

IN THE INTERESTS OF JUSTICE: REFORM OF THE JUDICIAL SERVICE COMMISSION



HELENSUZMAN
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FOREWORD

The most recent Judicial Service Commission (“JSC”) interviews for judicial appointment, in October 2022, included no interviews of candidates for appointment to the Constitutional Court – despite there being a vacancy on the highest court. This was because there were an insufficient number of candidates, the minimum required being four, for any lawful process of nomination to be made by the JSC.

That is an astounding situation – that seats on our highest court might sit empty because there are too few suitable candidates to fill them. And yet it really isn’t so surprising. One has to suspect that meritorious candidates simply haven’t made themselves available because they fear the sordid, shameful spectacles that recent JSC interview processes have too often offered up.

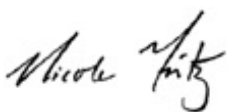
Judicial candidates can’t, of course, be shrinking violets. Embodying the requirements of justice, they should be personally courageous, resilient, and robust. Equally, the questioning of candidates must be searching and rigorous. But even the strongest of candidates will not readily volunteer to be subjected to interview processes that depart far from the fundamentals of basic fairness — where they are not apprised of and so not prepared to face smears and insulting attacks.

As Judge Keogile Matojane reminded us, in his JSC interview for Supreme Court of Appeal appointment, this type of abuse of the interview process risks our system of justice too: when judicial candidates are subject to such rancour and baseless attack, what hope have they of commanding respect and trust of ordinary litigants. And the perversity of the process goes further: it gives incentive to judicial candidates who are ambitious and seek promotion to steer well clear of politically contentious cases less they have to face hostile JSC commissioners. It is entirely antithetical to the independent-mindedness that we want our judicial candidates to evidence and the process of judicial appointment to reward.

Happily, the most recent JSC interviews reflected a pronounced improvement on previous rounds. This is likely the result of significant turnaround in individual commissioners, in the leadership of the JSC and of sustained and coordinated engagement by various civil society bodies. The announcement that the JSC had adopted revised criteria and guidelines for selecting judicial candidates ahead of this recent round and its decision to publish these criteria and guidelines and obtain public comment chimes with the impression of a JSC newly intent on meeting its constitutional obligations.

But one swallow does not a summer make. The significant debasement of the JSC interview process in those rounds preceding this most recent one requires that the JSC consider additional measures and reforms so that it might inspire confidence in candidates and the public at large that the process going forward is properly compliant with the magnitude of the task at hand – selecting judges equal to our constitutional democracy.

Moreover, while the JSC’s interview processes for judicial appointment have consumed the lion’s share of public controversy, its disciplinary processes also leave much to be desired. This report, written by HSF Senior Legal Researcher, Chelsea Ramsden, reflects close observance and detailed analysis of the JSC and its processes. It offers eleven considered proposals which we urge the JSC to consider, believing they would better secure openness, transparency and accountability of the JSC, enhance public trust in its processes, and restore credibility to its image.



Nicole Fritz
Director

ACRONYMNS USED



African National Congress	ANC
Council for the Advancement of the South African Constitution	CASAC
Economic Freedom Fighters	EFF
Helen Suzman Foundation	HSF
Judicial Conduct Committee	JCC
Judicial Conduct Tribunal	JCT
Judicial Service Commission	JSC
National Assembly	NA
National Council of Provinces	NCOP
National Development Plan	NDP
Office of the Chief Justice	OCJ
Supreme Court of Appeal	SCA

EXECUTIVE SUMMARY

The Judiciary is an essential arm of government. One of its functions is to maintain the balance between the three arms of government: the Legislature, the Executive and the Judiciary. In a situation where those other two arms do not function as they should, the role of the Judiciary assumes even greater importance. It is, therefore, essential that the Judiciary be composed of judicial officers who are fit for the role, equipped not only with requisite knowledge of the law but also with the necessary integrity and independence.

The Judicial Service Commission (“JSC”) performs a crucial task in the administration of the Judiciary, especially concerning the appointment, disciplining and removal of judicial officers. The Helen Suzman Foundation (“HSF”) is concerned about various aspects relating to the JSC, which are set out in detail in this Report. This Report contains a number of proposals to address these concerns, with the ultimate aim of ensuring that the JSC is able to play its role in ensuring the functioning of the Judiciary in accordance with our constitutional requirements.

The proposals are summarised as follows:

PROPOSAL 1

Amendment to the Composition of the Judicial Service Commission

The JSC has too many representatives of political parties and persons nominated by the President, in comparison to representatives of the Judiciary, the legal profession and academia. The HSF, therefore, proposes decreasing the number of political representatives on the JSC - this would require an amendment to the Constitution.

PROPOSAL 3

Publishing Informative Annual Reports of the Judicial Service Commission

The JSC does not meet its annual reporting standards. It is recommended that the necessary measures are adopted to compel the JSC to comply with its reporting obligations and to include sufficient information to provide the required transparency.

PROPOSAL 2

Creation of Accountability Mechanisms for Members of the Judicial Service Commission

As a result of the past conduct of individual commissioners of the JSC, it is proposed that a code of conduct be established for the JSC. The code will guide commissioners and the Chairperson as to how to act and the limits on their actions. There is no such code of conduct at the moment.

PROPOSAL 4

Increase Transparency and Access to the Composition and Functioning of the Judicial Service Commission

This Report argues that there is a significant lack of transparency regarding the composition and functioning of the JSC in general. It is proposed that the JSC establish its own website where up-to-date information and documentation will be easily accessible to the public.

PROPOSAL 5

Determine Clear and Defined Criteria and Procedures for the Appointment of Acting Judges

The lack of clarity surrounding the appointment of acting judges is cause for serious concern. It is recommended that a clear and uniform procedure be established, including the criteria for appointment, to be applied by all heads of court.

PROPOSAL 7

Prescribed Duration of Acting Appointments

In order to promote judicial independence, there must be prescribed time limits on the duration of acting appointments, including the number of permissible extensions on acting appointments.

PROPOSAL 9

Determine Clear and Defined Criteria and Procedures for the Selection of the Chief Justice

The appointment of the Chief Justice must be a process beyond reproach. A set procedure should be adopted to ensure consistency. In addition, clear and defined criteria must be included as part of the procedure and published at the beginning of the selection process.

PROPOSAL 11

Clarity on the Process of Laying Complaints Against Acting Judges

This Report proposes that the JSC and the Legislature make it clear, and amend the JSC Act, if necessary, to bring acting judges within the disciplinary procedures provided for in the Act and its regulations.

PROPOSAL 6

Judicial Service Commission Involvement in Acting Judges

The JSC currently plays no role in the appointment of acting judges. This Report argues that the JSC should establish a committee where at its bi-annual meetings, it considers all candidates for appointment to acting judge. This would create a pre-approved list of vetted candidates from which the various heads of court could draw from when the need arises to appoint an acting judge in their division.

PROPOSAL 8

Application of Clear and Defined Criteria for the Appointment of Judges

Clear and defined criteria are essential to the legitimacy of the appointment process. This Report commends the criteria published by the JSC but urges the JSC to strictly adhere to and apply these criteria.

PROPOSAL 10

Streamlining the Disciplinary Procedures

The current delay in the disciplinary procedures is cause for serious concern. It damages the image of the Judiciary and, as a consequence, the public's confidence and trust therein. A stream-lined process is recommended.

INTRODUCTION

One of the essential characteristics of a constitutional democracy is the relationship between the three arms of government: the Judiciary, the Executive, and the Legislature. Each arm has an important role to fulfil in a democratic state. The Executive initiates, creates and implements policy. The Legislature prepares and passes legislation and, in addition, plays an oversight role in respect of the Executive. Finally, the Judiciary ensures that the law is enforced and that government can be held accountable. In practice, this means that the Judiciary plays a crucial role when the other arms are not acting as they are intended to. Due to the persistent failings of the other two arms in South Africa, the Judiciary has had to play an active role in this regard.

The Judicial Service Commission (“JSC”) plays a crucial role in respect of the Judiciary: this relates not only to its role in the appointment and removal of judges but also in dealing with complaints that may be lodged against judges. Following the performance of the JSC over the past few years, the Helen Suzman Foundation (“HSF”) has become increasingly concerned about the JSC’s ability to perform its functions as required. We are of the view that the situation has reached a point where reforms to the JSC and its process must be attended to with the utmost urgency.

It is against this background that the HSF has compiled this Report, looking to analyse the structure and operations of the JSC in detail and present concrete proposals to address the various shortcomings of the JSC. The importance of urgent action in this regard cannot be over-stated.

Part I of this Report will provide a brief overview of the JSC and how it is regulated. Part II will address the composition and functioning of the JSC, and the concerns raised in relation to it. Part III will examine the appointment of acting judges to the Superior Courts and the lack of JSC participation in the process. Part IV will analyse the procedures for the appointment of judicial officers as well as the Chief Justice. Finally, Part V will explore the disciplinary procedures applicable to both permanent and acting judicial officers and the problems these raise.

I. OVERVIEW OF THE JUDICIAL SERVICE COMMISSION

The JSC is a constitutional body created in terms of section 178 of the Constitution.¹ It is governed by the Constitution and the Judicial Service Commission Act (“JSC Act”).² In addition, it is subject to regulations promulgated in terms of the JSC Act, which set out the various procedures and processes that need to be followed in conducting its business.

“THE JSC FULFILS A WIDE RANGE OF FUNCTIONS, BUT MOST IMPORTANTLY IT DEALS WITH THE APPOINTMENT AND DISCIPLINE, INCLUDING THE REMOVAL, OF JUDICIAL OFFICERS.”

The Constitution sets out the composition of the JSC.⁴ The JSC Act was promulgated to regulate the functioning of and matters incidental to the JSC, as well as to provide for the ‘oversight over judicial conduct and accountability of judicial officers’, which includes creating Judicial Conduct Tribunals

(“JCT”) or Judicial Conduct Committees (“JCC”) to deal with complaints against judges.⁵ The rules and regulations govern the following: nominations regarding non-judicial JCT members;⁶ regulation of the proceedings of JCTs;⁷ to provide for a Code of Judicial Conduct (“the Code”);⁸ to regulate the disclosure of registrable interests of judicial officers;⁹ and to set out the procedure employed when appointing or transferring judicial officers.¹⁰

In consequence, the JSC fulfils a wide range of functions, but most importantly it deals with the appointment and discipline, including the removal, of judicial officers. The Constitutional Court recognised this pivotal role of the JSC in its *Certification Judgment*.¹¹

1. Constitution of the Republic of South Africa, 1996.
2. 9 of 1994.
3. Ibid sections 25 and 35.
4. Constitution (n1) section 178.
5. JSC Act (n 2) Chapters 1-4.
6. Regulations regarding Non-Judicial Members of Tribunals GN R863 of 2012 GG 35802 of 18 October 2021.
7. Rules Regulating the Procedures Before Judicial Conduct Tribunals, 2012, GN R864 of 2012, GG 35802 of 18 October 2012 (“JCT Regulations”).
8. Code of Judicial Conduct GN R865 of 2012, GG 35802 of 18 October 2012.
9. Regulations relating to the Judicial Service Commission Act, 1994 GN R56 of 2014, GG 37273 of 29 January 2014.
10. Procedure of the Commission GN 404 of 2018, GG 41547 of 29 March 2018.
11. Chairperson of the Constitutional Assembly, Ex Parte: In Re Certification of the Constitution of the Republic of South Africa, 1996 [1996] ZACC 26 (CC); 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (“Certification Judgment”) at para 120.

II. COMPOSITION AND FUNCTIONING OF THE JUDICIAL SERVICE COMMISSION

This section analyses whether the composition of the JSC, as it currently stands, is hindering or enhancing its constitutional goals and objectives. The JSC's composition will necessarily impact the outcome and decisions of the JSC proceedings. Secondly, it addresses the concerns regarding a lack of accountability by individual JSC commissioners. A body as important to our democracy as the JSC unquestionably needs to be comprised of members of integrity and independence. To ensure this, there needs to be accountability on behalf of the commissioners. Finally, this section will examine the functioning of the JSC and the lack of transparency surrounding its actions.

A. The Composition of the Judicial Service Commission

The JSC comprises a mix of persons from the Executive and Legislature and members from the Judiciary, legal profession and academia. There are a total of 23 primary members (increasing to 25 when considering matters relating to a specific division of a High Court).¹² Of the 23 primary members, the non-political sphere is represented by eight members: three from the Judiciary, four from the legal profession, and one from academia.

The political sphere, on the other hand, is represented by 11 members: the Minister of Justice, six members of the National Assembly ("NA") (three of whom are to be from opposition parties), four members from the National Council of Provinces ("NCOP") (supported by at least six provinces). This number can increase to 15 as four members are to be designated by the President (at his discretion, provided the leaders of all parties in the National Assembly have been consulted).

The potential composition of the 15 "political" members raises a further red flag: adding together members of Parliament belonging to the majority political party, the African National Congress ("ANC"), and those designated by the President, a total of 12 members is arrived at.¹³ Experience shows that the members drawn from the NCOP are often exclusively drawn from the ANC.¹⁴

In addition, past practice has revealed that even the President's four appointees, who are intended to provide a 'perspective for the state in the broad sense of the nation as a whole', have political ties or aspirations.¹⁵ This means that most members of the JSC can be (and are most probably) members of (or closely aligned with) the governing party. Therefore, one political party can control the JSC since decisions are taken on a majority basis.

12. Constitution (n 1) section 178(1).

13. Hugh Corder, 'Appointment, Discipline and Removal of Judges in South Africa' in Hoon Phun Lee (ed) *Judiciaries in Comparative Perspective* (2011 Cambridge University Press) 99.

14. Chris Oxtoby, 'Managing a Fraught Transition: The Practice of the South Africa JSC' in Hugh Corder & Jan van Zyl Smit (eds) *Securing Judicial Independence: The Role of Commissions in Selecting Judges in the Commonwealth* (2017 Siber Ink), 166. The four NCOP representatives in both the 2021 and 2022 members were all ANC members, see Judges Matter, 'Who Sits on the JSC Panel' <<https://www.judgesmatter.co.za/opinions/who-sits-on-the-jsc-panel/>> and Judges Matter, 'JSC Chief Justice Interviews Panel' <<https://www.judgesmatter.co.za/interviews/chief-justice-interviews/jsc-chief-justice-panel/>>.

15. Oxtoby *Ibid* 166-7.

The current composition of the JSC, therefore, raises a genuine concern. This high level of political representativity is not in line with international standards.¹⁶

“SECONDLY, AND MORE IMPORTANTLY, A SITUATION WHERE THE POLITICAL AFFILIATIONS OF MEMBERS OF THE JSC MAY PLAY A DECISIVE ROLE IN ANY JSC DECISION CARRIES A SERIOUS DANGER.”

The high level of political representativity increases the chances of ‘endangering the neutrality of the Judiciary’, which is essential to the independence of the Judiciary¹⁷ as required by the Constitution.¹⁸ It must also be asked whether this situation reflects the Constitution’s intention and, further, whether the composition of the JSC does not conflict with the theory behind the separation of powers.

The current situation is problematic for at least two reasons. First, the political representatives do not know or understand ‘the challenges and demands’ that face judges.¹⁹

Secondly, and more importantly, a situation where the political affiliations of members of the JSC may play a decisive role in any JSC decision carries a serious danger. The assumption is that politicians (and those with clear political sympathies) will look to promote party-political interests.²⁰ President Cyril Ramaphosa has admitted as such at the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State (“the State Capture Commission”), when he disclosed that the ANC’s Cadre Deployment Committee (“Deployment Committee”) had met and decided on two candidates for the Constitutional Court and one candidate for a position at the Supreme Court of Appeal prior to the JSC appointment processes being conducted.²¹

In response to the Chairperson’s question whether this meant that the ANC members on the JSC would go into the interviews and deliberations believing that their role was to secure the appointment of the party named candidates, President Ramaphosa answered that ‘I think we must accept that we live in a world where lobbying takes place for placement of people anywhere People who for one reason or other would prefer certain persons or candidates to be placed in certain positions.’²² These admissions were confirmed when the minutes of the ANC’s Cadre Deployment Committee were made publicly available.²³

16. Chris Oxtoby, ‘The Appointment of Judges: Reflections on the Performance of the South African Judicial Commission Service’ (2021) 56(1) *Journal of Asian and African Studies* 34, 42; Venice Commission, ‘Judicial Appointments’ (16-17 March 2007) Opinion No. 403/2006 Council of Europe Doc No. CDL-AD(2007)028, para 3.
17. Venice Commission *ibid* para 1.
18. Constitution (n 1) section 165(2).
19. Chris Oxtoby (n 14) 165.
20. Oagile Bethuel Key Dingake, Najla Hasic, Tomei Peppard & Stephen Hayden, ‘Appointment of Judges and the Threat to Judicial Independence: Case Studies from Botswana, Swaziland, South Africa, and Kenya’ (2020) 44 *Southern Illinois University Law Journal* 407, 425; Dr Karen Brewer, James Dingemans QC & Dr Peter Slinn eds, ‘Judicial Appointments Commissions: A Model Clause for Constitutions’ (May 2013) *Commonwealth Lawyers Association, Commonwealth Legal Education Association & Commonwealth Magistrates’ and Judges’ Association* (“Model Clause”), explanatory notes section 4; Corder (n 13) 99.
21. The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State, ‘Report of the Judicial Commission of Inquiry into State Capture: Part VII: Vol.2’ (“State Capture Report Part VII: Vol.2”), paras 408.2 and 408.8.
22. The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State, ‘Transcript of President Cyril Ramaphosa’ (11 August 2021) Day 472, 34-7.
23. African National Congress, ‘Deployment Committee’ (22 March 2019) Secretary General’s Office <<https://press-admin.voteda.org/wp-content/uploads/2022/01/Deployment-Committee-Minutes-1.pdf>>, CR-REF-BUNDLE-227.37-8.

“THE DOMINANCE OF THE JSC BY POLITICAL REPRESENTATIVES CLEARLY ENCOURAGES PERCEPTIONS OF POLITICAL INFLUENCE AND THE DANGER OF A LOSS OF INDEPENDENCE AND INTEGRITY.”

The JSC members are supposed to bring an open mind to the appointment process in order to ‘exercise an independent mind based on a candidate’s qualities as revealed by the record and interview’.²⁴ However, where the Deployment Committee has made specific recommendations, the JSC members belonging to the ANC may find the recommendation to be very influential, causing those members ‘to be biased towards or against particular candidates’.²⁵

In addition, it must be pointed out that the President is given immense powers in selecting the Judiciary. He appoints the Chief and Deputy Chief Justice, the President and Deputy President of the Supreme Court of Appeal (“SCA”), as well as the Minister of Justice (who sits on the JSC).²⁶

It is important to ‘safeguard against the unjustified dominance of the commission by the executive or by members of parliament or representatives of political parties’.²⁷ The dominance of the JSC by political representatives clearly encourages perceptions of political influence and the danger of a loss of independence and integrity.²⁸ It is for this reason that the Model Clauses relating to the composition of judicial service commissions mention that membership of the Executive or Parliament is disqualifying.²⁹

The danger of political influence is heightened in the South African context, where the relationship between the Judiciary and the other two arms of state might be said to have deteriorated over the last few years.³⁰ This may be due, in part, to the increased reliance on the Judiciary when the other arms of government are not meeting their obligations or fulfilling their oversight roles.³¹ The tension may result in commissioners reverting ‘to their original positions in the different arms of government’ instead of ‘acting as a unitary structure’.³²

Whilst the diverse membership of the JSC may be seen as a way to increase accountability and transparency in the appointment process,³³ the large number of political representatives on the JSC inevitably creates the impression of potential political interference in the administration of justice and within the Judiciary. The appointment process of members of the JSC needs to ensure that there are proper safeguards in place to guard against even the mere perception of improper influence.³⁴

24. Susannah Cowen, ‘Judicial Selection in South Africa’ (2010) Democratic Governance Rights Unit, 19; Oxtoby (n 14) 167; ‘Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges’ (February 2016) British Institute of International and Comparative Law (“Cape Town Principles”), para 7; Azwimpheli Langalanga, ‘A Judiciary Under Siege – Reflections on the Judicial Service Commission 2021 Judges’ Interviews’ The Midpoint Paper Series No7/2021 (October 2021), 5.

25. State Capture Report Part VII: Vol.2 (n 21) paras 408.8 and 413.

26. Constitution (n 1) section 174(3).

27. Cape Town Principles (n 24) principle II.

28. Special Rapporteur on the Independence of Judges and Lawyers Leandro Despouy, ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers’ (24 March 2009) Human Rights Council Doc No. A/HRC/11/41, para 28; ‘The Appointment, Tenure and Removal of Judges Under Commonwealth Principles: a Compendium and Analysis of Best Practice’ (2015) 41(3) Commonwealth Law Bulletin 347 (“Commonwealth Principles”), para 1.3.4.

29. Model Clause (n 20) section 3. The Model Clause are as a result of ‘recommendations made at four regional consultative meetings attended by chief justices and senior judges between September 2014 and December 2015’ and South Africa was a participant of this initiative.

30. Langalanga (n 24) 4-7 and 17.

31. Ibid 2 and 10-1.

32. Ibid 5 and 17.

33. Chris Oxtoby & Tabeth Masengu, ‘Who Nominates Judges? Some Issues Underlying Judicial Appointments in South Africa’ (2017) 3 Stell LR 540, 541.

34. Commonwealth Principles (n 28) para 1.3.4; ‘Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers’ (30 October 2018) Southern African Chief Justices’ Forum (“Lilongwe Principles”) principle (iii); Despouy (n 28) para 28.

A related concern is the size of the JSC. It is assumed that the purpose of such a large membership is to ensure that many different views are represented. However, this very size can also be considered to constitute a hindrance to decision-making. Compared to commensurate appointment bodies in other countries, the JSC has a very large membership.³⁵ The danger of an overly large body, such as the JSC, is that it may become unmanageable and cumbersome.³⁶

PROPOSAL 1 AMENDMENT TO THE COMPOSITION OF THE JUDICIAL SERVICE COMMISSION

The current composition of the JSC does not meet international best practices or standards. International practice prescribes that a body responsible for appointing and disciplining judges should be made up of a majority of judges and/or legal professionals and not a majority of politically connected members.³⁷

This Report acknowledges, given South Africa's history, the need for a diverse spectrum of commissioners on the JSC.³⁸ Concerns for over-representation of political representatives was raised during the certification process of the Constitution. The Constitutional Court, although acknowledging that the mere inclusion of political representatives on the JSC did not invalidate the Constitutional provisions for JSC composition, held that the composition, in itself, did not violate the constitutional principles.³⁹ It is interesting to note in this context that a call for a smaller JSC membership, as well as to ensure a more even dispersion of the membership of commissioners, was called for by the National Development Plan ("NDP").⁴⁰

In response to a call for submissions on the Annual Review of the Constitution, the HSF submitted to Parliament that the JSC's composition should be changed to reflect international standards and safeguard the Judiciary from political interference. In line with that submission, this Report proposes that the composition of the JSC be amended in the Constitution to the following:

- a) Section 178(1)(h): Three persons identified by the National Assembly from among its members who are not also members of the national executive. Each of the three largest parties in the National Assembly is to designate a member (the current provision requires six persons, three of whom must be members of opposition parties);
- b) Section 178(1)(i): Three permanent delegates to the National Council of Provinces. Each of the three largest parties in the National Council of Provinces is to designate a member (the current provision requires four permanent delegates to the National Council of Provinces, designated with a supporting vote of six provinces); and

35. Oxtoby (n 14) 165.

36. Ibid 168.

37. See 'European Charter on the Statute for Judges' (1998) Council of Europe Doc No. DAJ/Doc (98) 23, para 1.3 and attached explanatory memoranda; 'Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia' (23-25 June 2010) OSCE Office for Democratic Institutions and Human Rights and Max Planck Minerva Institute Group on Judicial Independence ("Kyiv Recommendations"), recommendation 7-8; 'The Universal Charter of Judges' (17 November 1999) International Association of Judges, article 2-3; Model Clause (n 20); 'Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary' (9-11 May 2012) European Network of Councils for the Judiciary ("Dublin Declaration"), indicators 1-3; Cape Town Principles (n 24) principle II; Venice Commission (n 16) para 1; Commonwealth Principles (n 28) paras 1.6.9-10 and 1.6.13-5.

38. Oxtoby (n 14) 166.

39. Certification Judgment (n 11) paras 120-4.

40. National Planning Commission, 'National Development Plan 2030: Our Future – Make it Work' (15 August 2012) ("NDP"), 453.

- c) Section 178(1)(j): Two persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly (the current provision requires the President to designate four persons).⁴¹

The above amendment to the Constitution would achieve the dual purpose of both decreasing the size of the JSC and avoiding the danger of an effective political majority within the JSC.

We recognise that some of the most obvious party political allegiances reflected by commissioners in the JSC interviews have been reflected by commissioners representing the legal profession itself. Therefore, this proposed amendment will not address the risk of an overly politicised JSC on its own. As such it is important that the above proposal be implemented with Proposal Two below, which advocates for enhanced accountability mechanisms for commissioners of the JSC.

“FROM THE PAST ROUNDS OF JSC INTERVIEWS, IT IS APPARENT THAT SOME MEMBERS USE THE PROCESS TO ASK WHOLLY INAPPROPRIATE AND IRRELEVANT QUESTIONS, OR MAKE ADVERSE INFERENCES, EXCEED THEIR ALLOTTED QUESTIONS, AND IN SEVERAL INSTANCES, THEIR ENGAGEMENT WITH CANDIDATES CAN BE CONSIDERED BULLYING AND INTIMIDATORY.”

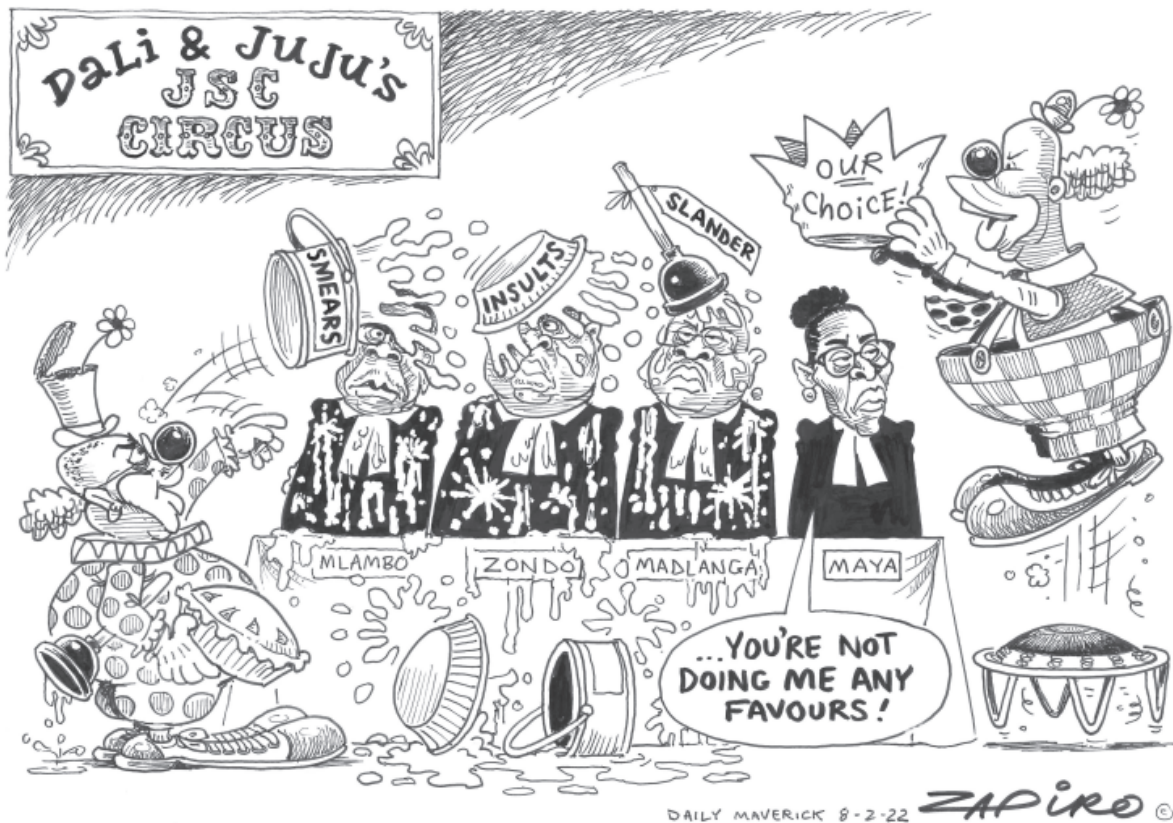
B. Accountability of the Members of the Judicial Service Commission

The conduct and actions of JSC commissioners during the interview process can significantly impact the success, or failure, of a candidate’s prospect for an appointment to the bench. Currently, there is no mechanism to submit complaints against JSC commissioners to the JSC itself. Each JSC member is accountable to the body that placed them there.

From the past rounds of JSC interviews, it is apparent that some members use the process to ask wholly inappropriate and irrelevant questions, or make adverse inferences, exceed their allotted questions, and in several instances, their engagement with candidates can be considered bullying and intimidatory. For example, during the April 2021 JSC interviews for two Constitutional Court vacancies, Julius Malema, a NA representative, politicised the interviews by questioning why a costs order was awarded against his party, the Economic Freedom Fighters (“EFF”), as well as attacking a candidate by calling her ‘nothing more than a political activist’. The Council for the Advancement of the South African Constitution Advancement (“CASAC”) wrote to the Speaker of the NA highlighting their concerns about Mr Malema’s continued presence on the JSC.⁴²

41. ‘Submission in Response to the Call for Comments on the Annual Review of the Constitution’ (30 June 2021) Helen Suzman Foundation <<https://hsf.org.za/publications/submissions/hsf-submission-annual-review-of-the-constitution.pdf>>.

42. Marianne Merten, ‘Parliament Asked to Act over Malema’s Role in Judicial Interviews, Given his Disparaging Comments About Judges’ (13 April 2021) Daily Maverick <<https://www.dailymaverick.co.za/article/2021-04-13-parliament-asked-to-act-over-malemas-role-in-judicial-interviews-given-his-disparaging-comments-about-judges/>>; James de Villiers, ‘Julius Malema Should be Removed from JSC’: 6 Questions with CASAC’s Lawson Naidoo’ (16 April 2021) News24 <<https://www.news24.com/news24/opinions/fridaybriefing/julius-malema-should-be-removed-from-jsc-6-questions-with-casacs-lawson-naidoo-20210415>>.



The Joint Committee on Ethics and Members' Interests considered the complaint and found that Mr Malema's conduct was acceptable with regards to the insinuations of political activism but ordered that he issue an apology to the candidate which he had interrogated regarding a costs order against the EFF.⁴³ This does not represent an adequate measure of accountability as it does little to deter similar actions from occurring in the future.

A further example of unacceptable questioning can be taken from the February 2022 interviews for the post of the Chief Justice. In these interviews, unsubstantiated rumours of sexual misconduct were put to Judge President Mlambo without the JSC having raised these concerns before the interview process, as required by its own practice and basic principles of justice.⁴⁴

43. Joint Committee on Ethics and Members' Interests, 'Report of the Joint Committee on Ethics and Members' Interests on the Complaint Against Honourable J.S. Malema MP' (1 December 2021) Parliamentary Monitoring Group <<https://pmg.org.za/tailed-committee-report/4784/>>. Mr Malema has since sought to review the decision of the Joint Committee on Ethics and Members' Interests and this matter is still pending before the court.

44. There is no formal document prescribing this practice, however it is evident from the interview themselves that this is something that the commissioners believe that they are bound by. For example, see Judicial Service Commission Interviews for Chief Justice, 3 February 2022: Judge President D Mlambo <<https://www.youtube.com/watch?v=-VrUgF2q8YE&t=19115s>> ("JP Mlambo Feb 2022") at 6:29:37, 7:06:50, 7:11:00, 7:37:50, and 7:41:10; SA Western Cape Division of the High Court, JSC Interview of Mr D M Thulare <https://www.youtube.com/watch?v=nf4At4YeO_c> at 1:18:00 – 1:30:05.

The subsequent reaction by candidates who are subjected to unacceptable interviews processes can be seen in the withdrawal of Judge Pillay from further interviews. In addition, even as far back as 2001, it was reported that an acting judge feared appearing before the JSC for a permanent position on the basis that he ‘had made a particular decision in a case with a political dimension’.⁴⁵

“THE LACK OF ACCOUNTABILITY MECHANISMS OR STRUCTURES FOR INDIVIDUAL COMMISSIONERS THREATENS THE INTEGRITY AND REPUTATION OF THE JSC.”

Of great concern are questions asked during the interview process which have a significant impact on the perceived, and real, legitimacy of the proceedings. Questions that go only to political objectives⁴⁶ or relate to a candidate’s religion,⁴⁷ sexual orientation,⁴⁸ or gender⁴⁹ are entirely inappropriate and do not relate to the candidate’s suitability.

The lack of accountability mechanisms or structures for individual commissioners threatens the integrity and reputation of the JSC. If commissioners may act or do as they please, the public will inevitably lose their trust in the appointment procedure and hold the view that the procedure lacks legitimacy. This will have a direct impact on the credibility of the Judiciary, as it relies on the trust of the public to function effectively.⁵⁰

The interviews conducted in October 2022 saw some progress towards an improved interview process. Nonetheless, this Report still believes it necessary to see the proposal below realised in order to enhance the accountability of JSC commissioners.

PROPOSAL 2 CREATION OF ACCOUNTABILITY MECHANISMS FOR MEMBERS OF THE JUDICIAL SERVICE COMMISSION

The JSC needs to create a professional code of conduct to which its members are bound.⁵¹ Many, if not most, organised professional bodies have a code of conduct that dictates how its members must act and conduct themselves. A code of conduct will guide commissioners on how to act, what is expected of them, the limits of their actions and the sanction that may be taken for exceeding such limits.

45. Special Rapporteur on the Independence of Judges and Lawyers Dato’ Param Cumaraswamy, ‘Mission to South Africa’ (25 January 2021) Commission on Human Rights – Economic and Social Council Doc No. E/CN.4/2001/65/Add.2 (“Mission to South Africa”), para 68.
46. Cowen (n 24) 21; Dingake (n 20) 408; See also Oxtoby (n 14) 162 where Judge Plaskett was questioned on providing a cases where he found in favour of the government. See for example SA Northern Cape High Court, JSC Interview of Advocate L G Lever SC – Judges Matter (April 2021) <<https://www.youtube.com/watch?v=gq9oBc5ZcVE>> (“Lever SC April 2021) where Adv Lever SC was asked his views on the two-state solution regarding Palestine and Israel at 28:50.
47. For example, see Lever SC April 2021 *ibid* at 39:47 where Adv Lever SC was questioned on whether his observance of the Sabbath will interfere with his work; and candidate Judge Unterhalter was questioned at length on his membership with the Jewish Board of Deputies (this happened again in the October 2021 interviews) – SA Constitutional Court JSC Interview of Judge D N Unterhalter – Judges Matter (April 2021) <<https://www.youtube.com/watch?v=Fdc3JrV9u8A>> (“Unterhalter J Apr 2021”) and SA Constitutional Court JSC Interview of Judge D N Unterhalter – Judges Matter (October 2021) <<https://www.youtube.com/watch?v=z0TMT-cf9LQ>> (“Unterhalter J Oct 2021”).
48. Oxtoby (n 16) 42; Morné Olivier, ‘A Perspective on Gender Transformation of the South African Judiciary’ (2013) 130 (3) 448, 461.
49. Oxtoby *ibid*; Olivier *ibid* 458; See generally April 2021 JSC Interview of Judge Kathree-Setiloane – SA Constitutional Court JSC Interview of Judge F Kathree-Setiloane – Judges Matter (April 2021) <<https://www.youtube.com/watch?v=xY5NPHLwXDs>>.
50. *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC), para 16.
51. Civil society organisations, including the HSF, have made this request to the JSC in February 2022, available here <<https://hsf.org.za/news/press-releases/jsc-letter-final-22-feb-2022.pdf>>.

The JSC must create a mechanism to process complaints against commissioners. Such a mechanism should also contain provisions for sanctioning offending members. Nevertheless, at the very least and subject to the above proposal not being implemented, there is no valid reason why the information on how to lay a complaint against a JSC member with their respective nominating organisations/bodies should not be made available and easily accessible.

The JSC has recently published criteria for judicial appointment for public comment.⁵² The criteria will assist commissioners as to what questions are considered permissible. The criteria will be addressed in further detail below. In addition to the criteria, the JSC has provided guidelines as to the types of questions that may be asked.⁵³

But while the criteria and guidelines are to be welcomed and are much needed, there still needs to be mechanisms to hold JSC commissioners who contravene the new policy to account. In addition, the new set of criteria and directions has to be utilised in practice, and it remains to be seen at the April 2023 interviews whether or not the JSC commissioners and the Chairperson will adhere to the new policy. Therefore, this Report maintains that the JSC must publish a code of conduct and the proposed accountability mechanisms.

C. Functioning of the Judicial Service Commission

The JSC is an important body, and as such, the public has a vested interest in not only understanding the processes and procedures of the JSC but also in being kept informed and up to date on the work of the JSC. There is, unfortunately, minimal transparency regarding the work of the JSC.

The JSC is mandated by section 6 of the JSC Act to table a written annual report in Parliament. In terms of section 6(2), this report must contain the following:

- a) the activities of the Commission during the year in question;
- b) all matters dealt with by the Judicial Conduct Committee referred to in section 8;
- c) all matters relating to, including the degree of compliance with, the Register of Judges' Registrable Interests referred to in section 13, as reported by the Registrar of Judges' Registrable Interests; and
- d) all matters considered by the Commission in the course of the application of Chapters 2 and 3 of this Act, including the number of matters outstanding and the progress in respect thereof.

Although the JSC annual reports are now available on the Judiciary's website,⁵⁴ these have only recently been uploaded, and it is evident that the JSC has not been meeting its annual reporting requirements.

52. 'JSC Media Statement: JSC Criteria and Guidelines for Selecting Candidates for Judicial Appointment' (27 October 2022) available here <<https://www.judiciary.org.za/index.php/news/press-statements/2022>>; 'Criteria and Guidelines for use by the JSC for Judicial Appointment' (27 October 2022) available here <<https://www.judiciary.org.za/index.php/judicial-service-commission/criteria-for-judicial-appointment>> ("2022 Criteria").

53. 2022 Criteria *ibid*, paras 33-6.

54. The JSC's annual reports can be accessed here <<https://www.judiciary.org.za/index.php/judicial-service-commission/jsc-annual-reports>>.

In 2021, the Justice and Correctional Services Committee in the NA commented on the JSC's failure to comply with its reporting requirements.⁵⁵ The Chairperson, Mr Magwanishe, noted that 'the JSC was non-compliant with section 6(2) of the JSC Act, insofar as it had never submitted a report to Parliament on its activities'.⁵⁶ Committee member, Mr Dyanti remarked that 'no institution that used public funds could be allowed not to account for its activities' and that '[a]ccording to the Committee's records, the JSC had never submitted to that kind of accountability before'.⁵⁷ In response, Ms Sejosengwe, Secretary-General of the OCJ, responded that the JSC had submitted its reports and, in fact, she had hard copies of the last four reports.⁵⁸

The dearth of information is most obvious in relation to complaints against judges and the steps taken by the JSC in dealing with those complaints. The JSC Annual Report 2020/2021 reveals very little on this topic.⁵⁹ Out of 81 complaints processed, that Report shows that only two were referred to the JCT.⁶⁰ These complaints were against Judge Makhubele and Judge Parker.⁶¹ In addition, only one complaint referred to the JCT, against Judges Mavundla, Poswa, Preller and Wesbter, was considered by the JSC.⁶²

Other than the complaints referred to above, all that is recorded is the number of complaints received per Superior Court and the number of complaints that have been processed.⁶³ There is no detail provided on the outcome of the matters in respect of which complaints were laid, aside from a statement that most complaints relate to dissatisfaction regarding an outcome or judgment.⁶⁴

It is accepted that a balance needs to be struck 'between protecting the independence and dignity of the judiciary when considering complaints ... and the overriding principles of openness, transparency and accountability that permeate the Constitution'.⁶⁵ However, where simple figures are provided with little substantive explanation or content, an impression is created that the balance is tilting to one side.

The JSC Annual Report 2020/21 does not allow one to assess 'the health of the judicial complaints system, and whether judges are being held accountable for misconduct', nor does it provide any useful information regarding the categorisation of the complaints, the time taken to address these complaints, nor what has happened in previous cases where a JCT was established.⁶⁶

55. Justice and Correctional Services Committee, 'SAHRC, PPSA & OCJ 2020/21 Annual Report' (10 November 2021) Parliamentary Monitoring Group <<https://pmg.org.za/committee-meeting/33745/>>.

56. Ibid. It must be noted that Mr Magwanishe is a current commissioner on the JSC.

57. Ibid.

58. Ibid.

59. Judicial Service Commission, 'Annual Report 2020/21' Office of the Chief Justice ("JSC Annual Report 2020/21").

60. Ibid para 5.4.

61. Ibid.

62. Ibid para 5.5.1. The Judiciary's website does not contain the decisions and reasons of the JCT in this matter, nor the decisions in Judge Motata's matter, unlike it did with JP Hlophe. This in itself evidences the concerns raised regarding the accessibility and transparency of the workings of the JSC.

63. Ibid para 5.3.

64. Ibid.

65. JSC Act (n 2) preamble.

Although acting judges do not fall under the purview of the JSC, it should not be the case that the body tasked with overseeing the administration and functions of judges does not reflect in its reporting the number of acting judges that were appointed during that year, never mind the length for which they were appointed.

“AS A CONSTITUTIONAL BODY, THERE IS MUCH ESSENTIAL INFORMATION RELATING TO THE WORK OF THE JSC THAT SHOULD BE EASILY ACCESSIBLE, FOR EXAMPLE, A DECISION OF THE JCC OR JCT.”

There is no recent information regarding acting judges. The OCJ Annual Report 2020/2021⁶⁷ and the Judiciary Annual Report 2020/2021 make no mention of acting judges. In fact, the last reference to the number of acting judges contained in an OCJ Annual Report was in the Annual Report of 2015/16, and even then, the only information that was provided was that there were 855 acting judges.⁶⁹ There was no mention of the length of the acting position, the number of extensions, or the numbers in each court.⁷⁰

The JSC reporting also needs to disclose more information regarding the work and business of the JSC. The JSC does not have its own website, which is surprising for an institution of such importance. Instead, the JSC places some (but not all) media statements and documents on the Judiciary’s website. As a constitutional body, there is much essential information relating to the work of the JSC that should be easily accessible, for example, a decision of the JCC or JCT. Such decisions and other media statements relating to the JSC fall under the Judiciary’s ‘general’ press statements folder, making it extremely difficult for the public to locate the JSC related documents. This cannot be considered to represent a sufficient level of transparency.

A final concern relates to the transparency regarding the composition of the JSC. There is little to no information on how the members from the various sectors are appointed as JSC commissioners. Are they nominated, or do they put themselves up for the position? Do they run unopposed, or do they have to lobby for the position? Are they appointed through a democratic voting process?⁷¹

The commissioners of the JSC perform vitally important functions, and it is therefore essential that the commissioners are subjected to scrutiny before being appointed to ensure that they are persons of integrity, independence and are fit to perform the various functions to the highest degree. This is especially so as very few mechanisms are available currently to hold recalcitrant commissioners to account.

66. Franny Rabkin, ‘Complaints against ConCourt Judges Soar’ (5 December 2021) Sunday Times <<https://times-e-editions.pressreader.com/article/281625308589614>>, including comment from Mbekezeli Benjamin from Judges Matter and Lawson Naidoo from CASAC. The article reveals the four JCTs were established according to the JSC Annual Report of 2017/18 and yet in all subsequent reports there has been no mention of outcome.

67. Office of the Chief Justice, ‘Annual Report 2020/2021’ Office of the Chief Justice (“OCJ Annual Report 2015/16”).

68. Judiciary of South Africa, ‘The South African Judiciary Annual Report 2020/21’ Judiciary (“Judiciary Annual Report 2020/21”).

69. Office of the Chief Justice, ‘Annual Report 2015/2016’ Office of the Chief Justice (“OCJ Annual Report 2015/16”), Annexure A of Part D, para 2.

70. The HSF has written a letter to the Minister of Justice and Constitutional Development requesting this information, however, at the time of writing this Report no response has been received.

71. The HSF sent letters to the General Council of the Bar of South Africa; the Law Society of South Africa, the NA, and the NCOP requesting information pertaining to the questions raised above. At the time of writing this Report, only the NA and the General Council of the Bar of South Africa have responded providing the required information.

PROPOSAL 3 PUBLISHING INFORMATIVE ANNUAL REPORTS OF THE JUDICIAL SERVICE COMMISSION

Uncertainty as to whether the JSC meets its annual reporting requirements to Parliament cannot be accepted. The JSC is a constitutional body that spends public funds and performs vital constitutional functions. Parliament must ensure that the JSC takes responsibility and, if necessary, it must sanction those responsible for failing to fulfil their duties.

The annual reports of the JSC are exceedingly sparse and uninformative. This is so particularly concerning complaints received against judges. This Report proposes that the JSC's annual report should also include details regarding the complaints against judges and information on acting judges.

This Report recognises that a balance needs to be struck between protecting judges and openness as required by the Constitution. With this in mind, there is no reason why the annual report cannot give details of which categories the complaints fall into, even if the judge is not named. In addition, given the apparent delays in dealing with complaints, it would enhance accountability if the annual report gave timelines of the processing of the various complaints. Finally, the annual reports do not disclose the outcome of most matters, which should be provided.

If the complaints are categorised, and the outcomes are given, this will only enhance the public's trust and confidence in the Judiciary. Especially if, according to the JSC Annual Report 2020/21, most complaints are invalid because they relate to orders or judgments.

PROPOSAL 4 INCREASE TRANSPARENCY AND ACCESS TO THE COMPOSITION AND FUNCTIONING OF THE JSC

There needs to be more clarity surrounding the JSC's composition and functioning. The JSC should have its own website where all relevant documents, including annual reports, media statements, JCT, JCC and JSC decisions, calls for nominations, and any other relevant information can be accessed. This will assist in increasing transparency and, ultimately, accountability.

In addition, the legitimacy and transparency of the JSC will be improved if it provides information about how each of the members are nominated and appointed from their various sectors, and in line with Proposal Two of this Report, information on the mechanisms to hold JSC commissioners accountable should also be provided. This information should also be accessible on its website.

III. THE APPOINTMENT OF ACTING JUDGES

Acting judges are judicial officers acting temporarily in the position of a judge without a permanent appointment. The South African legal system, and the Constitution itself, ‘envisages a bench staffed by permanent judges who are appointed after rigorous scrutiny and nomination by the JSC’.⁷² However, acting judges are not submitted to the same rigorous scrutiny, and the use of acting judges has become increasingly common.

“HOW A SENIOR JUDGE, USUALLY THE JUDGE PRESIDENT OF THE DIVISION, CHOOSES WHO SHOULD ACT IN THEIR DIVISION IS UNEXPLAINED AND LACKS CLARITY, BUT MORE IMPORTANTLY, TRANSPARENCY.”

A. Lack of Clarity in the Appointment Procedure

Section 175(2) of the Constitution provides that the Minister of Justice must appoint acting judges after consulting the senior judge of that division. The section is worded in a way that would indicate that the Minister has a discretion. However, in practice, it appears that the Minister will usually act on the senior judge’s recommendation.⁷³ What is unclear is how the senior judge decides whom to recommend.

How a senior judge, usually the Judge President of the division, chooses who should act in their division is unexplained and lacks clarity, but more importantly, transparency. A Judge President usually relies on word of mouth from other judges in the division, essentially a tap on the shoulder. This raises concerns for at least two reasons. First, this method would mean that it would usually be the attorneys or advocates who frequently act in that division who would receive favourable consideration, potentially excluding a wide pool of candidates deserving of consideration.⁷⁴ It can also lead to a situation where a friend or family member of a judge in the relevant division may be suggested to the Judge President, not based on their merit but on their relationship.

Secondly, this method results in lowered levels of scrutiny of the potential candidates. The application and appointment process is not transparent. There is no system in place to do basic checks on degrees or experience, and often, particularly in the case of attorneys and magistrates, there is very little to verify whether the candidate is committed to the values of the Constitution.⁷⁵ This process would be considered unfair by ‘most human resource (HR) managers’ and there is no involvement of the JSC at any stage of this process.⁷⁶ The absence of JSC participation may be understandable initially given that acting appointments sometimes need to be made on an urgent basis, but there is no reason why the JSC cannot be involved at a later stage by, for example, reviewing and confirming the appointment.⁷⁷

72. Johan Trengrove, ‘The Prevalence of Acting Judges in the High Courts – is this Consistent with an Independent Bench?’ (Parliamentary Monitoring Group 2007) <<https://static.pmg.org.za/docs/2007/070817trengrove.htm>> para 27.

73. Trengrove *ibid.*, para 9; Tabetha Masengu and Alison Tilley, ‘Is the Appointment of Acting Judges Transparent?’ (2015) 553 *De Rebus* 24, 25; Olivier (n 48) 462. The Minister must be made in good faith – see *Certification Judgment* (n 11) para 131. However, an issue was raised during the February 2022 JSC Interviews regarding whether the Minister of Justice may suggest a name, or names, to the head of the court for appointment of an acting judge – see discussion in *Chief Justice Interviews: JSC Interview of Justice Raymond Zondo – Judges Matter* (Feb 2022) <<https://www.youtube.com/watch?v=VcEtOX8teZQ>> at 6:37:30 – 7:06:10.

74. Olivier (n 48) 462.

75. Masengu (n 73) 25-6; Trengrove (n 72) para 27.

76. Trengrove (n 72) para 8.

77. Cumaraswamy (n 45) para 109.

The lack of transparency surrounding the appointment of acting judges was raised in the February 2022 interviews for the position of Chief Justice. For example, in President Maya's interview, commissioner Matolo-Dlepu raised the very concern articulated here regarding the lack of procedure and the need for a policy to avoid perceptions of favouritism and to widen the

“THERE IS NO FORMAL REQUIREMENT FOR APPOINTMENT AS A PERMANENT JUDGE THAT YOU FIRST HAVE TO HAVE ACTED IN THAT POSITION. HOWEVER, IT IS INCREASINGLY APPARENT DURING THE JSC INTERVIEWS THAT THE JSC APPLIES THIS AS A SORT OF INFORMAL REQUIREMENT.”

pool of potential candidates.⁷⁸ A similar issue was raised by Minister Lamola during Judge President Mlambo's interview, where he proposed that a transparent process would minimise complaints, issues and rumours arising from the current system of appointment of acting judges and allow for an increased number of potential candidates.⁷⁹ In the same interview, Commissioner Tshepe proposed the urgent need for a transparent policy to alleviate the current criticism.⁸⁰

There is no formal requirement for appointment as a permanent judge that you first have to have

acted in that position.⁸¹ However, it is increasingly apparent during the JSC interviews that the JSC applies this as a sort of informal requirement.⁸² In the interviews held in April 2021 and October 2021 for two Constitutional Court justice positions, Adv Dodson SC was questioned about his lack of experience as an acting justice,⁸³ Judge Kathree-Setiloane, who has acted at the Constitutional Court, was asked how important she thought it was for candidates to have acting experience in the court to which they are applying,⁸⁴ and the same was asked of Judge Mathopo.⁸⁵ Judge Unterhalter was questioned on the value of having acted in the relevant court and whether it would be unfair to consider a candidate who had not acted in that court against one who had, in other words, whether it gave candidates an advantage if they had already acted in the relevant court.⁸⁶ The same was evidenced by the April 2021 interviews.⁸⁷ Although it was acknowledged that it was not a formal requirement, the questions reveal that it is a requirement in all but form.⁸⁸

This presents a genuine concern, mainly because of the absence of transparency and clarity as to how acting judges are appointed. The fact that the discretion and authority lies with the head

78. Judicial Service Commission Interviews for Chief Justice, 2 February 2022: President M M L Maya (2) <<https://www.youtube.com/watch?v=dkF7i3oOPi4>> at 2:06:06.

79. JP Mlambo Feb 2022 (n 40) at 4:22:08.

80. Ibid at 4:50:13.

81. 2022 Criteria (n 52) para 11.

82. Olivier (n 48) para 462; Oxtoby (n 33) 560; Corder (n 13) 101-2.

83. SA Constitutional Court JSC Interview of Advocate A C Dodson SC – Judges Matter (April 2021) <<https://www.youtube.com/watch?v=VldOyFdWuM>> at 14:04 and 25:05. See also generally the discussion between then-Chief Justice Mogoeng Mogoeng at 1:22:45. In addition, Adv Dodson was questioned on his lack of acting experience during the October 2021 interviews, see Constitutional Court: JSC Interview of Adv A C Dodson SC – Judges Matter (Oct 2021) <<https://www.youtube.com/watch?v=nBNJKnwccBo&t=2580s>> at 43:00 and 1:01:25.

84. Constitutional Court: JSC Interview of Judge F Kathree-Setiloane – Judges Matter (October 2021) <<https://www.youtube.com/watch?v=rjCyMClztO0>> at 21:15 and 1:14:17.

85. SA Constitutional Court JSC Interview of Judge R A Mathopo – Judges Matter (October 2021) <<https://www.youtube.com/watch?v=M9zE4jHxRWc>> at 35:13.

86. Unterhalter J October 2021 (n 47) at 1:11:39, 1:40:49, 1:41:50, and 1:47:45.

87. Unterhalter J Apr 2021 (n 47) at 34:02. See also SA Constitutional Court JSC Interview of Judge N Kollapen – Judges Matter (April 2021) <<https://www.youtube.com/watch?v=jCAYnIsOgQ>> at 13:30 and SA Constitutional Court JSC Interview of Judge B Vally – Judges Matter (April 2021) <<https://www.youtube.com/watch?v=hyw5eELjm7k>> at 22:37.

88. Unterhalter J Oct 2021 (n 47) at 1:41:50.

of the relevant court means that they are essentially the gatekeepers to a path of permanent appointment or to appointment to a higher court.⁸⁹ The lack of transparency, and the tap on the shoulder process, allows for a level of arbitrariness and unfairness in the permanent appointment process.

“FINALLY, IT IS VITALLY IMPORTANT THAT A UNIFORM PROCEDURE BE ADOPTED FOR APPOINTING ACTING JUDGES. THIS WILL REMOVE ANY DOUBT REGARDING BIAS OR FAVOURITISM AND OPEN UP THE OPPORTUNITY FOR OTHER CANDIDATES FROM ALL AREAS OF THE PROFESSION TO PUT THEIR NAMES FORWARD.”

PROPOSAL 5 DETERMINE CLEAR AND DEFINED CRITERIA AND PROCEDURES FOR THE APPOINTMENT OF ACTING JUDGES

Creating and formulating clear and defined criteria for the appointment of acting judges will enhance the certainty and uniformity of the appointment process. Not only will this assist the heads of courts in assessing the applications for an acting position, but it will also assist candidates in determining whether or not they meet the requirements for application. Publishing the pre-determined criteria may also open up the pool to other potential candidates who were previously unaware that they qualified to apply or were unaware of how to best go about indicating their availability or willingness to be appointed as an acting judge. In addition, pre-determined criteria will assist in removing the possibility of bias in the appointment process.

Finally, it is vitally important that a uniform procedure be adopted for appointing acting judges. This will remove any doubt regarding bias or favouritism and open up the opportunity for other candidates from all areas of the profession to put their names forward. It will provide instruction to those other persons who were previously unaware of how to best go about indicating their availability or willingness to be appointed as an acting judge. This will improve the transparency of what is currently a very obscure appointment process.

PROPOSAL 6 JUDICIAL SERVICE COMMISSION INVOLVEMENT IN ACTING JUDGES

The appointment of acting judges happens on an as-needed basis, often at short notice. Therefore, it is understandable that the JSC process for the appointment of judges is too time-consuming and expansive for it to be applied here. However, this does not mean that the JSC has no role to play in this process.

This Report argues that the JSC should establish a committee, or sub-committee, where it considers all candidates for appointment to acting judge at its bi-annual meetings. The committee need not even interview candidates but could make its decision based on the received documentation, for example, an application form and curriculum vitae. This would create a pre-approved list of vetted candidates from which the various heads of courts could draw when the need arises to appoint an acting judge in their division.

89. Corder (n 13) 103.

A secondary procedure could be put in place where there is an urgent need for the appointment of an acting judge and there are no available candidates on the list. In this instance, the JSC could review the appointment after the fact or at an urgent sitting of the sub-committee. It is envisaged that this procedure would only be used in exceptional circumstances, which would need to be stipulated, and that the above pre-approved list system would be the primary source from which to draw acting judges in order to prevent abuse.

“THE INCREASE IN THE NUMBER OF ACTING JUDGES AND THE LENGTH OF THEIR APPOINTMENT IS CONTRARY TO WHAT WAS ENVISAGED IN THE CONSTITUTION AND TO THE PURPOSE FOR WHICH AN ACTING JUDGE IS APPOINTED.”

B. Length or Duration of Appointment

The final concern is the need for greater clarity on the length or duration of an acting stint as a judge. The very nature of an acting appointment is that it is meant to be temporary and for a short period.⁹⁰ They are only intended to ‘fill temporary vacancies which occur between meetings of the JSC’.⁹¹

In 2001, it was reported that the appointment period was generally between one to three months.⁹² However, it later transpired that this was not necessarily the case as some acting judges had been appointed for at least two years.⁹³ In addition, it was reported at that time that an increased number of ‘judges are appointed as acting judges’.⁹⁴ There is little evidence to suggest that this practice has changed in subsequent years. Rather it was evident from the October 2022 interviews that lengthy acting appointments are still prevalent, when it was revealed that one candidate for a high court position had already acted for a total of 126 weeks.⁹⁵

The increase in the number of acting judges and the length of their appointment is contrary to what was envisaged in the Constitution and to the purpose for which an acting judge is appointed.⁹⁶

A lengthy acting appointment contract may put added pressure on the acting judge as it ‘may, in effect, cause them to relinquish their private practices and make them unduly dependent on the good graces of the Minister and the local Judge President for further appointments’⁹⁷ and this may have a significant impact on the acting judge’s independence.

90. Cumaraswamy (n 45) para 63.

91. Certification Judgment (n 11) para 127.

92. Cumaraswamy (n 45) para 66.

93. Ibid.

94. Ibid.

95. ‘Gauteng Division of the High Court: Interview of Adv N E Ndlovane – Judges Matter’ (6 October 2022) <<https://www.youtube.com/watch?v=1vUc7wChJqQ>>, (“Ndlovane October 2022 Interview”) at 07:05.

96. Ibid para 100; Trengrove (n 72) para 13.

97. Trengrove ibid para 22.

Acting judges do not have real security of tenure. Whilst they are in an acting capacity, they are secure, but because their appointment has an expiry date and may be subject to an extension or a permanent appointment, this may impact how they handle or decide a matter that comes before them. The temporary appointment of a judge presents the real risk 'of undue pressure and interference, weakening both the actual and perceived independence of the judge'.⁹⁸ An acting judge may feel pressured to decide a matter in a certain way if they know that an interview for a permanent position is coming up in front of a politically weighted JSC.⁹⁹ In addition to pressure to decide a matter in a particular manner, an acting judge is more susceptible to be corrupted or to refrain from reporting 'inappropriate behaviour or corrupt acts if they witness them'.¹⁰⁰

A further concern is the possibility of a conflict of interest. An acting judge does not sever any professional relationships¹⁰¹ and so for the duration of the acting appointment they may be subject to the pressures and influences of those relationships. But, conversely, if a person is appointed as an acting judge for a significant period of time those professional relationships fall away, their practices suffer,¹⁰² and they are dependent upon the income that they receive from the acting position.¹⁰³ This potentially leads to a situation where the acting judge may feel pressured not to upset certain relationships.

Finally, there are no mechanisms or structures currently in place that can 'protect acting judges' when confronting the issues articulated above.¹⁰⁴ During the certification of the Constitution, the Constitutional Court was of the opinion that there were adequate safeguards in place to protect acting judges.¹⁰⁵ These safeguards include that an acting judge is required to take the prescribed oath, is protected by the provisions of section 165 of the Constitution,¹⁰⁶ and that the Minister is not responsible for allocating cases to acting judges. However, it is possible that these may no longer be considered sufficient protections for acting judges.¹⁰⁷ All the concerns raised above are only compounded when the procedure for the appointment and duration of the appointment remains uncertain and lacks transparency.

98. Special Rapporteur on the Independence of Judges and Lawyers Diego García-Sayán, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers' (17 July 2020) General Assembly Doc No. A/75/172, para 66.

99. Trengrove (n 72) para 21; Venice Commission (n 16) para 40; Kumaraswamy (n 45) para 68.

100. Special Rapporteur on the Independence of Judges and Lawyers Gabriela Knaul, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers' (13 August 2013) General Assembly Doc No. A/67/305, para 52.

101. Trengrove (n 72) para 15.

102. See Ndlovane October 2022 Interview (n 95) at 55:00 and 59:35.

103. Ibid para 22.

104. Ibid para 23.

105. Certification Judgment (n 11) paras 131-2.

106. Constitution (n 1) section 165 provides –

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

107. Certification Judgment (n 11) para 131.

PROPOSAL 7 PRESCRIBED DURATION OF ACTING APPOINTMENTS

A founding feature of the Judiciary is the need for independence. As such, the impact of the appointment, and use, of acting judges is a primary concern, potentially impairing the requirement of independence. At the heart of this risk is the lack of security of tenure.¹⁰⁸ Security of tenure is an 'essential element' of judicial independence'.¹⁰⁹

Given the concerns raised above and the need to ensure and promote judicial independence, there needs to be prescribed time limits on the length or duration of an acting appointment and the number of extensions that may be given. This limit would need to be fully observed. Not only will this provide a higher number of candidates the chance to act, but it will assist greatly in preventing perceptions of a lack of independence.

108. Cowen (n 24) 8.

109. Cumaraswamy (n 45) para 99.

IV. THE APPOINTMENT OF JUDGES

The process of the appointment of judges is integral to the quality and independence of the Judiciary. This section will first consider the lack of defined criteria when appointing judicial officers. Second, it examines the lack of procedure and criteria relating to the appointment of the Chief Justice.

“THE CONSTITUTION PROVIDES LITTLE GUIDANCE, ONLY REQUIRING THAT THE PERSON BE ‘FIT AND PROPER’ AND ‘APPROPRIATELY QUALIFIED’. HOWEVER, THE 2022 CRITERIA PUBLISHED BY THE JSC FOR PUBLIC COMMENT MAKES SIGNIFICANT STRIDES IN PROVIDING CLARITY ON THE CRITERIA TO BE APPLIED.”

A. The Lack of Defined Criteria

Essential to the determination of whether the appointment procedure enhances the quality and independence of the Judiciary is a consideration of the criteria applied during that process. No set formula can be used to determine whether the candidate will be a good judge.¹¹⁰ The collective strength of our Judiciary depends on the individual strength and expertise offered by different judges, but stipulated and objective criteria must guide the appointment process.

The Constitution provides little guidance, only requiring that the person be ‘fit and proper’ and ‘appropriately qualified’.¹¹¹ However, the 2022 Criteria published by the JSC for public comment¹¹² makes significant strides in providing clarity on the criteria to be applied.¹¹³

Despite this, some caution is still required in that open-ended concepts can be subject to individual interpretation.¹¹⁴ The risks inherent in this are obvious - especially if commissioners have varying understandings and especially if those understandings might be put in service of particular political agendas.¹¹⁵

Prior JSC interviews have shown little to no evidence that the JSC applied its 2010 Criteria,¹¹⁶ and even if it did, how it interpreted or attributed weight to those criteria.¹¹⁷ This Report urges the JSC not to repeat the same mistake.

110. Cowen (n 24) 77.

111. Constitution (n 1) section 174(1).

112. 2022 Criteria (n 52).

113. The HSF has commented on the 2022 Criteria.

114. Ibid 154-5; Cowen (n 24) 15.

115. Cowen ibid 19.

116. JSC, ‘Summary of the Criteria Used by the Judicial Service Commission When Considering Candidates for Judicial Appointment’, (15 September 2010) <<https://constitutionallyspeaking.co.za/criteria-used-by-jsc-when-considering-judicial-appointments/>> (“2010 Criteria”).

117. Oxtoby (n 14) 157; Oxtoby (n 16) 39.

In addition, past interviews showed little demonstration of the JSC applying and interpreting the constitutional criteria, particularly the relationship between sections 174(1) and 174(2).¹¹⁸ This has been the cause of much consternation. Section 174(1) provides for two constitutional requirements – ‘fit and proper’ and ‘appropriately qualified’ – that must be met in order for a candidate to be appointed as a judge.¹¹⁹ It is section 174(2), which requires that race and gender be considered that leads to the most debate.¹²⁰

“IT IS QUITE UNTENABLE THAT AT THIS EARLY PHASE OF THE RECRUITMENT PROCESS, CANDIDATES SHOULD BE EXCLUDED FOR NO OTHER REASON BUT THEIR RACE.”

The SCA recently considered the interplay between section 174(1) and (2) in the Lawrence judgment.¹²¹ In this matter, the SCA was tasked with considering an appeal wherein the appellant, the Magistrates’ Commission, overlooked the respondent, Mr Lawrence, for a permanent appointment as a magistrate, despite his impressive acting record, on the sole basis of his race.¹²² The SCA found that the record of the shortlisting proceedings revealed that the Appointments Committee (a sub-committee of the Magistrates Commission) ‘was fixated on excluding candidates from a particular group and no flexibility from the targeted group would under any circumstances even have been considered’.¹²³ As a result, the SCA dismissed the appeal and held that the shortlist proceedings were unlawful and unconstitutional on the basis that:

‘The legislative scheme does not permit a targeted group approach, precisely because no one factor can at the outset override or take precedence over other factors. The starting point of the exercise was therefore fundamentally flawed. The record shows that the process was rigid, inflexible and quota-driven. The blanket exclusion of white persons, no matter how high they may have scored in respect of the other relevant factors is revealing. Any white candidate, no matter how good, was mechanistically excluded. The result was that Mr Lawrence’s application was not considered at all. The approach of the Committee was not consistent with the proper interpretation and application of section 174 of the Constitution, regulation 5 or the AP. Rather than considering race as but one of [the] factors, albeit an important one, the Committee set out to exclude candidates, including the respondent, on the basis of their race. Such an approach does not meet the threshold set by our courts and cannot be countenanced. It is important to emphasise that we are concerned here with the shortlisting process. It is quite untenable that at this early phase of the recruitment process, candidates should be excluded for no other reason but their race.’¹²⁴

The 2022 Criteria recognises that race and gender considerations are weighty factors to be taken into account but that it ‘should not result in candidates being unfairly disqualified’.¹²⁵

118. Oxtoby (n 14) 38; Olivier (n 48) 463. Constitution (n 1) section 174(1) and (2) provides –

(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.

119. Olivier *ibid* 452.

120. Cowen (n 24) 63; Olivier *ibid* 450.

121. *Magistrates Commission and Others v Lawrence* [2021] ZASCA 165; (2022) 43 ILJ 567 (SCA); [2022] All SA 321 (SCA) (“Lawrence”).

122. *Ibid* para 1.

123. *Ibid* para 28.

124. *Ibid* para 34.

125. 2022 Criteria (n 52) para 24.



It seems clear that there is an interplay between these two sub-sections. However, representativity on its own will not necessarily enhance the legitimacy of that court. Belonging to a particular race or gender does not guarantee that you meet the requirements of section 174(1), nor does it guarantee that you will be able to perform the functions required. If candidates are appointed 'solely' on this basis, then the legitimacy and effectiveness of the court may be undermined.¹²⁶ To look at section 174(2) in this light is to assume that 'justice can only properly be dispensed by "one of your racial kind"'¹²⁷ and this would be contradictory to the idea that justice must be dispensed impartially.¹²⁸ Highlighting this concern, Judge Cachalia was criticised during an interview for saying, in response to a statement that he was not supportive of the transformation project, that 'as a litigant, he did not expect to see a judge that looked like him, but rather one who would do justice by him'.¹²⁹

This Report is not advocating that the bench should not reflect the demographics of South Africa. It unequivocally should and, instead, it maintains that being of a specific race and/or gender is not enough in and of itself to enhance the legitimacy of the Judiciary. Section 174(1) requirements must first be met before section 174(2) considerations are made.¹³⁰

126. Cowen (n 24) 73.

127. Ibid 67.

128. Kate Malleon, 'Creating a Judicial Appointments Commission: Which Model Works Best?' (2004) Public Law 104, 106.

129. Izak Smuts SC, 'The Judiciary: Do White Males Not Need to Apply?' Politics Web (5 April 2013) <<https://www.politicsweb.co.za/news-and-analysis/the-judiciary-do-white-males-not-need-apply>>.

130. Olivier (n 48) 454.

Defined criteria will not only assist the JSC members and the candidates but will also be of value to the public. There is little public awareness of what qualities the JSC looks for in a judge.¹³¹ Public awareness will enhance the public's perception of and trust in the process,¹³² enhancing overall legitimacy. Finally, it will give the necessary and required transparency and certainty to the procedure as a whole.¹³³

PROPOSAL 8 EIGHT: APPLICATION OF CLEAR AND DEFINED CRITERIA FOR THE APPOINTMENT OF JUDGES

Clear and defined criteria are essential to the legitimacy of the appointment process. The commissioners on the JSC, the candidates, and the public must be aware, before the nomination and interview process are conducted, precisely what criteria will be applied in the appointment process. This would align with international best practice¹³⁴ and will ensure greater transparency and accountability.¹³⁵ It will also lend greater credibility to the appointment procedure, as each candidate will know what is expected of them, whether they meet such criteria and how they will be judged. Finally, this will allow for a more accurate measure to assess candidates against each other.

The adoption of the 2022 Criteria is the first step. This Report urges the JSC to consistently utilise the criteria in future interviews and to regularly review and update them, as the relevant criteria may change from time to time. However, publication of updated criteria must at least coincide with the call for nominations so that nominators and potential candidates are aware, from the inception of the process, of the standards they are expected to meet.

B. The Lack of Defined Procedure for Selection of the Chief Justice

There is an obvious need for the procedure for the selection and appointment of the Chief Justice to be uniform and prescribed. The fact that the President, as head of the Executive, has such broad and powerful discretion should be of concern when there are no uniform procedures to ensure the proper scrutiny of candidates. The approach adopted by President Ramaphosa can be commended for being the most open and inclusive procedure used to date.

President Ramaphosa invited the public to nominate suitably qualified candidates to be the next Chief Justice and established a six-person Shortlisting Panel to create a shortlist of candidates from these nominations based on predetermined exclusionary criteria.¹³⁶ The public was then invited to make objections to the short-listed candidates.¹³⁷ The Shortlisting Panel, after considering the submissions and the substantive criteria agreed upon in advance, submitted a report to President

131. Cowen (n 24) 8.

132. Oxtoby (n 16) 160 and 174.

133. Oxtoby (n 16) 160 and 174.

134. Model Clause (n 20), section 9; Commonwealth Principles (n 28) para 1.3.1.; Commonwealth (Latimer House) Principles on the Three Branches of Government (2003), principle IV(a); Human Rights Committee, 'General Comment No.32', CCPR/C/GC/32, (23 August 2007) <<https://digitalibrary.un.org/record/606075?ln=en>>, para 19; Lilongwe Principles (n 34) principles (i) and (vii).

135. Commonwealth Principles *ibid* para 1.2.2; Cowen (n 24) 9; Cape Town Principles (n 24) principle III.

136. 'President Ramaphosa Invites Public Participation in Selection of Chief Justice' (The Presidency, 16 September 2021) <<http://www.thepresidency.gov.za/press-statements/president-ramaphosa-invites-public-participation-selection-chief-justice>>, President Ramaphosa appointed Judge Navi Pillay, Minister of Justice and Correctional Services Ronald Lamola, former Minister of Justice Reff Radebe, former Public Protector Adv Thuli Mandonsele, Ms Mmapaseka Steve Letsike, and Professor Ziyad Motala; 'Panel Names 8 Nominees for Position of Chief Justice' (The Presidency, 4 October 2021) <<http://www.thepresidency.gov.za/press-statements/panel-names-8-nominees-position-chief-justice>> ("Press Statement 2"), the exclusionary criteria was centered around having the correct documentation.

137. Press Statement 2 *ibid*.

Ramaphosa with a list of eight potential candidates.¹³⁸ After considering the report, President Ramaphosa provided four candidates to the JSC for it to conduct its own interview process.¹³⁹

Evident from the above-described process is how broad public participation and consultation were utilised in the appointment process. Such an open and transparent process serves to enhance the legitimacy of the proceedings and the final appointment of the Chief Justice. However, nothing in legislation or regulations would have prevented him from circumventing the whole process at any time and appointing any of the other short-listed nominees or even another candidate to the position.

A set, uniform procedure will add significant certainty and much-needed transparency to the process. A valid concern regarding President Ramaphosa's adopted process is that there may be some duplication between the work of the Shortlisting Panel and that of the JSC, as the JSC requested the resubmission of documents and submissions by the public and relevant bodies in respect of the candidates.¹⁴⁰ However, there is nothing improper in the JSC's call; after all it is the constitutional body tasked with vetting the suitability of candidates.

In addition to uncertainty regarding the procedure, there is further uncertainty about what criteria will guide the selection of the Chief Justice. This is evidenced by the multiple news articles that were written specifically on the criteria to be used ahead of the announcement of President Ramaphosa's process.¹⁴¹ President Ramaphosa's Shortlisting Panel agreed on the following criteria for applications:

The applicant -

1. is a fit and proper person who possesses the qualifications, skills, knowledge and expertise reasonably expected of an incumbent of the position of the Chief Justice;
2. meets the constitutional requirements for appointment including with regard to citizenship and mandatory age for discharge from active service;

138. 'Chief Justice Shortlisting Panel Presents Report to President' (The Presidency, 29 October 2021) <<http://www.thepresidency.gov.za/press-statements/chief-justice-shortlisting-panel-presents-report-president>>; 'Terms of Reference for Shortlisting Panel of Nominations for Purposes of Filling the Imminent Vacancy of the Chief Justice of the Republic of South Africa' (The Presidency) <https://www.thepresidency.gov.za/sites/default/files/TOR%20for%20Shortlisting%20Panel%20%28Final%29_0.pdf>("Terms of Reference").
139. 'President Submits List of Candidates for Position of Chief Justice to Judicial Service Commission and Political Parties' (The Presidency, 17 November 2021) <<http://www.thepresidency.gov.za/press-statements/president-submits-list-candidates-position-chief-justice-judicial-service-commission-and-political-parties>>.
140. Erin Bates, 'Casac Worries JSC is Duplicating Processes Ahead of February Interviews for Top Judges' (2 December 2021) Business Live <<https://www.businesslive.co.za/bd/national/2021-12-02-casac-worries-jsc-is-duplicating-processes-ahead-of-february-interviews-for-top-judge/>>.
141. 'South Africa is Due to Get a New Chief Justice: What it Takes to do the Job Well' (30 August 2021) The Conversation <<https://theconversation.com/south-africa-is-due-to-get-a-new-chief-justice-what-it-takes-to-do-the-job-well-166839>>; Chelsea Ramsden, 'Given the Current Judicial and Political Climate, the Selection of the Next Chief Justice is of Vital Importance' (27 August 2021) Daily Maverick <<https://www.dailymaverick.co.za/article/2021-08-27-given-the-current-judicial-and-political-climate-the-selection-of-the-next-chief-justice-is-of-vital-importance/>>; Nicole Fritz, 'A Fractured ANC Requires a New Chief Justice Who is Principled, Courageous and Articulate' (27 August 2021) News24 <<https://www.news24.com/news24/opinions/fridaybriefing/nicole-fritz-a-fractured-anc-requires-a-new-chief-justice-who-is-principled-courageous-and-articulate-20210826>>; Lawson Naidoo and Dan Mafora, 'New Chief Justice has to Guide the ConCourt Through a Myriad of Challenges' (27 August 2021) News24 <<https://www.news24.com/news24/opinions/fridaybriefing/lawson-naidoo-and-dan-mafora-new-chief-justice-has-to-guide-the-concourt-through-a-myrriad-of-challenges-20210826-2>>; 'South Africa is Set to Appoint a New Chief Justice. The Stakes Have Never Been Higher' (22 April 2021) The Conversation <<https://theconversation.com/south-africa-is-set-to-appoint-a-new-chief-justice-the-stakes-have-never-been-so-high-159338>>; Judges Matter, 'What Kind of Qualities Should a Chief Justice Possess?' (5 October 2020) Daily Maverick <<https://www.dailymaverick.co.za/article/2020-10-05-what-kind-of-qualities-should-a-chief-justice-possess/>>; 'Criteria for the Appointment of a Chief Justice' (17 September 2020) Judges Matter <<https://www.judgesmatter.co.za/opinions/criteria-for-the-appointment-of-a-chief-justice/>>.

3. as head of the Judiciary, demonstrates the ability and capability to:-
 - a. defend, protect and uphold the Constitution;
 - b. create a conducive environment for asserting the independence of the judiciary and respect for separation of powers; lead and spearhead South Africa's transformative jurisprudence geared for the advancement of social justice and access to justice; and
 - c. promote a culture of work ethic geared to meet the acceptable judicial performance standards and standards of accountability.
4. is reputed to be of unblemished integrity, be beyond reproach, possess moral leadership qualities and strong skills that would assist in promoting and enhancing an harmonious environment for the entire judiciary;
5. has judicial competence;
6. demonstrates a level of sensitivity and objectivity towards equality in terms of race, gender, persons with disabilities, LGBTI people and other vulnerable groups.¹⁴²

Again, as with the procedure utilised by President Ramaphosa, the stipulation of more detailed criteria can be commended as being the most transparent criteria used to date. Unfortunately, this does not mean they will be utilised again in the future. In addition, as the JSC deliberated in private, it is unclear what criteria they considered in making their determination.¹⁴³

A further concern which arose during the interviews was that the JSC did not seem to understand its role in this process. Section 174(3) of the Constitution only requires the President to consult with the JSC.¹⁴⁴ Instead, the JSC recommended a single candidate, and in doing so, exceeded its mandate as it was meant to assess the suitability for appointment of the candidates as opposed to substituting its preference for that of the President.¹⁴⁵ This situation could have easily been avoided if a precise and uniform procedure had been provided.

142. Terms of Reference (n 138) para 5.

143. However, it must be remembered that the HSF was successful in the Constitutional Court in the case of *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) ("HSF v JSC"). In this case the Constitutional Court reasoned that the JSC's private deliberations were of manifest relevance to an application to review a decision of the JSC and to withhold them would constitute an unjustified limitation of the right of access to courts, enshrined in section 34 of the Constitution. In this regard, the Constitutional Court pointed out that the JSC's advisory role in appointing judicial officers was a crucial constitutional function and that our rules governing judicial review should allow applicants seeking to review the JSC's decisions to formulate their case on the most complete record of relevant information possible. In addition, the Constitutional Court, balancing the need to effectively bring judicial review proceedings against the JSC's confidentiality concerns, found that it would be an underestimation of the JSC's members to assume that they would shrink from robust debate, even if there were a risk that their deliberations could be disclosed subject to a confidentiality regime. It also found that the court below had underestimated the resilience of candidates for judicial office themselves, as they are in any event subject to a robust public interview process that poses no more reputational risk than private deliberations that are later disclosed.

144. And with the leaders of the other parties in the NA.

145. Esmie Ferreira, 'Ramaphosa says JSC exceeded its mandate in recommending Maya for Chief Justice' (16 February 2022) Mail & Guardian <<https://mg.co.za/news/2022-02-16-ramaphosa-says-jsc-exceeded-its-mandate-in-recommending-maya-for-chief-justice/>>.

PROPOSAL 9 DETERMINE CLEAR AND DEFINED CRITERIA AND PROCEDURES FOR SELECTION OF THE CHIEF JUSTICE

The appointment of a Chief Justice is an event of national importance, and the process should be beyond reproach. In addition, as the President is imbued with immense power and discretion in the appointment process, clear guidelines will provide legitimacy and transparency.

A set procedure should be adopted for all Chief Justice appointments to ensure consistency. For example, a procedure similar to that adopted by President Ramaphosa, where there is comprehensive consultation and public participation in the process should be consistently applied.

Criteria should be published before the start of the process. The criteria must be detailed and not set out in vague terms in order to avoid potential abuse. The appointment of a Chief Justice is not an annual event, and it is, therefore, reasonable that the criteria may change between appointments based on the demands of the office. As such, it would be better to publish the criteria relating to the appointment of a Chief Justice before the start of each process as opposed to general criteria applicable to all Chief Justice appointments.

V. DISCIPLINARY PROCEDURES

The disciplinary procedures are well laid out and documented in the JSC Act and relevant regulations and rules. Nonetheless, the composition of a JCC and JCT require further consideration. In addition, the application of the set procedures raises concerns as to the protracted periods required to finalise complaints and consistency in dealing with the complaints. Finally, given the prevalence of the appointment of acting judges, the lack of clarity as to how, if required, a complaint is to be laid against an acting judge is cause for genuine concern.

A. Delay and Inconsistency in Dealing with Complaints

The composition of the JCC and the JCT is, to a large degree, in line with international practice. International best practice dictates that these bodies should be composed of members of the Judiciary, sitting or retired, with some representation from the legal profession outside of the Judiciary.¹⁴⁶ Neither the JCC nor the JCT involve members of the Executive, the Legislature or persons nominated by the President, but instead, make use of sitting judges and other legal professionals. However, some concerns arise in respect of the processes after the JCC or JCT has made its findings. The participation of Presidential appointees, who may be closely aligned with the governing party, when the JSC must confirm a finding of gross incompetence, gross misconduct or incapacity, and the fact that the ultimate decision to remove a judge lies with the Legislature potentially raises difficulties.¹⁴⁷

The process of complaints and disciplinary procedures against judges is detailed and, in theory, should run effectively and efficiently. However, in practice, this is not the case. The delays in dealing with and finalising matters are cause for extreme concern and impact the accountability, efficiency and integrity of the Judiciary. Two cases clearly demonstrate that the current system needs to be reworked.

“IN MAY 2008, A COMPLAINT WAS LODGED AGAINST JP HLOPHE FOR ATTEMPTING TO IMPROPERLY INFLUENCE TWO CONSTITUTIONAL COURT JUSTICES TO FIND IN FAVOUR OF THEN-PRESIDENT JACOB ZUMA.”

146. García-Sayán (n 98) para 24; Special Rapporteur on the Independence of Judges and Lawyers García-Sayán, ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers’ (2 May 2018) Human Rights Council Doc No. A/HRC/38/38, para 61; Special Rapporteur on the Independence of Judges and Lawyers Gabriela Knaul, ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers’ (28 April 2014) Human Rights Council Doc No. A/HRC/26/32, para 93.

147. Despouy (n 28) para 61.

The first is the case of Judge Motata. In 2007, Judge Motata drove into a residential wall whilst intoxicated and was subsequently involved in a verbal confrontation with the property owner. Judge Motata used racial slurs, profanities and language of a derogatory nature, all of which were recorded by the owner.¹⁴⁸ In 2009, Judge Motata was found guilty of driving under the influence of alcohol, which was confirmed on appeal.¹⁴⁹ Three complaints were laid against Judge Motata with the JSC, one in 2007, one in 2008, and the last in 2011.¹⁵⁰ In 2011, the JCC recommended that a JCT be appointed.¹⁵¹ The JCT was established in March 2013.¹⁵² Eventually, in 2018, the JCT recommended his impeachment as it found that his conduct was ‘prejudicial to the impartiality and dignity of the courts’ as well as that the manner in which he allowed his defence to be conducted ‘at his trial was incompatible with or unbecoming of the holding of judicial officer’ and therefore allowing him to remain on the bench would ‘negatively affect the public’s confidence in the justice system’.¹⁵³

In October 2019, the JSC rejected the recommendation of the JCT and found that his conduct did not constitute gross misconduct but that he was ‘guilty of the lesser offence of misconduct’ and ordered him to pay a fine.¹⁵⁴ Astonishingly, not only did this process begin in 2007 and was only finalised by the JSC in 2019 but the JSC saw fit to substitute the JCT’s determination with a completely different one of its own. This is not the end of the matter, as the JSC’s decision is being challenged in the High Court.¹⁵⁵

The second case is the matter of Judge President Hlophe (“JP Hlophe”). In May 2008, a complaint was lodged against JP Hlophe for attempting to improperly influence two Constitutional Court justices to find in favour of then-President Jacob Zuma.¹⁵⁶ In August 2009, a sub-committee of the JSC consisting of then-Judge President Ngoepe, Moerane SC and Semanya SC decided, based on the evidence before it, that JP Hlophe was not guilty of gross misconduct.¹⁵⁷ After lengthy litigation in the courts challenging this decision, the Constitutional Court dismissed JP Hlophe’s applications for leave to appeal, and as such the decision of August 2009 of the JSC was set aside.¹⁵⁸ As a result, the complaint was referred to a JCC in April 2012.¹⁵⁹ In October 2012, the JCC recommended the appointment of a JCT.

148. ‘The JSC’s Misdealings Against Judge Motata’ (7 September 2020) Judges Matter <<https://www.judgesmatter.co.za/opinions/the-jscs-misdealings-against-judge-motata/>>.

149. Ibid.

150. Ibid.

151. Ibid.

152. Ibid.

153. Ibid.

154. Ibid.

155. Ernest Mabuza, ‘No Court Date Yet for Civil Case Over Judge Nkola Motata’ Times Live <<https://www.timeslive.co.za/sunday-times/news/2021-08-29-no-court-date-yet-for-civil-case-over-judge-nkola-motata/>>.

156. *Justices of the Constitutional Court v Judge President M J Hlophe* (9 April 2021) Judicial Conduct Tribunal (“Hlophe JCT Decision”), paras 6-7.

157. Ibid para 16.

158. *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Other* [2012] ZACC 4; 2012 (6) SA 13 (CC); 2012 (6) BCLR 567 (CC). See further *Acting Chairperson: Judicial Service Commission & Others v Premier of the Western Cape Province* [2011] ZASCA 53; 2011 (3) SA 538 (SCA); *Freedom Under Law v Acting Chairperson: Judicial Service Commission & Others* [2011] ZASCA 59; 2011 (3) SA 549 (SCA); *Premier of the Western Cape v Acting Chairperson: Judicial Services Commission and Others* [2010] ZAWCHC 80; 2010 (8) BCLR 823 (WCC).

159. *Hlophe JCT Decision* (n 156) para 21.



Again, after lengthy litigation in the courts, the JCT convened to hear the complaint in July 2018, but a recusal application was sought.¹⁶⁰ The JCT convened again in October 2019, but there were further issues, this time regarding fees, and the matter was rescheduled for October 2020.¹⁶¹ A further delay led to the matter only being heard in December 2020.¹⁶² In April 2021, in a unanimous

“IN APRIL 2021, IN A UNANIMOUS DECISION OF THE JCT, IT FOUND THAT JP HLOPHE WAS GUILTY OF GROSS MISCONDUCT AND RECOMMENDED HIS IMPEACHMENT.¹⁶³ THE REPORT WAS TRANSMITTED TO THE JSC FOR CONSIDERATION.”

decision of the JCT, it found that JP Hlophe was guilty of gross misconduct and recommended his impeachment.¹⁶³ The report was transmitted to the JSC for consideration.¹⁶⁴ On 25 August 2021, the JSC confirmed the findings of the JCT and recommended his impeachment.¹⁶⁵

Unsurprisingly, JP Hlophe took the JSC’s decision on review, which was ultimately dismissed in May

2022.¹⁶⁶ Pending the NA’s constitutionally obligated process to consider the JSC’s impeachment decision, the JSC has finally recommended to President Ramaphosa that JP Hlophe be suspended.¹⁶⁷ The President is yet to take any decision in this regard.

160. Ibid para 27.

161. Ibid para 28.

162. Ibid.

163. Ibid pars 123-4.

164. In terms of the JSC Act (n 2) section 33.

165. The decision was not unanimous and there was a minority judgment finding that his conduct did not amount to gross misconduct.

166. Hlophe v Judicial Service Commission and Others [2022] ZAGPJHC 276; [2022] 3 All SA 87 (GP).

167. Constitution (n 1) section 177(3) provides that: The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1) and subsection (1) refers to the removal of a judge on the basis of a finding of incapacity, gross incompetence or gross misconduct.

THERE NEEDS TO BE A STREAMLINED PROCESS THAT DEALS WITH INITIAL COMPLAINTS. FOR EXAMPLE, THE JSC COULD SET UP A COMMITTEE OF SENIOR SITTING AND RETIRED JUDGES TO CONSIDER THE INITIAL COMPLAINTS AND DETERMINE WHETHER THERE IS ANY MERIT IN THEM. THE JSC RECEIVED 162 COMPLAINTS IN THE 2020/2021 YEAR, AND ONLY HALF OF THESE COMPLAINTS HAVE BEEN PROCESSED.

The above two cases powerfully show how the JSC process can be subject to unacceptable and unreasonable delays. Delays, especially regarding complaints of gross misconduct, lead to diminished confidence in the Judiciary. The current procedures are evidently not working effectively.

Aside from such delays, a further concern that needs to be raised is the inconsistency in dealing with complaints. For example, a complaint laid against Judge Makhubele for holding a 'dual status as a Judge of the High Court of South Africa and Chairperson of the Interim Board of Control of the Passenger Rail Agency of South Africa (PRASA)' led to the JSC recommending that a JCT be appointed and that Judge Makhubele be suspended in terms of section 177(3)¹⁶⁸ of the Constitution pending the outcome of the matter.¹⁶⁹ In a further instance ten judges, as well as the Chairperson of the Cape Bar Council, laid a complaint against Judge Parker that resulted in the appointment of a JCT.¹⁷⁰ Again, the JSC recommended suspension pending the outcome of the matter.¹⁷¹

This Report does not argue that neither Judges Makhubele nor Parker should have been suspended. But it does argue that there is inconsistency in the approach and treatment of judges on the part of the JSC. The JSC did not recommend that either Judge Motata or JP Hlophe be suspended pending the finalisation of their complaints. The complaints against both were very serious and had the very likely impact of bringing the Judiciary into disrepute.¹⁷²

Although the JSC has now finally called for JP Hlophe's suspension, it is inconceivable that it took well over a decade to do so. To make matters worse, not only is JP Hlophe the head of his division, so having more powers at his disposal than ordinary judges and thus enhancing the ability to bring the Judiciary into disrepute, but there have been several other complaints relating to JP Hlophe. It is alleged that he was involved in the making of racist and sexist remarks, nepotism, and adjudicating on matters where there was a clear conflict of interest.¹⁷³

This is highly contradictory to the JSC's approach taken in the cases of both Judges Makhubele and Parker. It is difficult to avoid the impression that the same principles are not applied to all cases. If the JSC is seen as unfair or biased, this undoubtedly impacts the credibility and legitimacy of the body and the Judiciary.

168. Constitution (n 1) section 177(3) provides that: 'The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1)' and subsection (1) refers to the removal of a judge on the basis of a finding of incapacity, gross incompetence or gross misconduct.

169. JSC Annual Report 2020/21 (n 59) para 5.4.1.

170. *Ibid* para 5.4.2.

171. *Ibid*.

172. Corder (n 13) 106-7 and 109-10.

173. Karyn Maughan, 'How the WC Judge President has Faced 10 Major Scandals, Without Any Sanction' (5 March 2021) News24 <<https://www.news24.com/news24/Opinions/FridayBriefing/how-the-western-cape-judge-president-has-faced-10-major-scandals-in-his-term-without-any-sanction-20210304>>.

PROPOSAL 10 STREAMLINING DISCIPLINARY PROCEDURES

Delays in the finalisation of disciplinary procedures are a cause for alarm. It damages the image of the Judiciary and, as a consequence, the public's confidence and trust therein. The increase in complaints¹⁷⁴ indicates the unhappiness of the general public with the functioning of the Judiciary, which needs to be addressed with a sense of urgency.

There needs to be a streamlined process that deals with initial complaints. For example, the JSC could set up a committee of senior sitting and retired judges to consider the initial complaints and determine whether there is any merit in them. The JSC received 162 complaints in the 2020/2021 year, and only half of these complaints have been processed.¹⁷⁵ Based on the limited information in the JSC Annual Report, it would appear that most of the claims are baseless and relate to dissatisfaction with a judge's order or judgment.¹⁷⁶ These are not valid grounds for a complaint against a judge¹⁷⁷ and, therefore, can be swiftly dealt with by the suggested complaint screening committee described above.

B. The Lack of Clarity Surrounding the Complaints Process Involving Acting Judges

Part III of this Report addressed the concerns raised regarding the appointment of acting judges and highlighted the frequency and prevalence of extended appointments. This section calls attention to the fact that there needs to be greater clarity as to whether acting judges fall within the disciplinary procedures provided for in the JSC Act and its regulations.

For all intents and purposes, an acting judge performs the work and functions of a permanent judge. This necessarily means that there will be instances in which a complaint may need to be laid against an acting judge to hold them accountable for their conduct. The JSC Act defines a judge as:

'any Constitutional Court judge or judge referred to in section 1 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001),¹⁷⁸ which includes a judge who has been discharged from active service in terms of that Act, as well as any person holding the office of judge in a court of similar status to a High Court, as contemplated in section 166 of the Constitution, and, . . . includes any Constitutional Court judge or judge performing judicial duties in an acting capacity'.¹⁷⁹

174. JSC Annual Report 2020/21 (n 59) para 5.3.

175. Ibid.

176. Ibid.

177. JSC Act (n 2) section 15(2) which provides that: 'A complaint must be dismissed if it –
 (a) Does not fall within the parameters of any of the grounds set out in section 14(4);
 (b) Does not comply substantially with the provisions of section 14(3);
 (c) Is solely related to the merits of a judgment or order;
 (d) Is frivolous or lacking in substance; or
 (e) Is hypothetical.

On a purposive interpretation, it is clear that the above section includes acting judges. There is no information contained in the annual reports or anywhere else that indicates if any complaints, or the number thereof, have been laid against acting judges. The JSC Annual Report 2020/21 does not mention acting judges and, therefore, of the 162 complaints referenced in the report, it is impossible to determine whether any of the complaints were laid against acting judges.¹⁸⁰ Furthermore, there is no information as to how the JSC deals with complaints against acting judges or what the outcomes have been. This is an untenable situation that must lead to great apprehension regarding the accountability of acting judges.

PROPOSAL 11 CLARITY ON THE PROCESS OF LAYING COMPLAINTS AGAINST ACTING JUDGES

An accountability loophole of this degree cannot continue to exist, particularly given the vast number of acting judges appointed to the courts. Therefore, this Report proposes that the JSC and the Legislature make it clear and amend the JSC Act; if necessary, to make it unambiguously clear that the disciplinary procedures provided for in the Act and its regulations apply to acting judges.

178. Footnote does not appear in original Judges' Remuneration Act section 1(1) defines a judge as any person who is, or who has held, the position of judge in any of the Superior Courts.

179. JSC Act (n 2) section 7(1)(g).

180. JSC Annual Report 2020/21 (n 59) para 5.3.

CONCLUSION

A comprehensive consideration of the current structures of the JSC is urgently required. The current system raises many concerns and requires action to avoid damage to the integrity and legitimacy of the Judiciary.

This Report considers several shortcomings within the existing structure and functioning of the JSC and puts forward specific proposals to bring the JSC in line with international best practice. This is an essential step in strengthening the Judiciary and the rule of law in South Africa.

The Judiciary relies on the public's trust and confidence in order to be effective. It is, therefore, essential that the Judiciary is composed of judicial officers who are fit for the role. This requires them to have the requisite knowledge of the law and the Constitution and the appropriate integrity, merit and independence. It is similarly imperative that the body tasked with oversight of the Judiciary and the JSC must function efficiently, with independence and integrity and in a transparent and accountable manner.

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