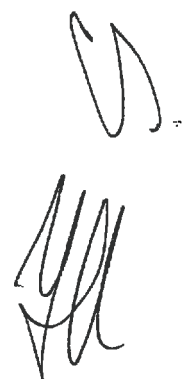
Could it further be explained how this approach (and the generally benign approach reflected in the 'reasons' to Mr Dolamo's considerable disciplinary record) is to be reconciled with the established approach by the JSC to material non-disclosures?

Also as regards consistency, our client would be glad to understand the weight given, in contrast, to Adv Gauntlett's unblemished disciplinary record over 35 years (which is not mentioned and accordingly is to be inferred to have been overlooked) – as regards the perception of 'some' referred to above.

Your kind and urgent attention would be appreciated.

Yours faithfully

MATSEPES INCORPORATED
R.B. CLOETE



"FA7"

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Mr R B Cloete
Matspes Inc
P O Box 258
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9300

Per E-mail: mskoud@matspes.co.za

Dear Mr Cloete

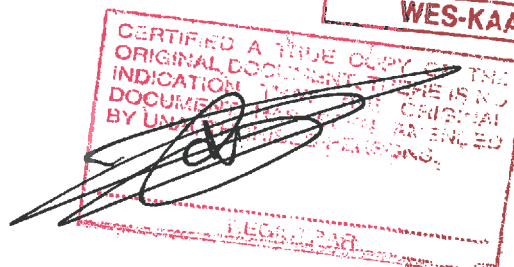
**RECOMMENDATIONS OF THE JSC REGARDING APPOINTMENTS TO THE WESTERN
CAPE BENCH**

We acknowledge receipt of your letter sent via email dated 09 November 2012.

I was requested by the Chairperson of the Judicial Service Commission (Commission) to respond as follows:

1. The reasons have been collated by the Chairperson from the contributions made by Commissioners during the deliberations that preceded the voting. The Commissioners had, at the end of the sitting, mandated the Chairperson to do so.
2. The Commission has not formed any view that Adv Gauntlett is not a fit and proper person. However, the fact that a person is a fit and proper, does not by itself guarantee a recommendation for appointment. It has happened in the past that such candidates were not recommended; it is likely to happen in the future. This would particularly be the case when there are more such candidates (fit and proper) than the available vacancies. The present is such a case.

1



3. The 'agreed and published formulation of required judicial attributes' do not purport to exclude other factors which may be considered by Commissioners as relevant for determining whether a candidate should be recommended for appointment.
4. No decision was ever taken by the Commission not to recommend 'more than one white male at any given point in time'. Past appointments to the North and South Gauteng High Courts attest to this. For example, during its sittings in April and October 2010, the Commission recommended the appointment of two white males to the North and South Gauteng High Courts on each occasion.
5. The JSC considers both diversity and representivity when it considers appointments.
6. All factors and information elicited during Mr Dolamo's interview were known to all Commissioners when each of them exercised their vote. And so was Adv Gauntlett's unblemished disciplinary record.

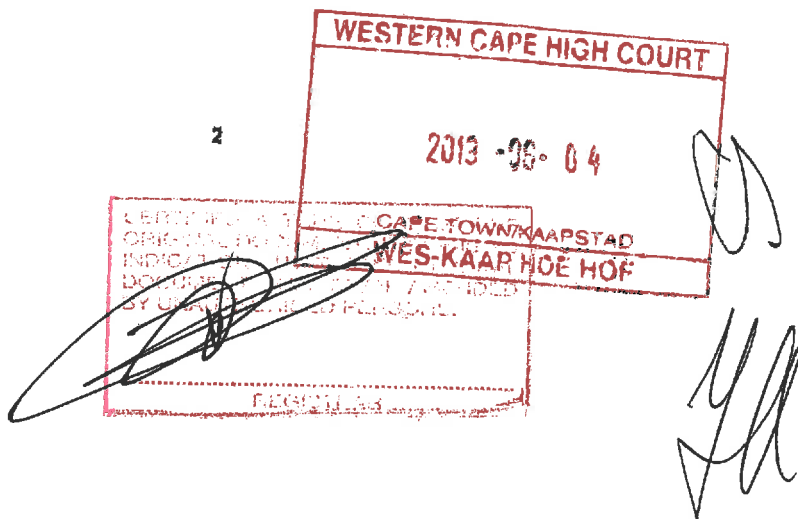
We believe that this letter, as well as the previous one, has now given you all the necessary information and trust that the matter is now closed.

Yours sincerely,



Sello Chiloane
Secretary: Judicial Service Commission
Date: 14/11/2012

2



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REPUBLIC OF SOUTH AFRICA
JUDICIAL SERVICE COMMISSION

**SUMMARY OF THE CRITERIA USED BY THE JUDICIAL SERVICE COMMISSION WHEN
CONSIDERING CANDIDATES FOR JUDICIAL APPOINTMENTS**

At its Special Sitting held, in Johannesburg on 10 September 2010, the Judicial Service Commission 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. This decision is in line with the JSC's principle that the process of judicial appointments should be open and transparent to the public so as to enhance public trust in the judiciary.

The following criteria are used in the interview of candidates, and in the evaluation exercise during the deliberations by the members of the Commission:

Criteria stated in the Constitution

1. Is the particular applicant an appropriately qualified person?
2. Is he or she a fit and proper person, and
3. Would his or her appointment help to reflect the racial and gender composition of South Africa?

Supplementary Criteria

1. Is the proposed appointee a person of integrity?
2. Is the proposed appointee a person with the necessary energy and motivation?
3. Is the proposed appointee a competent person?
 - (a) Technically competent
 - (b) Capacity to give expression to the values of the Constitution
4. Is the proposed appointee an experienced person?
 - (a) Technically experienced
 - (b) Experienced in regard to values and needs of the community
5. Does the proposed appointee possess appropriate potential?
6. Symbolism. What message is given to the community at large by a particular appointment?

Issued by the Judicial Service Commission

