

SERVING THE JUDICIARY?

**A review of the activities of the South African Judicial Service Commission
2009 to 2022**

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EXECUTIVE SUMMARY

Over the last 12 years the performance of the Judicial Service Commission (JSC) in the execution of its two primary functions -- of appointing judicial officers and holding them to account – has in many respects been dismal. The problems that have plagued it are manifold, and urgent structural, infrastructural and procedural reform is required in order for it to fulfil its constitutional mandate effectively.

On the appointment of judicial officers, the JSC's failure to adopt and apply appropriate guidelines has led to inconsistent questioning of candidates, inexplicable appointment decisions and a lack of accountability. In addition, its processes have been stymied by political interference at various levels, with the now notorious public interviews in particular being used by commissioners to air their political agendas. Perhaps the most controversial part of the JSC's recent appointments history has, however, been its interpretation and application of the constitutional mandate in section 174(1) and (2) to effect greater race and gender representation within the judiciary, and its confusion of this mandate with the broader concept of transformation. This has resulted in both the differential treatment of candidates on the basis of their race and/or gender as well as a series of questionable appointment decisions overlooking eminently suitable candidates.

In respect of its role in judicial accountability, the JSC's handling of complaints short of gross misconduct, and in respect of which no Judicial Conduct Tribunal has been established, is difficult to assess. This is on account of the lack of publicly available information regarding these complaints as well as the JSC's failure to provide Annual Reports to Parliament. The JSC's handling of complaints of gross misconduct has been characterised by delay, inconsistency and constitutionally unsound conduct and decision-making.

Freedom Under Law has prepared this report with a view both to highlight these shortcomings in the JSC's performance in recent history and to propose mechanisms by which they may be addressed. These proposals are aimed at constructively addressing problems of structure, infrastructure and process.

Structurally, the JSC is cumbersome large and beset by political interference. We accordingly suggest a reduction in the number of political appointees to the JSC. However, this requires a constitutional amendment, which is by definition difficult to effect. This alone will in any event not address the problem of political interference completely, and there needs to be a shift in perspective to recognise the unique and non-party-political function of the JSC as a constitutional body expressly designed to ensure judicial independence.

From an infrastructural perspective, the JSC apparently lacks sufficient internal support to assist it with carrying out its mandate. We suggest the strengthening of the JSC Secretariat and the development of a specific internal body to assist with the administration of both the nomination and disciplinary functions of the JSC.

From a procedural perspective, many of the complaints levelled at the appointments process can be addressed by introducing clearer guidelines for judicial appointment, and by requiring greater accountability in adhering to these guidelines.

The JSC's disciplinary procedures have proved opaque and unwieldy. It is difficult to discern to what extent delay is due to structural and procedural encumbrances or inefficiencies, to the pressures of their routine judicial office on the senior judges involved or to hesitation to pursue complaints. Given the increasing volume of complaints, the Judicial Conduct Committee requires greater internal support. Disciplinary procedures need to be streamlined and arguably complainants ought to be brought back into the process to enhance expeditious management of complaints. The JSC should develop realistic timeframes for the resolution of complaints, and failure to adhere to these must be accompanied by a reasonable explanation. The use of retired judges to preside in Judicial Conduct Tribunals should also be considered. In short, parts I and III of chapter 2 of the JSC Act should be fundamentally reassessed to attain the "appropriate and effective balance between protecting the independence and dignity of the judiciary ... and the overriding principles of openness, transparency and accountability" contemplated in the Preamble to the JSC Act.

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INTRODUCTION

Throughout its existence Freedom Under Law (FUL) has monitored the judiciary and the courts as the primary promoters and protectors of the rule of law within South Africa's constitutional democracy. The Judicial Service Commission (JSC)¹ serves an important gatekeeping function in respect of the judiciary by interviewing candidates for vacancies on the bench and making recommendations for appointment² and by dealing with complaints brought against judges. The JSC's role in creating and maintaining a competent, impartial, independent and accountable judiciary cannot be overemphasised.

Especially over the last 12 years, FUL has on many occasions reacted to lapses on the part of the JSC and its commissioners, and to ineptitude in the performance of its constitutional mandate. It has been,³ and continues to be,⁴ involved in litigation against the JSC, particularly in respect of its failures to execute its disciplinary function. During this period the JSC has also attracted much attention and criticism from the popular media and academic commentators regarding its conduct vis-à-vis both its appointment and its disciplinary obligations.

This is why the FUL Board resolved to conduct a review of the JSC's performance in relation to judicial appointments and discipline for the period 2009-2022 (the period under review) and to produce this report. The report has multiple objectives, including:

¹ Established in terms of section 178 of the Constitution.

² Constitution, s 174. The JSC's role differs in respect of different positions and different courts. This is discussed in detail below in parts 1 and 3.

³ Specifically litigation regarding the JSC's handling of the complaint against Judge President Hlophe, including: *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Others* [2012] ZACC 4 on appeal from *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* [2011] ZASCA 59 (on appeal from *Freedom Under Law v The Acting Chairperson: Judicial Service Commission and Others* Case No. 63513/09 North Gauteng High Court, 10 December 2010, unreported). This is discussed more fully below in part 4.

⁴ See part 4.4.2 below. At the time of writing, *Freedom Under Law v Motata* (2021) ZAGPPHC 14 has been taken to the SCA on appeal.

- i. to provide an objective record of the JSC's meetings in respect of appointments (when the JSC convened for interviews; who was interviewed; who were the commissioners at the time; and who was ultimately nominated for appointment);
- ii. to discuss the various issues that have been raised regarding the appointment, and specifically the interview, process that have attracted popular and academic attention and / or resulted in litigation;
- iii. to examine the JSC's performance in handling complaints against judges, particularly in respect of complaints of gross misconduct, including litigation occasioned by its failures; and
- iv. in view of these discussions, to make remedial recommendations and proposals to address both the structural problems inherent in the JSC as well as the challenges of its current processes.

The JSC's conduct throughout the period under review can generously be described as erratic. In respect of appointments, there have been multiple complaints regarding its failure to nominate suitable candidates and its nomination of unsuitable candidates, culminating in litigation on more than one occasion.⁵ This is not to mention its now notorious interview process that has from time to time devolved into a highly publicised media spectacle. As to disciplinary matters, it is difficult to assess the JSC's performance in handling complaints against judges for less than egregious conduct because the information provided in the available Annual Reports⁶ is scant,⁷ and recent anecdotal reports seem to indicate that such complaints are not handled timeously, if at all. This tardiness is, however, grossly overshadowed by the delay

⁵ Discussed further below in part 3.

⁶ Annexure C sets out all Annual Reports issued by the JSC during the period under review.

⁷ JSC Annual Report 2020-2021 available at <https://www.judiciary.org.za/index.php/judicial-service-commission/jsc-annual-reports> (accessed July 2022) at 13: "For the period under review, the Committee received 162 complaints lodged against Judges in the various Superior Courts. Of this number, 81 complaints were resolved while 81 are still pending. In 2019/20 financial year, the Committee dealt with 99 complaints, of which 70 were finalised while 29 were outstanding. The numbers reflected above indicate a 64% increase of the number of complaints received by the Committee for the 2020/21 financial year."

with which the JSC has handled – and in many ways mishandled – complaints relating to gross misconduct.

In addition, there is a lack of accountability by the JSC. In a constitutional design carefully predicated on checks and balances, the JSC has seemingly fallen through the cracks. There is a single statutory reporting obligation, in terms of which it is required to submit Annual Reports to Parliament.⁸ From what we have been able to ascertain in the public domain, the JSC failed to fulfil this reporting obligation for ten consecutive years between 2008 and 2017.⁹

During this period, outside of the critical attention it has received from FUL and other non-governmental organisations¹⁰ as well as opposition parties in Parliament, the only effective accountability mechanism for the JSC has been litigation,¹¹ in which it has been called on to justify and account for its decisions. This is not the ideal mechanism for accountability for a variety of reasons: it is not systematic or preventive, occurring only once a breach of duties has taken place or is threatened; it is time-consuming¹² and costly;¹³ and it places the onus on others to hold the JSC

⁸ Judicial Service Commission Act 9 of 1994 (the JSC Act) s 6.

⁹ The Judiciary website contains Annual Reports filed for the periods 2017-2018, 2018-2019, 2019-2020 and 2020-2021 (being the most recent) <https://www.judiciary.org.za/index.php/judicial-service-commission/jsc-annual-reports> (accessed July 2022). The Department of Justice website contains Annual Reports filed for the periods 2004, 2006 and 2007 https://www.justice.gov.za/reportfiles/report_list.html (accessed July 2022).

See commentary on this failure by Judges Matter <https://www.judgesmatter.co.za/opinions/ten-years-of-no-accountability-to-parliament-by-jsc/> (accessed July 2022).

¹⁰ For example, the Democratic Governance and Rights Unit at the University of Cape Town, Judges Matter and the Council for the Advancement of the South African Constitution (CASAC).

¹¹ Annexure D contains a list of all cases during the period under review in which the JSC has been a party.

¹² See, for example, in part 3 below a discussion of the litigation culminating in the Constitutional Court decision in *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8. In this matter, a preliminary issue in a review application regarding access to the record of the JSC's "private deliberations" took almost six years to resolve.

¹³ Maughan (2022) "SA's litigation timebomb: Govt faces R147bn in lawsuits, spends billions on legal fees" available at <https://www.news24.com/news24/southafrica/news/sas-litigation-timebomb-govt-faces-r147bn-in-lawsuits-spends-billions-on-legal-fees-20220226> (accessed July 2022).

See also Annexure 3B of the latest Annual Report from the Office of the Chief Justice 2020/2021 listing current litigation against the JSC as contingent liability, including: *Helen Suzman Foundation v Judicial Service Commission*; *Limpopo Legal Solutions vs Judicial Service Commission & 2 Others*; *Snail vs Judicial Service Commission & Others*; *Judge Goliath vs JP Hlophe vs JSC Tribunal*.

to account rather than the JSC taking its own steps to comply with its constitutional mandate to “ensure accountability, responsiveness and openness”.¹⁴

This report has been drafted both with a view to assessing whether the JSC has efficiently and effectively complied with its constitutional mandate and in a concerted effort to address a total vacuum in accountability during a period in which serious questions have been raised about the JSC’s competence and impartiality. It is also aimed at assessing whether the JSC has taken the requisite steps to respect, protect and promote constitutional values. The report furthermore provides concrete suggestions and proposals in support of the ongoing and increasingly loud calls for changes to the structure and processes of the JSC.

This report is divided into five parts:

1. Research methodology and obstacles
2. Background and composition of the JSC
3. Judicial appointments
4. Judicial accountability
5. Concluding remarks

1. RESEARCH METHODOLOGY AND OBSTACLES

In compiling this report and its annexures, we collected publicly available information on the JSC and its various appointment and disciplinary processes during the period under review. This information included transcripts and/or video footage of interviews for appointments;¹⁵ media statements issued by the JSC; formal reports issued by the JSC;¹⁶ judgments in matters in which the JSC was a party as well as papers filed

Available at https://www.judiciary.org.za/images/news/2021/OCJ_Annual_Report_2020-2021.pdf (accessed July 2022).

¹⁴ Constitution, s 1(d).

¹⁵ We are indebted to Judges Matter, an organisation within the Democratic Governance and Rights Unit (DGRU) at the University of Cape Town (UCT), for the work it has done to make these transcripts and recordings available.

¹⁶ In terms of s 6 of the JSC Act, the JSC is required to submit a written report to Parliament for tabling within six months of the end of every year. The report is required to include information relating to: (a) the activities of the Commission during the year in question; (b) all matters dealt with by the Judicial

in these matters where these are available; published decisions of the Judicial Conduct Committee (JCC) and Judicial Conduct Tribunals (JCT); academic literature; reports and statements issued by non-governmental organisations;¹⁷ and news articles and opinion pieces in the popular media. These sources were supplemented as required with the personal records of those who have monitored the JSC's interview process for the period under review.¹⁸

What became apparent early on in the compilation of this documentation is how the JSC itself makes very little information publicly available in a coherent and organised way. That which it does make available is not easily or centrally located.¹⁹ As a result, what should be a relatively mundane research task – for example, establishing who sat on the JSC during each round of appointment interviews – involves arduously piecing together historical data from multiple sources.

There are, as a result, unavoidable lacunae in some of the annexures that form a part of this report. To this end, we have contacted various appointing constituencies and non-governmental organisations in an effort to finalise the annexures and noted where we have received feedback.

This lack of reasonably accessible information regarding the JSC's operations during the period under review is indicative of a failure by the JSC to conduct itself with the necessary degree of accountability, responsiveness and openness required of it as a

Conduct Committee (JCC); (c) all matters relating to the Register of Judges' Registrable Interests; and (d) all matters considered by the Commission regarding the Judicial Conduct Committee and Judicial Conduct Tribunals, including the number of matters outstanding and progress in respect thereof.

¹⁷ Including *inter alia* the DGRU and Judges Matter.

¹⁸ We are indebted to Chris Oxtoby (of the DGRU at the time of the writing of this report) for his assistance in this regard. Oxtoby has both researched the backgrounds of shortlisted candidates prior to interview by the JSC and attended in person almost every appointments session over the period under review. He has also provided invaluable comment in the drafting of this report.

¹⁹ Documents issued by the JSC, for example its Annual Report to Parliament, are inconsistently housed in either the Department of Justice website or the Judiciary website. For a long time, the JSC's official web presence was buried in the Constitutional Court's website. It now has its own tab on the Judiciary website, which is something of an improvement, but there are still significant gaps in the information available to the public, as this report highlights. This issue manifests itself in many ways, such as the lack of information about the membership of the JSC and the dearth of information about the outcome of complaints.

constitutional body. We have, in parts 3 and 4 below, made several proposals intended to address these issues and assist the JSC with fulfilling this mandate.

2. BACKGROUND AND COMPOSITION OF THE JSC

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

- (a) the Chief Justice, who presides at meetings of the Commission;*
- (b) the President of the Supreme Court of Appeal;*
[Para. (b) substituted by s. 16(a) of the Constitution Sixth Amendment Act of 2001.]
- (c) one Judge President designated by the Judges President;*
- (d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;*
- (e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;*
- (f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;*
- (g) one teacher of law designated by teachers of law at South African universities;*
- (h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;*
- (i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;*
- (j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and*
- (k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that Division and the Premier of the province concerned, or an alternate designated by each of them.*
[Para. (k) substituted by s. 2(a) of the Constitution Second Amendment Act of 1998, by s. 16(b) of the Constitution Sixth Amendment Act of 2001 and by s. 10 of the Constitution Seventeenth Amendment Act of 2012.]²⁰

Annexure A to this report provides a summary of the membership of the JSC throughout the period under review.²¹

²⁰ Constitution, s 178(1).

²¹ It is complete to the limited extent that historical information is publicly available from various sources. We deal with the problem of the non-availability of information relating to the JSC and its conduct below in part 3.

All members of the JSC sit for the purpose of judicial appointments – interviewing and recommending candidates.²² However, it sits without those commissioners who are members of the National Assembly (NA) and the National Council of Provinces (NCOP) in respect of all other matters.²³

The JSC has the powers and functions assigned to it in the Constitution and national legislation²⁴ and is empowered to determine its own procedure, but its decisions must be supported by a majority of its members.²⁵ The national legislation enacted to regulate matters incidental to the JSC is the JSC Act.²⁶ The JSC Act was amended significantly in 2008 in order to regulate in greater detail the internal disciplinary processes for complaints made against judges.²⁷

Internationally, the JSC is one of the largest judicial selection bodies. It was intended as a compromise to ensure the participation of various stakeholders in the judicial appointments process in order to address the historically executive-dominated system²⁸ and lend legitimacy to the process.²⁹ The level of direct party-political representation on the JSC is, however, unusual by international standards.³⁰ In response to an objection that the legislature and the executive were overly represented on the JSC and that this infringed the Constitutional Principle regarding the separation of powers, the Constitutional Court in the First Certification Judgment

²² It routinely sits twice per annum, during the Easter and October High Court recesses. Agendas are often heavily loaded, resulting in extremely long sessions with interviews extending into the small hours.

²³ Constitution, s 178(5).

²⁴ Constitution, s 178(4).

²⁵ Constitution, s 178(6).

²⁶ Judicial Service Commission Act 9 of 1994.

²⁷ Judicial Service Commission Amendment Act 20 of 2008.

²⁸ Discussed below in further detail in part 3.

²⁹ Corder (2021) “Comprehensive review: The JSC is in freefall and the stakes are too high for it to fail.” *Daily Maverick* available at <https://www.dailymaverick.co.za/opinionista/2021-06-30-comprehensive-review-the-jsc-is-in-freefall-and-the-stakes-are-too-high-for-it-to-fail/> (accessed July 2022); Oxtoby (2021) “The Appointment of Judges: Reflections on the Performance of the South African Judicial Service Commission.” *Journal of Asian and African Studies* 56(1) 34 at 36. Available at <https://journals.sagepub.com/doi/full/10.1177/0021909620946849> (accessed November 2022).

³⁰ Oxtoby above n 29 at 36.

observed that the composition of the JSC was the result of a political compromise, but one that ultimately did not infringe any of the Constitutional Principles:

Appointment of judges by the executive or a combination of the executive and Parliament would not be inconsistent with the [Constitutional Principles]. The JSC contains significant representation from the judiciary, the legal professions and political parties of the opposition. . . . As an institution it provides a broadly based selection panel for appointments to the judiciary and provides a check and balance to the power of the executive to make such appointments. In the absence of any obligation to establish such a body, the fact that it could have been constituted differently, with greater representation being given to the legal profession and the judiciary, is irrelevant. Its composition was a political choice which has been made by the [Constitutional Assembly] within the framework of the [Constitutional Principles]. We cannot interfere with that decision ...³¹ (Footnotes omitted).

There have been calls in recent years to amend the JSC's composition because it is "too large to function effectively"³² and ultimately "hamstrung by political interests".³³ These calls have come from opposition parties within the other branches of government,³⁴ legal academics³⁵ and media commentators. Some commentators have suggested that the problems experienced by the JSC in recent years have less to do with its structural composition and more with the specific identity of its commissioners,³⁶ while still others suggest that such an amendment would be

³¹ *In re: Certification of the Constitution of the Republic of South Africa [1996] ZACC 26* at para 124.

³² National Development Plan 2030 (2012) available at <https://www.gov.za/issues/national-development-plan-2030> (accessed July 2022) at 453.

³³ *Ibid.*

³⁴ See the discussion of a private member's bill (PMB7-2013) tabled in Parliament by a Democratic Alliance MP in Olivier and Hoexter (2014) "The Judicial Service Commission" in Hoexter and Olivier (eds) *The Judiciary in South Africa*. Cape Town: Juta, pp 154-199 at 172. The Bill sought: to reduce the NA contingent from six to four (and require two of the four to be from opposition parties); reduce the NCOP contingent from four to two (with one being drawn from an opposition party); and reduce the presidential appointees from four to two and prohibit them from participating in the appointment of judges to the Constitutional Court.

³⁵ See for example Corder (2021) above n 29; and Olivier and Hoexter (2014) above n 34 at 172: "It does seem that nothing short of radical change in the composition of the JSC will suffice to displace the current perception that its decision-making is directed by a powerful ANC-aligned bloc."

³⁶ See for example Grootes (2022) "Fixing the JSC, making it serve SA's people and not the politicians? Maybe start with baby steps." *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2022-02-07-fixing-the-jsc-making-it-serve-sas-people-and-not-the-politicians-maybe-start-with-baby-steps/> (accessed July 2022).

“undemocratic”.³⁷ We discuss possible changes to the JSC’s composition further in part 3 below.

3. JUDICIAL APPOINTMENTS

3.1 Background

Prior to the adoption of the Constitution, judges were appointed by the State President, through the inherited “tap-on-the-shoulder” system.³⁸ In practice, although there were occasional and often notorious exceptions, the Minister of Justice (and the head of the relevant court) wielded great power – essentially making the selection, which was ultimately rubber-stamped by the State President.³⁹

The primary, and most damaging, consequences of this system of selection were that:

- i. the lack of transparency shrouded in mystery the process by which an entire arm of government was appointed;
- ii. almost all appointees were from the ranks of senior counsel resulting in an exclusively white and, with one exception, male judiciary by 1990;⁴⁰ and

³⁷ Nkala (2022) “Call to remove politicians from JSC is short-sighted.” *Mail & Guardian* available at <https://mg.co.za/opinion/2022-02-22-call-to-remove-politicians-from-jsc-is-short-sighted/> (accessed July 2022).

³⁸ Oxtoby (2021) above n 29 at 35; Tilley and Ndlebe (2021) “Judicial Appointments in South Africa.” *British Journal of American Legal Studies* 10(3) 458-478 at 460. For a more detailed synopsis of the process of judicial appointments in the pre-democratic era, see Olivier (2014) “The selection and appointment of judges.” In Hoexter and Olivier (eds) *The Judiciary in South Africa*. Cape Town: Juta, pp 116-153 at 117 et seq.

³⁹ Oxtoby (2021) above n 29; and Wesson and du Plessis (2008) “Fifteen years on: Central issues relating to the transformation of the South Africa judiciary.” *South African Journal on Human Rights* 24(2) 187-213 at 190.

⁴⁰ Wesson and du Plessis (2008) above n 39 at 190.

- iii. the bench and the resulting jurisprudence (with a few notable exceptions)⁴¹ were predominantly executive-minded and judicial independence was ultimately impaired.⁴²

It is little wonder that with the dawn of constitutional supremacy and the end of parliamentary sovereignty a total overhaul of this system was required. The creation of the JSC and the processes it has adopted in relation to the appointment of judges have – at least in theory – gone some way toward addressing the problems associated with the earlier system. However, in practice, the composition of the JSC and the way in which these processes are in fact implemented have created a new set of problems.

The extent of the JSC's role in judicial appointments varies by both court and position:

- i. The Chief Justice and the Deputy Chief Justice are appointed by the President after consulting the JSC and the leaders of parties represented in the National Assembly;⁴³
- ii. The President and Deputy President of the Supreme Court of Appeal are appointed by the President after consulting the JSC;⁴⁴
- iii. With appointments to the Constitutional Court, the JSC is required to prepare a list containing three more nominees than the number of vacancies. The President then either makes an appointment from this list – after consulting the Chief Justice and the leaders of parties represented in the National Assembly – or may reject the list and ask for it to be supplemented with further nominees;⁴⁵ and

⁴¹ See, for example, *R v Abdurahman* 1950 (3) SA 136 (A); *R v Lusu* 1953 (2) SA 484 (A); and *R v Ngwevela* 1954 (1) SA 123 (A).

⁴² Oxtoby above n 29 at 35.

⁴³ Constitution, s 174(3). In recent years “after consulting with the JSC” has come to mean that prospective candidates are publicly interviewed by the JSC.

⁴⁴ *Ibid.*

⁴⁵ Constitution, s 174(4).

- iv. All other judges are appointed by the President on the advice of the JSC.⁴⁶

In terms of section 5 of the JSC Act,⁴⁷ the Minister must by Notice in the Government Gazette “make known the particulars of the procedure, including subsequent amendments which the Commission has determined in terms of section 178(6) of the Constitution”. The latest Notice issued by the JSC regarding its process was in March 2018.⁴⁸ The JSC Process Regulations set out the procedures followed by the JSC in the appointment of judges to the Constitutional Court (section 2) and all other judges (section 3), with the procedures varying only slightly in accordance with the JSC’s differential role in these appointments.⁴⁹ In respect of both:

- i. The Regulations establish a “screening committee” comprised of eight members of the JSC as appointed from time to time (in addition, the Head of the Court concerned and the Premier of the Province concerned, where applicable, or an alternate designated by each of them *may* participate);⁵⁰
- ii. When the JSC is informed of a vacancy on a Court by the Head of that Court, it will announce the vacancy publicly and call for nominations by a specified date;⁵¹
- iii. After the closing date for nominations, the members of the JSC are provided with the nominations⁵² and are invited to inform the screening committee, prior

⁴⁶ Constitution, s 174(6). Oxtoby above n 29 at 36 – “on the advice of the JSC” is understood to be mandatory, i.e. the President is required to appoint those candidates nominated by the JSC.

⁴⁷ Above n 8.

⁴⁸ Notice No. 404 in *Government Gazette* No. 41547 (29 March 2018) (JSC Process Regulations) at 4.

⁴⁹ The only differences are: (i) an additional obligation on the Chairperson of the JSC to “distil and record the Commission’s reasons for recommending the candidates selected” (s 2(k)) and to provide these reasons to the President (s 2(n)) in respect of appointees to the Constitutional Court; and (ii) provision for further candidates to be recommended for the Constitutional Court vacancies if it is so required in terms of s 174(4) of the Constitution (s 2(l)).

⁵⁰ JSC Process Regulations above n 48 s 1.

⁵¹ *Ibid* s 2(a) and (b) in respect of Constitutional Court judges and s 3(a) and (b) in respect of all other judges.

⁵² *Ibid* s 2(c) and 3(c) set out what a nomination is required to contain, being (i) a letter of nomination identifying the person making the nomination and the candidate; (ii) the candidate’s written

to its meeting, of the names of any candidates whom they feel strongly should be included on the interview shortlist and provide a written motivation therefor;⁵³

- iv. At its meeting the screening committee prepares a shortlist of candidates to be interviewed which must include “those who qualify for appointment and who in the opinion of the majority of the members of the screening committee, have [a] reasonable prospect of selection for appointment”;⁵⁴
- v. The shortlist is then published for comment by a specified closing date;⁵⁵
- vi. After this closing date, the shortlist, together with the nominations of the shortlisted candidates and the comments received on them, is distributed to the members of the JSC;⁵⁶
- vii. All shortlisted candidates are interviewed in proceedings open to the public and the media;⁵⁷
- viii. After completion of the interviews, the JSC deliberates in private and decides on the candidates to be recommended by majority vote taken by way of secret ballot;⁵⁸ and
- ix. The JSC then publicly announces the names of the recommended candidates⁵⁹ and advises the President of its recommendations (and, in

acceptance of the nomination; (iii) a detailed CV of the candidate setting out his or her formal qualifications together with a completed questionnaire provided by the JSC; and (iv) such further pertinent information concerning the candidate which he or she or the nominating person wishes to provide.

⁵³ Ibid s 2(d) in respect of Constitutional Court judges and s 3(d) in respect of all other judges.

⁵⁴ Ibid s 2(e) in respect of Constitutional Court judges and s 3(e) in respect of all other judges.

⁵⁵ Ibid s 2(f) in respect of Constitutional Court judges and s 3(f) in respect of all other judges.

⁵⁶ Ibid s 2(g) in respect of Constitutional Court judges and s 3(g) in respect of all other judges.

⁵⁷ Ibid s 2(h) and (i) in respect of Constitutional Court judges and s 3(h) and (i) in respect of all other judges.

⁵⁸ Ibid s 2(j) in respect of Constitutional Court judges and s 3(j) in respect of all other judges.

⁵⁹ Ibid s 2(m) in respect of Constitutional Court judges and s 3(k) in respect of all other judges.

respect of Constitutional Court judges, provides reasons for each recommendation).⁶⁰

Whilst seemingly transparent and innocuous enough on paper, each stage of this process has the potential to generate a great deal of controversy, and in fact in recent years has done so. For the purposes of discussion, we have divided the process into two stages: (i) the pre-interview / shortlisting stage and (ii) the interview and deliberative stage.

3.2 **Pre-interview / shortlisting stage**

In the latest Annual Report filed by the JSC, there is no reference to a “screening committee” of eight members as set out in the JSC Process Regulations.⁶¹ There is, however, reference to a seven-person “Sifting Committee” which is “responsible for compiling a shortlist of candidates to be interviewed by the Commission”.⁶² However minor, inconsistencies of this kind – between professed practice in the JSC Process Regulations⁶³ and actual practice referred to in a Report – have the potential to affect public confidence in the JSC.

This Sifting Committee holds a significant degree of control over who the JSC ultimately interviews.⁶⁴ There is at least one instance in which an eminently suitable candidate who had applied for a vacancy in the SCA after acting in that court was not shortlisted for an interview. It is difficult to explain the failure to shortlist him, even for the interview stage, on grounds other than the Sifting Committee’s misapplication of the section 174(2) mandate. This is an issue discussed in greater detail below, in the context of the JSC’s ultimate appointment processes. We have not, however, been able to find any instance of a disgruntled applicant or nominee who has been

⁶⁰ Ibid s 2(n) in respect of Constitutional Court judges and s 3(l) in respect of all other judges.

⁶¹ JSC Process Regulations above n 48 s 1.

⁶² JSC Annual Report 2020-2021 available at <https://www.judiciary.org.za/index.php/judicial-service-commission/jsc-annual-reports> (accessed July 2022) at 9.

⁶³ JSC Process Regulations above n 48.

⁶⁴ Voting by majority after receiving submissions from the broader JSC (JSC Process Regulations above n 48 s 1).

refused an interview at this preliminary stage and challenged this decision. While the Sifting Committee may simply be the most practical way of dispensing with nominations where there is no chance of appointment – i.e. self-made nominations by those who do not possess the necessary basic qualifications – it is a powerful body within the JSC and one whose precise mandate and make-up are unclear.

Given this scope of influence, one might expect the Sifting Committee to be a microcosm reflective of the broader JSC constituency. However, the latest Annual Report records the membership of this committee as follows:⁶⁵

- i. Justice MM Maya – as convenor (President of the SCA);
- ii. Adv TG Madonsela SC (Presidential nominee in terms of s 178(1)(j));
- iii. Ms H Matolo-Dlepu (Presidential nominee in terms of s 178(1)(j));
- iv. Ms D Tshepe (Presidential nominee in terms of s 178(1)(j));
- v. Mr L Sigogo (representative of the attorneys' profession in terms of s 178(1)(f));
- vi. Mr A J Nyambi (NCOP delegate in terms of s 178(1)(i)); and
- vii. Prof N Ntlama (teacher of law in terms of s 178(1)(g)).

Of this group of seven, three are nominees designated by the President. Is it overly cynical to say that by stacking this initial screening body with presidential nominees, the resulting interviews (and possibly appointments) are no different from what they would be if South Africa had a smaller executive-dominated group nominating judges (as is often found in other Commonwealth countries) rather than its large JSC? Given the lack of clarity on how the Sifting Committee is constituted, the criteria it uses to select a candidate for interview⁶⁶ and whether there are mechanisms within the JSC to override its decisions or to permit a dissatisfied nominee to challenge exclusion, the concern certainly deserves explanation and justification.

⁶⁵ JSC Annual Report 2020-2021 above n 62 at 9. Four of these commissioners are no longer members of the JSC, and one would imagine that Justice Maya will also no longer sit on the committee now that she has been appointed DCJ. Adv Madonsela was removed by the President following the 2022 Chief Justice interviews, Ms Tshepe was appointed chair of the Competition Tribunal, Mr Sigogo passed away and Prof Ntlama has been appointed to the Electoral Court.

⁶⁶ This is related to the lack of clarity regarding clear guidelines for selection of judges, an issue which is discussed further below in this part .

It seems, however, that the concern that the Sifting Committee might take an overly restrictive approach is, at least for the time being, largely theoretical. This is because, in practice, if any criticism may be levelled against this initial screening mechanism in recent years, it is that it has not been strict enough. This has resulted in a sometimes weak interview pool.⁶⁷ Fritz has suggested that the weak candidates who make it to the level of JSC interviews “[come] at the cost of integrity and the respect in which we hold the profession. There is a big point to be made about the importance of screening candidates so that those who are invited to be interviewed actually know that they stand a real chance of being appointed, not being set up for embarrassment.”⁶⁸

While this initial pre-interview stage has not garnered the same level of media attention or created the volume of litigation as the interview stage, there remains potential for it to do so. This could be avoided if the JSC were to ensure transparency regarding both how this initial screening body is selected so as to ensure that it represents the broader JSC membership, and the criteria on which it bases its assessment as to whether a candidate has a “reasonable prospect of selection for appointment”.⁶⁹ The latter issue is one that has been at the forefront of debate regarding the interview stage of the appointment process, to which we now turn.

3.3 Interview⁷⁰ and deliberative stage

The decision by the JSC to hold open interviews for prospective candidates is one that was rightly lauded. It promotes transparency in the selection of judges and acts as an accountability mechanism for the JSC since the public can assess whether it is

⁶⁷ Ho (2021(a)) “Lack of criteria for Bench appointments a ‘fundamental failure’ in Judicial Service Commission interview process.” *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/> (accessed July 2022).

⁶⁸ *Ibid.*

⁶⁹ JSC Process Regulations above n 48 s 2(e) and 3(e).

⁷⁰ Annexure B sets out certain details about proceedings each time the JSC has sat for interviews of candidates for appointment in the period under review and includes information regarding who was interviewed and who was ultimately nominated.

performing its constitutionally mandated task appropriately.⁷¹ It is, however, widely agreed amongst academic commentators and media observers that the interview process has, at least at times in recent years, degenerated into a media circus.⁷²

In summarising the varied descriptions given to the JSC's public interviews, Gravett⁷³ writes the following:

Commentators and observers have uncharitably described the JSC's public interviews as a "charade", "fascinating ... on some kind of Schadenfreude reality-TV level", "beset by acrimony and controversy", a "sham", and a "tragicomic farce". The JSC interviews of some judicial candidates have been characterised as "intrusive and occasionally aggressive", a "grilling", "prolonged and gruelling", "highly embarrassing to watch", an "interrogat[ion]", a "castiga[tion]", "a barrage of angry questions", "a rough ride", "brutal", "harassment", "harsh and hostile", "tortuous" and "cringe-worthy", being "dragged through the mud", and "not to elicit an answer, but to humiliate and to hector". By contrast, other candidates' interviews are "perfunctory ... lasting only a few minutes", "brief, cordial and rather affable", "jolly", "rather anodyne and unchallenging", "superficial", "short and bland", "convivial exchange[s]", "pleasant affairs", with some JSC commissioners aligned with the ruling party "serv[ing] up some gentle patsy questions" to favoured candidates. (Footnotes omitted; ellipses in original)

It is little wonder then that during the period under review at least 26 nominated candidates withdrew before their interviews⁷⁴ and some even after the interview process had commenced.⁷⁵ Whilst any number of reasons may motivate

⁷¹ Ibid.

⁷² See, for example, Gravett (2017) "Towards an algorithmic model of judicial appointment: the necessity for radical revision of the Judicial Service Commission's interview procedures" *THRHR* (80) 267-286 at 270; Tilley and Ndlebe 2021 above n 38.

⁷³ Gravett above n 72 at 271.

⁷⁴ A recent example of this is Judge Dhaya Pillay's refusal to make herself available for the October 2021 interview session for a vacancy on the Constitutional Court, after the outright hostility she had encountered in her interview for the same vacancy in the April 2021 round of interviews. This is discussed further below in part 3.3.

The conduct of the JSC during this particularly problematic round of interviews – April 2021 – was challenged by the CASAC and an out-of-court settlement reached in terms of which the recommended shortlist of candidates for appointment to the Constitutional Court submitted by the JSC to the President after the April interviews was set aside and fresh interviews for the vacancies were conducted in October 2021.

All other examples are marked "withdrew" in the attached Annexure B.

⁷⁵ See, for example, Magistrate Lamminga claiming that the interview process was conducted unfairly in Shange (2021) "Judge candidate withdraws from JSC interviews, labelling them unfair." *Sowetan Live* available at <https://www.sowetanlive.co.za/news/south-africa/2021-10-08-judge-candidate-withdraws-from-jsc-interviews-labelling-them-unfair/> (accessed July 2022).

withdrawals, certainly some of these were triggered by candidates' reluctance to subject themselves to the unpredictability and at times outright hostility of the JSC interview process.⁷⁶ Bearing in mind the number of candidates who have chosen to withdraw at a late stage, it seems clear that the number of those deterred earlier on who therefore do not make themselves available for consideration must be even greater. The detrimental effect that this has on the pool of candidates for appointment is evident.⁷⁷

A corollary of this issue is the struggle the JSC has had to shortlist sufficient candidates for the Constitutional Court during the period covered by the report. Following at least three sittings (for the eventual interviews that took place in 2012 and 2016, and for the recent October 2022 sitting) the JSC had to re-advertise a Constitutional Court vacancy because there were not enough candidates to meet the minimum requirement of section 174(4)(a). In addition, there are several instances where interviews have taken place in which the JSC has been compelled by this constitutional requirement to submit four or five names to the President but has been able to interview only a bare minimum of four or five candidates.⁷⁸ The dangers of this approach were highlighted by the withdrawal of Justice Bosielo in October 2016 and by the JSC recommending candidates for only one of the two vacancies advertised in April 2022.

The same point flows from the dearth of candidates for the country's highest court as from the number of withdrawals across all the courts. Neither is reflective of a functional and trusted appointment system.

The interviews conducted throughout the period under review have attracted considerable attention and led to several rounds of litigation against the JSC, the resignation of a member of the JSC, and a general loss of confidence in the JSC's ability to perform its mandate. Before going on to discuss the criticisms levelled at

⁷⁶ Oxtoby (2021) above n 28 at 41.

⁷⁷ See also Justice Kriegler's lecture at the University of the Witwatersrand Law Faculty delivered on 18 August 2009 accessible at <https://constitutionallyspeaking.co.za/can-judicial-independence-survive-transformation-a-public-lecture-delivered-by-judge-johann-kriegler-at-the-wits-school-of-law/> (accessed July 2022).

⁷⁸ See annexure B.

the JSC in greater detail, together with proposals for addressing these, we set out below in chronological order some of the more notable moments of the JSC's recent appointments history.

For many commentators, 2009 was a watershed moment in the history of the JSC.⁷⁹ After the country's general elections in April 2009, the newly elected President Zuma appointed a new Minister of Justice, Mr Jeff Radebe.

The JSC interviews were due to take place on 8 June 2009 but Minister Radebe requested a last-minute postponement, despite several candidates already having arrived in Cape Town for their interviews.⁸⁰ The JSC then decided "by a majority" to postpone all the interviews, citing the need to consider "the enhancement of the independence of the judiciary and the vital question of the transformation of the judiciary in terms of the constitution with regard to race and gender representivity in order to facilitate meaningful input into the appointment process" as well as the need to familiarise the new JSC members drawn from the newly elected Parliament with the body's procedures.⁸¹

Once the JSC reconvened for the interviews the following month, President Zuma had, without notice to them, hastily replaced the long-serving presidential nominees on the JSC (Adv Bizos SC,⁸² Adv Moroka SC,⁸³ Adv Nthai SC⁸⁴ and Mr Ernstzen⁸⁵) with four new appointees: Adv Ntsebeza SC, Adv Semanya SC, Adv Soni SC and

⁷⁹ Olivier and Hoexter (2014) above n 34 at 176 et seq. They discuss this series of events and the surrounding media and academic criticism thereof at 171.

⁸⁰ Ibid.

⁸¹ SAPA (2009) "JSC puts judges interviews on hold." *Polity* available at <https://www.polity.org.za/print-version/jsc-puts-judges-interviews-on-hold-2009-06-09> (accessed July 2022).

⁸² Adv Bizos SC had served on the JSC for 15 years (See Judges Matter (updated in 2017) available at <https://www.judgesmatter.co.za/opinions/zuma-removes-jsc-members/> (accessed July 2022).)

⁸³ Adv Moroka SC had served on the JSC for 15 years (ibid).

⁸⁴ Adv Nthai had served on the JSC for four years (ibid).

⁸⁵ The earliest available Annual Report indicates that Mr Ernstzen had served on the JSC since at least 2004 (JSC Annual Report, 2004 available at https://www.justice.gov.za/reportfiles/other/JudicialSC_ANR_2004.pdf (accessed July 2022)), although anecdotally we understand him to have served since the JSC's inception.

Ms Ndoni.⁸⁶ The ANC had also used its majority position in the NCOP to replace the opposition delegate on the JSC.⁸⁷

The interviews held in 2009 after this reconfiguration of the JSC were “markedly inconsistent”. Olivier and Hoexter say the following of the September round of interviews for vacancies on the Constitutional Court:

Certain candidates were asked ‘more intrusive and occasionally aggressive’ questions on the subject of transformation, while others, including Judge President Mogoeng of the North West High Court, were asked rather anodyne and unchallenging questions that failed to probe their suitability for appointment to the Constitutional Court. Since then, tough questions on transformation have continued to be put sometimes in a confrontational and irascible manner.⁸⁸ (Footnotes omitted).

The post-interview deliberations did further damage to the credibility of the process when the JSC took only 30 to 40 minutes to produce a shortlist of seven candidates to be handed to President Zuma after having interviewed 20 candidates.⁸⁹

In April 2011, the JSC interviewed seven candidates⁹⁰ for three vacancies on the Western Cape High Court (WCHC) – a black man, a white woman and five white men. After the interviews, the JSC recommended only one candidate – Mr Henney, the black male candidate – for appointment with the result that the other two positions remained vacant.⁹¹

The Cape Bar Council, aggrieved by the decision not to fill the two vacancies, brought an application for an order declaring the proceedings of the JSC to be inconsistent with the Constitution, unlawful and invalid; declaring the failure by the JSC to fill two judicial vacancies on the WCHC Bench to be unconstitutional and

⁸⁶ Olivier and Hoexter above n 34 at 171 where they discuss the fallout after this and the questions raised about the packing of the JSC with ANC supporters.

⁸⁷ Ibid

⁸⁸ Ibid at 176.

⁸⁹ Davis (2010) “Judicial Appointments in South Africa.” *Advocate* December 2010 pp 40-43 at 42.

⁹⁰ Adv Brusser SC, Ms Cloete, Adv Fitzgerald SC, Mr Henney, Mr Koen, Adv Olivier SC and Adv Rogers SC.

⁹¹ *JSC v Cape Bar Council* [2012] ZASCA 115.

unlawful; and directing the JSC, properly constituted, to reconsider the applications of the shortlisted candidates who were not selected (and who persisted in their applications) in the light of the court's judgment.

The WCHC found in favour of the Cape Bar Council on both grounds of its application: (i) that because neither the Judge President nor the Deputy Judge President of the WCHC attended the April 2011 meeting of the JSC, it was not properly constituted and the decisions taken at that meeting were unconstitutional, unlawful and invalid; and (ii) that in all the circumstances, the JSC had no reason not to recommend candidates for the two remaining vacancies which rendered its failure to do so irrational and unconstitutional.⁹² The SCA ultimately agreed with the WCHC decision, dismissing the appeal.⁹³

Later, in August 2011, President Zuma nominated Justice Mogoeng Mogoeng for the position of Chief Justice. After receiving submissions from various bodies, the JSC interviewed Justice Mogoeng in September 2011 in order to gauge his suitability as Chief Justice, and he was ultimately appointed on 8 September 2011.

This was a hugely controversial appointment and the JSC's interview process was, again, thrust into the spotlight. Many interested civil society groups⁹⁴ had raised serious concerns regarding Chief Justice Mogoeng's suitability for the role and argued that the JSC did not put these to the candidate in an appropriate way, claiming that "several commissioners behaved as if they were Justice Mogoeng's defence counsel, not independent guardians of the Constitution and the independence of the judiciary".⁹⁵ The opposition party the Democratic Alliance also claimed that the JSC had effectively "become an extension of the African National

⁹² Ibid.

⁹³ Ibid.

⁹⁴ See, for example, Section 27 (2011) "JSC interview raises concerns about judicial appointment process." Section 27 website available at <https://section27.org.za/2011/09/jsc-interview-raises-concerns-about-judicial-appointment-process/> (accessed July 2022).

⁹⁵ Ibid.

Congress, giving a cloak of respectability to political predetermination⁹⁶ and had rubber-stamped the President's single nominee.⁹⁷

In the April 2012 interview round, Deputy Judge President Mojapelo's interview for the position of Judge President of the North and South Gauteng High Courts attracted criticism.⁹⁸ The interview was a lengthy two hours and 25 minutes and the DJP was repeatedly questioned about a media article he had written discussing the JSC's failure to follow its own procedure in respect of the appointment of Chief Justice Ngcobo in 2009.⁹⁹ The heated questioning led a media commentator to conclude the political representatives on the JSC were using the opportunity to "grill" the more outspoken judges.¹⁰⁰

In June 2012 the JSC held interviews for vacancies on the Constitutional Court, with similar accusations being levelled against it regarding the unevenness of its approach.¹⁰¹ A commentator observed that Judge Zondo's interview was "pleasant enough" and lasted only about 40 minutes.¹⁰² However, he also noted that Judge Nugent of the SCA received a "relentless grilling", being repeatedly questioned over remarks that he had withdrawn his candidacy for the Constitutional Court in 2009 because he did not trust the JSC to fulfil its constitutional mandate – this being shortly after the JSC's gross mishandling of the Hlophe disciplinary matter.¹⁰³ Judge Nugent stayed the course, maintaining the reasons for his loss of faith in the JSC in

⁹⁶ See Olivier and Hoexter above n 34 at 171.

⁹⁷ Zille (2011) DA: Statement by Helen Zille, Democratic Alliance leader, on the suitability of Judge Mogoeng for the position of Chief Justice. *Polity* available at polity.org.za/article/da-statement-by-helen-zille-democratic-alliance-leader-on-the-suitability-of-judge-mogoeng-for-the-position-of-chief-justice-05092011-2011-09-05 (accessed July 2022).

⁹⁸ Tolsi (2012(a)) "Politicians grill outspoken Judges." *Mail & Guardian* available at <https://mg.co.za/article/2012-04-20-politicians-grill-outspoken-judges/> (accessed July 2022).

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Tolsi (2012(b)) "Hard punches and soft-peddling by the JSC in Con Court interviews." *Mail & Guardian* available at <https://mg.co.za/article/2012-06-09-hard-punches-and-soft-peddling-by-the-jsc-in-con-court-interviews/> (accessed July 2012).

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

the earlier period, and after several commissioners had tried to interrogate him further on this, Chief Justice Mogoeng shut down this line of questioning.

In October 2012 the JSC interviewed eight candidates for vacancies on the WCHC. It later made certain recommendations for appointment. The recently retired Deputy President of the SCA, Louis Harms, demanded reasons for the recommendation of one candidate, then Acting Judge Dolamo, over another, Adv Gauntlett SC.¹⁰⁴ Dissatisfied with the reasons provided, the Helen Suzman Foundation (HSF) launched review proceedings in the High Court, impugning the recommendation on the grounds of unlawfulness and irrationality. In terms of the rules of court,¹⁰⁵ the JSC was required to file the record of the proceedings sought to be corrected or set aside together with such reasons as it is by law required to give. The JSC filed a record consisting of: (a) the reasons for the decision by the JSC, which had been distilled by the Chief Justice after the deliberations; (b) the transcripts of the JSC interviews; (c) each candidate's application for appointment; (d) comments on each candidate by various professional bodies and individuals; and (e) related research submissions and correspondence.¹⁰⁶ The HSF subsequently discovered that the deliberations themselves were recorded and requested access to the transcripts, which the JSC declined, claiming that the post-interview deliberations "are done in a closed session for reasons of confidentiality".¹⁰⁷ The JSC successfully defended this refusal in both the High Court¹⁰⁸ and the SCA.¹⁰⁹

The litigation on this preliminary issue eventually ended six years later with a decision of the Constitutional Court ordering the JSC to deliver the full recording of the "private deliberations", including the audio recording and any transcript thereof.¹¹⁰

¹⁰⁴ *Helen Suzman Foundation v Judicial Service Commission* above n 12. See Justice Jafta's synopsis at para 88.

¹⁰⁵ Rule 53(1)(b) of the Uniform Rules of Court.

¹⁰⁶ *Helen Suzman Foundation v Judicial Service Commission* above n 12 at para 3.

¹⁰⁷ *Ibid* at para 4.

¹⁰⁸ *Helen Suzman Foundation v Judicial Service Commission* [2014] ZAWCHC 136.

¹⁰⁹ *Helen Suzman Foundation v Judicial Service Commission* [2016] ZASCA 161.

¹¹⁰ *Helen Suzman Foundation v Judicial Service Commission* above n 12 at para 83.

At the time of writing, the latest Annual Report of the JSC confirms that the HSF has indicated that it intends to proceed with its substantive review application, although it has not taken any further steps to do so.¹¹¹ It is problematic that almost ten years after a recommendation was made by the JSC, a review of this decision is yet to be finalised.

Shortly before the commencement of the April 2013 JSC interviews, Adv Izak Smuts SC (the representative of the General Council of the Bar, who had served on the JSC since September 2009) prepared and handed to the JSC a document entitled “Transformation and the Judicial Service Commission”.¹¹² Smuts subsequently resigned, after preparing a detailed explanation of his reasons,¹¹³ and this fallout, together with his scathing criticism of the JSC’s conduct, was well-documented in the media.¹¹⁴ In a later interview at the University of Cape Town (UCT)¹¹⁵ Smuts confirmed that the JSC’s failure during his period as a commissioner to appoint candidates whom he had described in his resignation statement as of “intellectual forensic excellence, steeped in the values of the Constitution”¹¹⁶ was indicative of a deeper underlying reluctance to appoint or promote independent-minded intellectuals to the bench.¹¹⁷ This was an issue, he said, far more nuanced than simply the failure to appoint white male candidates.¹¹⁸

¹¹¹ JSC Annual Report 2020-2021 above n 7 at 23.

¹¹² Staff Reporter (2013(a)) “Izak Smuts right to quit JSC.” *IOL* available at <https://www.iol.co.za/news/izak-smuts-right-to-quit-jsc-1500299> (accessed July 2022).

¹¹³ Smuts (2013) “Why I am resigning from the JSC.” *Politicsweb* available at <https://www.politicsweb.co.za/politics/why-im-resigning-from-the-jsc--izak-smuts> (accessed July 2022).

¹¹⁴ See, for example: Tolsi (2013(a)) “JSC’s Izak Smuts quits after transformation row.” *Mail & Guardian* available at <https://mg.co.za/article/2013-04-12-izak-smuts-resigns-after-transformation-row/> (accessed July 2022); Staff Reporter (2013(b)) “Smuts resigns, attacks JSC.” *IOL* available at <https://www.iol.co.za/news/politics/smuts-resigns-attacks-jsc-1499587> (accessed July 2022).

¹¹⁵ Interview with Izak Smuts SC regarding his resignation from the JSC (2013). *Con’Texts - A Blog for the Constitutional Law students at UCT Law Faculty* available at <https://contextsblog.wordpress.com/2013/04/20/interview-with-izak-smuts-sc-regarding-his-resignation-from-the-jsc/> (accessed July 2022).

¹¹⁶ Smuts refers to the following by name: “Cachalia, Budlender, van der Linde, Paterson, Gauntlett and most recently Plasket” in both his published resignation letter (above n 113) as well as his later interview with students at UCT (above n 115).

¹¹⁷ Interview with Izak Smuts SC regarding his resignation from the JSC (2013) above n 115.

¹¹⁸ *Ibid.*

This furore over the JSC's policy (or lack thereof) regarding transformation played out in the background of the April 2013 interviews and it would seem, as observed by most commentators, that Judge Plasket bore the brunt of this dis-ease within the JSC.¹¹⁹ Judge Plasket, a white male, was one of three interviewees for two vacancies on the Supreme Court of Appeal.¹²⁰ He was interviewed together with Judge Willis, a white male, and Judge Salduter, a black female.

Judge Plasket's interview has been characterised by many as openly hostile.¹²¹ It descended into a long and heated discussion about race, gender and merit in the context of transformation.¹²² In the course of this discussion Judge Plasket suggested that merit could in some cases trump race and gender.¹²³ Despite his obvious strengths as a judge and his excellent record, he was not recommended for appointment to the SCA.¹²⁴ By comparison, Judge Willis had a "congenial interview" and was ultimately recommended for appointment¹²⁵ with some media commentators inferring that, given the commonality of the interviewees' race and gender, the difference in the interview approaches was due to Judge Willis being seen as more "executive-minded".¹²⁶

In October 2014 the JSC attracted criticism for the way in which it handled an interview for the transfer of a judge to a different court.¹²⁷ Judge Mjoli sought a transfer from the Mthatha seat of the Eastern Cape Division to the Bhisho seat for

¹¹⁹ Oxtoby (2021) above n 29 at 41; Tolsi (2013(b)) "JSC Conflict laid bare by inconsistency." *Mail & Guardian* available at <https://mg.co.za/article/2013-04-12-jsc-conflict-laid-bare-by-inconsistency/> (accessed July 2022).

¹²⁰ Ibid.

¹²¹ Oxtoby (2021) above n 29 at 41.

¹²² Olivier and Hoexter above n 34 at 177.

¹²³ Ibid.

¹²⁴ Ibid. Judge Plasket was, however, ultimately recommended for appointment to the SCA after a further interview six years later, in April 2019.

¹²⁵ Oxtoby (2021) above n 29 at 41.

¹²⁶ Tolsi (2013(b)) above n 119.

¹²⁷ Hindle (2014) "The new JSC in a man's world." *The Con Mag* available at <http://www.theconmag.co.za/2014/11/10/the-new-jsc-and-the-patriarchy/> (accessed July 2022); Judges Matter (2021) "Transfers between courts: the unspoken shaming of women." *Judges Matter website* available at <https://www.judgesmatter.co.za/opinions/transfers-between-courts/> (accessed July 2022).

personal reasons related to her family¹²⁸ – specifically because her husband had been arrested (on charges of rape) at their family home in front of her children, who were traumatised; that, as a result, her three children¹²⁹ no longer had after-school supervision; and that her nine-year old child wished to attend a school in East London.¹³⁰ Judge Mjali was subject to an emotionally charged interview in which she was reduced to tears, fielding an array of inappropriate comments and questions, including: that because the requested move was from a rural to an urban court, it required greater justification; that raising her child’s schooling needs was inappropriate; that she should have sent her children to boarding school; and even a comment by Commissioner Thandi Modise that her child was a “spoilt brat” for insisting on a particular school.¹³¹ The JSC showed scant sympathy and ultimately denied the request. In so doing, they left an existing vacancy at the Bhisho court unfilled.¹³² This decision seems entirely irrational in the circumstances and in contrast to previous decisions by the JSC to allow for a transfer for personal reasons.¹³³ The refusal to transfer Judge Mjali can be contrasted with the willingness to transfer Judge Pakati from the Northern Cape to the Eastern Cape High Court in October 2019. It does appear that Judge Mjali’s circumstances were more deserving of a transfer (and, unlike Judge Pakati, she was not even requesting a transfer to another province). This type of inconsistency is a major problem with the JSC’s process.

In 2015, the JSC’s interviews for vacancies on the Constitutional Court followed shortly after Sudanese President al-Bashir, in contravention of an order of the High Court, was allowed to leave the country without being arrested.¹³⁴ The interviews were held one day after the leadership of the judiciary had called a media conference to address criticism levelled by politicians following on an arrest order

¹²⁸ Ibid.

¹²⁹ Ibid – including one with special needs that required consideration.

¹³⁰ Ibid.

¹³¹ Hindle (2014) above n 127 does indicate that this comment was, however, made before Judge Mjali disclosed further details regarding her husband’s arrest and the child’s subsequent trauma.

¹³² Judges Matter (2021) above n 127.

¹³³ Ibid.

¹³⁴ In what was later found to be a breach of South Africa’s international law obligations.

granted by the High Court.¹³⁵ This discomfort between the branches of government played itself out during the candidates' interviews and completely overtook the process. Justice Minister Masutha asked each candidate whether judges could be "dangerously wrong" and in reply Chief Justice Mogoeng asked whether, even if "certain members of society" believed decisions to be wrong, they were entitled to breach court orders.¹³⁶

In light of the COVID-19 pandemic and the national lockdown, the JSC held no interviews in 2020. However, when interviews resumed in April 2021, those for the vacancies on the Constitutional Court were sensationally politicised, enough to warrant yet another application to declare the JSC's conduct unlawful, this time by CASAC.¹³⁷ The hostile attitude evinced by Commissioner Julius Malema and Chief Justice Mogoeng towards Judge Dhaya Pillay in particular prompted the review application.¹³⁸

CASAC argued, rightly, that JSC interviews are not a platform for party politics; are not a space for the JSC to investigate and evaluate complaints against judges; are not an opportunity for commissioners to question judgments in which they lost as litigants; and are not an opportunity to air individual grudges against candidates.¹³⁹

The JSC ultimately entered into a settlement agreement with CASAC which was made an order of court. The April 2021 shortlist that had been submitted to the President was set aside and fresh interviews were conducted in October 2021, this time under the chairmanship of then Acting Chief Justice Zondo.¹⁴⁰ While these

¹³⁵ Rabkin (2015) "Top court interviews show up recent strains." *Business Day* available at <http://businessday.newspaperdirect.com> (accessed July 2022).

¹³⁶ Ibid.

¹³⁷ Ho (2021(b)) "Judicial Service Commission reaffirms April's ConCourt candidates shortlist after October reinterview process." *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2021-10-05-judicial-service-commission-reaffirms-aprils-concourt-candidates-shortlist-after-october-reinterview-process/> (accessed July 2022).

¹³⁸ Ibid. Videos of the April 2021 interviews can be watched on the Judges Matter youtube channel: <https://www.youtube.com/watch?v=VldOyFdVVuM&list=PLMNU7JUitFJw2ary6bZtZntCjE0rsDJ4->

¹³⁹ Tilley and Ndlebe (2021) above n 38 at 466.

¹⁴⁰ Ibid. Lawson Naidoo of CASAC is quoted in Ho (2021(b)) above n 137 as saying, "We are greatly encouraged by the different manner in which the interviews got started today. It seemed that Judge Zondo had much more control in terms of the questions and the time allocated to each candidate."

interviews were less hostile, if for no reason other than that the JSC knew it was under extra scrutiny, they ultimately yielded the same shortlist.¹⁴¹ Notably, after her entirely inappropriate interview in April, Judge Pillay withdrew her nomination and did not make herself available for re-interview.¹⁴² It is worth noting that Judge Unterhalter was again excluded from the list sent to the President, as in April – pertinent in light of what was to follow in April 2022.

In February 2022 the JSC held interviews for the Chief Justice position. It interviewed four candidates: Justice Madlanga; Justice Maya; Judge President Mlambo; and Deputy Chief Justice Zondo. These interviews were the subject of controversy for a variety of reasons and have escalated the calls to bring about changes to the JSC. One is prompted to ask whether interviews are an appropriate means of achieving the “consultation” necessary as part of the constitutional mandate in this process.

First was the questionable conduct of the commissioners as between themselves culminating in a particularly heated exchange between Minister Ronald Lamola and Julius Malema.¹⁴³

The second is that the interviews were, again, noticeably uneven between candidates, with some observers commenting that while the interviews commenced cordially with Justice Madlanga and Justice Maya, they degenerated with Judge President Mlambo and Justice Zondo.¹⁴⁴ This was anticipated to some extent in

¹⁴¹ Ferreira (2021) “JSC interviews for ConCourt, round two: better process, same outcome.” *Mail & Guardian* available at <https://mg.co.za/news/2021-10-05-jsc-interviews-for-concourt-round-two-better-process-same-outcome/> (accessed July 2022).

¹⁴² Ho (2021(b)) above n 137. This, as Nicole Fritz has pointed out, did damage to the gender split of the candidates interviewed “We have been less good in terms of changing the gender composition of our Bench to really reflect South African society at large. And with Judge Pillay understandably not making herself available to be reinterviewed, we went from three of eight possible candidates being women to two of seven.”

¹⁴³ Gerber (2022) “EFF continues campaign against Judge Dunstan Mlambo, calls for Ronald Lamola’s removal from Cabinet.” *News24* available at <https://www.news24.com/news24/southafrica/news/eff-continues-campaign-against-judge-dunstan-mlambo-calls-for-ronald-lamolass-removal-from-cabinet-20220205> (accessed July 2022).

¹⁴⁴ See Mafora (2022) “A requiem for the Judicial Service Commission.” *New Frame* available at <https://www.newframe.com/a-requiem-for-the-judicial-service-commission/> (accessed July 2022); “It is

consequence of Justice Zondo being a divisive contender following on from the “State Capture Inquiry”.¹⁴⁵ That it materialised, however, is evidence of parliamentary appointees and some other members of the JSC using the forum for party-political ends rather than for its express purpose of appointing candidates best suited for specific vacancies. The range and tone of the questioning continued to be problematic, including amongst other things asking Justice Maya whether South Africa was ready for a female Chief Justice¹⁴⁶ and ambushing Judge President Mlambo with rumoured allegations of sexual misconduct.¹⁴⁷

The third is more symptomatic of deeper problems within the JSC. It seems to have misunderstood its mandate in respect of the Chief Justice vacancy. While it was preferable to interview several candidates for the position,¹⁴⁸ the JSC’s role remained a consultative one.¹⁴⁹ It was not called on, nor was it appropriate, to recommend a single candidate, a step it announced with almost indecent haste, and apparently even before a formal recommendation had been sent to the President.¹⁵⁰ The JSC recommended Justice Maya for the position, but Justice Zondo was ultimately appointed, with a view to Justice Maya being nominated for the Deputy Chief Justice position that would become vacant upon Justice Zondo’s promotion.¹⁵¹

no coincidence that Mlambo and deputy chief justice Raymond Zondo were treated in less than dignifying ways for reasons that render them politically unpalatable to some sections of the JSC.”

¹⁴⁵ The Judicial Commission of Inquiry into Allegations of State Capture report, published in several parts and available at <https://www.statecapture.org.za/site/information/reports> (accessed July 2022).

¹⁴⁶ See a discussion of this interaction by Mabuza (2022) “SA has always been ready for a female Chief Justice.” *Times Live* available at <https://www.timeslive.co.za/news/south-africa/2022-02-02-sa-has-always-been-ready-for-a-female-chief-justice-says-judge-maya/> (accessed July 2022).

¹⁴⁷ Chabalala (2022) Chief Justice interviews: 'I have never sexually harassed anyone' - Judge President Dunstan Mlambo. *News 24* available at <https://www.news24.com/news24/southafrica/news/chief-justice-interviews-i-have-never-sexually-harassed-anyone-judge-president-dunstan-mlambo-20220203> (accessed July 2022); Besent (2022) “Chief Justice nominee Dunstan Mlambo denies allegations of sexual harassment.” *SABC News* available at <https://www.sabcnews.com/sabcnews/chief-justice-nominee-dunstan-mlambo-denies-allegations-of-sexual-harassment/> (accessed July 2022); Venter (2022) “Dunstan Mlambo grilled by Judicial Service Commission over sexual harassment claims.” *IOL* available at <https://www.iol.co.za/pretoria-news/news/dunstan-mlambo-grilled-by-judicial-service-commission-over-sexual-harassment-claims-5b91b3c5-2dc1-429d-9d38-36ae8879aa11> (accessed July 2022).

¹⁴⁸ Unlike the single-person interview for Chief Justice Mogoeng Mogoeng.

¹⁴⁹ Constitution, s 174(3).

¹⁵⁰ Mafora (2022) above n 144.

¹⁵¹ The Presidency (2022) President Cyril Ramaphosa appoints Justice Raymond Zondo as Chief Justice. *Press Statement* available at

The crucial point is that holding public interviews for judicial office, in a fraught political environment, heightens the need for proceedings to be governed by a clear process, for clear and transparent criteria to be followed, and for the interviews to be firmly, fairly, and effectively chaired.

In the routine April 2022 interviews, Judge Unterhalter was ambushed with a question regarding his participation during an acting stint at the Constitutional Court in the dismissal of an application for leave to appeal which he had earlier dismissed in the SCA.¹⁵² Chief Justice Zondo informed the Commission that Judge Unterhalter had not been told that this issue would be raised because the JSC had been informed of it too late. This did not, however, bring an end to the line of questioning and Judge Unterhalter was ultimately put on the spot and given a laptop and 30 minutes to prepare a response. He later acknowledged that he should have recused himself from consideration of the petition to the Constitutional Court.¹⁵³ Judge Unterhalter was ultimately left off the shortlist given to the President, notwithstanding his obvious fitness for the office in which he was serving at the time in an acting capacity.

An issue that merits special attention is how the JSC handles adverse comments about candidates during interviews. There are three aspects of this issue: the extent to which candidates are forewarned about adverse comments about their candidacy; the way the JSC deals with these comments during an interview; and the phenomenon of adverse comment coming from a candidate's own head of court.

The JSC's practice in this respect has been unclear and inconsistent. There is apparently a practice that candidates are to be forewarned of adverse comments, but this is not consistently applied. Judge Unterhalter was required to respond to an

<https://www.gov.za/speeches/president-ramaphosa-appoints-justice-zondo-chief-justice-11-mar-2022-0000> (accessed July 2022).

¹⁵² See a discussion of this by Mafolo (2022) "ConCourt candidate David Unterhalter faces unexpected grilling at JSC interviews." *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2022-04-06-concourt-candidate-david-unterhalter-faces-unexpected-grilling-at-jsc-interviews/> (accessed July 2022).

¹⁵³ Ibid.

adverse comment without forewarning during the April 2022 sitting and Judge President Mlambo does not appear to have been forewarned that he was to be questioned about allegations of sexual harassment during the Chief Justice interviews in February 2022.¹⁵⁴

This issue is not new. In April 2010 the Chief Justice forcefully stated the position that a candidate had to be forewarned about an adverse comment,¹⁵⁵ but at the JSC's next sitting SCA candidates were faced with questions about SCA judges commenting on alleged poor performance, despite claiming that they had not previously been aware of these criticisms.¹⁵⁶

Once an adverse comment has been introduced into an interview, the JSC has often been troubled as to how to deal with it. When sitting as a selection authority (rather than as a body dealing with conduct complaints), the JSC seems reluctant to pronounce on the veracity of a complaint but is also clearly wary of appointing candidates who may potentially be found in the future to have committed serious misconduct.

Two useful illustrations of this phenomenon are Judge Murphy's interview for a position on the Labour Appeal Court in April 2014 and the late Justice Bosielo's interview for the Constitutional Court in October 2016. Judge Murphy's interview took place while a complaint against him by Advocate Mokhari SC was still pending before the JSC, and this factor clearly seemed to weigh heavily with the JSC. Ultimately, Judge Murphy was not appointed. Justice Bosielo's interview was even more dramatic. An objection to his candidacy was put before the JSC, alleging that

¹⁵⁴ See page 119 of his interview available at <https://www.judgesmatter.co.za/wp-content/uploads/2022/04/Judicial-Service-Commission-Interviews-for-Chief-Justice-3-February-2022-Judge-President-D-Mlambo.pdf> (accessed October 2022).

¹⁵⁵ See *Business Day* (2010) as reported in *Legalbrief* available at <https://legalbrief.co.za/diary/legalbrief-today/story/zille-chief-justice-clash-at-jsc/print/> (accessed October 2022).

¹⁵⁶ See Oxtoby and Sipondo (2010) Report on the JSC Interviews in October 2010. *DGRU* available at http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/AnalysisOctober2010%20%20.pdf (accessed October 2020) pp 4-5 for a general discussion of this issue.

he had benefited unduly from a mining deal.¹⁵⁷ After multiple entreaties to withdraw his candidacy, Justice Bosielo ultimately did so, with the result that the entire round of interviews for the Constitutional Court vacancy collapsed.¹⁵⁸

One can sympathise to an extent with the JSC's position in these cases. It would clearly be undesirable to appoint individuals to the bench or to higher judicial office who then turn out to have committed serious improprieties of which the JSC had been informed when recommending them. On the other hand, there is clearly a grave danger of this concern being weaponised in order improperly to prevent candidates from being appointed. It is crucial that the JSC grapple with the question of how it is to balance these considerations.

A concern in recent years has been adverse comment coming from a candidate's own head of court, or former head of court, putting the candidate in the awkward position of having to rebut criticism from a colleague who is or has recently been a member of the JSC. Examples of this are the April 2017 interview of Judge Kgoele for DJP of the North West High Court (an interview which became so acrimonious that the Chief Justice publicly read out a tweet describing it as an "ugly spat")¹⁵⁹ and Judge Pakati's October 2017 interview for DJP of the Northern Cape High Court, when the division's recently retired Judge President Kgomo wrote to the JSC prior to the interview, setting out sharp criticisms of the candidate. A similar letter in respect of another candidate appears to have caused that candidate to withdraw.¹⁶⁰

This way of conducting interviews seems highly undesirable. It is an issue that any reform of the JSC's interview process should address.

¹⁵⁷ Rabkin (2016) "Interview process for Constitutional Court halted as candidate withdraws". *Times Live* available at <https://www.timeslive.co.za/news/south-africa/2016-10-04-interview-process-for-constitutional-court-halted-as-candidate-withdraws/> (accessed October 2022).

¹⁵⁸ Only four candidates had been shortlisted for a single vacancy. Once Justice Bosielo had withdrawn, an insufficient number of names remained to send to the President, as required by section 174(4)(a) of the Constitution.

¹⁵⁹ See the synopsis of the interview at Judges Matter available at <https://www.judgesmatter.co.za/interviews/april-2017-interviews/jsc-candidates/judge-shane-kgoele/> (accessed October 2022).

¹⁶⁰ Staff Reporter (2016) "The dark world of judicial politics." News24 available at <https://www.news24.com/News24/the-dark-world-of-judicial-politics-20171008-2> (accessed October 2022).

The most recent October 2022 interviews witnessed a fair degree of civility and proper process, which served to a limited extent to restore some of the decorum necessary in this public phase of the judicial appointments process.¹⁶¹ A wide range of judicial vacancies needed to be filled, and two observations deserve noting.

First, given the chairing of Deputy Chief Justice Maya and some further changes to the membership of the JSC, the questions posed to candidates were generally more appropriate, respectful and nuanced than had become the norm over the previous few years. Once more, however, Mr Malema was the exception to this welcome change.

Second, especially in relation to appointments to fill the five vacancies in the SCA, there was an awareness of the great need to replace some senior judges of appeal who had recently retired. It seems that this factor, together with the fact that the current composition of the SCA bench (four of the 19 justices are white) is already broadly reflective of the country's demographics, may have weighed heavily with the JSC when it made its recommendations to appoint three white and two black judges. This signifies a constructive approach to the relationship between sections 174(1) and (2), a matter canvassed at various stages of this report. It is also worth noting that two out of the three appointments to the Gauteng High Court were white men.

Yet we would maintain that the quality and legitimacy of the judicial appointments process should not vary as much as it has in recent years and should certainly not depend so much on the membership of the JSC from time to time. Rather, structural and procedural safeguards should be in place to ensure, as far as is practically possible, that the process is not subverted by irresponsible members. Our evaluation and recommendations for reform as set out below build on this foundation.

¹⁶¹ Ramsden (2022) "The good, the bad and the in-between of the JSC interviews." *Daily Maverick* available at <https://www.dailymaverick.co.za/opinionista/2022-10-25-the-good-the-bad-and-the-in-between-of-the-jsc-interviews/> (accessed October 2022).

Given this mottled history, various criticisms have been levelled against the interview process from different quarters. Certain common and interlinked elements of criticism can, however, be distilled: the clumsiness in its processes that is the result of an overlarge and eclectic body; the frequent failure on the part of the Chair to maintain fairness; the lack of clear guidelines or criteria in assessing candidates; great inconsistency in the depth and length of the questioning of candidates; the JSC's understanding and implementation of its constitutional mandate in section 174(2); and party-political interference. We now consider some of these criticisms in greater detail.

3.3.1 Guidelines/Criteria

The lack of any clear criteria or guidelines against which the JSC assesses candidates is raised repeatedly by academic¹⁶² and popular¹⁶³ commentators alike; and has even been acknowledged in the National Development Plan, 2030, where the following is recorded:¹⁶⁴

Unfortunately, there is little or no consensus in the Judicial Service Commission (JSC) or in the legal fraternity about the qualities and attributes needed for the bench. Although the Constitution stipulates general criteria for the appointment of judicial officers, it is important for the JSC to elaborate further guiding principles to build consensus on the qualities and attributes of the “ideal South African judge”.

¹⁶² See, for example: Tilley and Ndlebe (2021) above n 38; Gravett (2017) above n 72; Cowen *Judicial Selection in South Africa* (2010) Johannesburg: Paarl Media; Davis (2010) above n 89.

¹⁶³ See, for example: Nicholson (2022) “JSC must adopt a code of conduct and interview criteria before continuing its work – civil society groups.” *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2022-03-03-jsc-must-adopt-a-code-of-conduct-and-interview-criteria-before-continuing-its-work-civil-society-groups/> (accessed July 2022); Ho (2021) above n 67.

See also submissions by Judges Matter and the DGRU (2022) Submission for the JSC Sitting in April 2022. Judges Matter website available at https://www.judgesmatter.co.za/wp-content/uploads/2022/03/DGRU-Submission-JSC-April-2022_FIN_AL-copy.pdf (accessed July 2022).

There is some opposition to the idea of clearer criteria from Grootes (2022) above n 36. However, his analysis seems to misinterpret what the generally understood role of these criteria would be, with him saying that “It is entirely possible that a candidate is the best qualified on paper but is still the wrong person for the job.” Properly constructed criteria would not simply involve examining candidates’ qualifications on paper.

¹⁶⁴ National Development Plan 2030 above n 32 at 453.

A clear set of criteria is indispensable for a rational selection process. Besides that being consistent with regional and international best practice articulated in the Lilongwe Principles,¹⁶⁵ other benefits accrue to having a clearer set of criteria: it encourages open debate about the adequacy of the criteria;¹⁶⁶ it enables those who are nominating candidates, or commenting on nominations, to do so properly;¹⁶⁷ it enables prospective candidates to assess their own candidacy prospects;¹⁶⁸ it enables the media to generate informed public debate;¹⁶⁹ it enhances justifiable decision-making;¹⁷⁰ and it ensures greater accountability because there are ascertainable criteria against which appointment decisions can be measured. It is also an issue that, if addressed appropriately, would likely resolve some of the other complaints levelled against the JSC at the interview stage – for example, clearer guidelines may lead to greater consistency in interview questioning and reduce political interference or, at any rate, make it more apparent.

There are, of course, potential problems with introducing more detailed guidelines. They may be applied in a mechanical way¹⁷¹ or may lead to rote questioning in which certain candidate-specific attributes may be glossed over.¹⁷² However, this would still be preferable to the dizzying array of irrelevant questions that candidates have fielded in recent history.

¹⁶⁵ Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers (2018) Southern African Chief Justices' Forum website available at <https://sacjforum.org/sites/default/files/about/files/2020/Lilongwe%20Principles%20and%20Guidelines%20on%20the%20Selection%20and%20Appointment%20of%20Judicial%20Officers.pdf> (accessed July 2022)

¹⁶⁶ Cowen (2010) above n 162.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ An example of this can be seen in the JSC's own treatment of acting appointments in recent history, at times elevating an acting appointment to a peremptory criterion for appointment and thereby considerably narrowing the pool of potential appointees. At the same time this practice adds increased weight to the influence on appointments of heads of court, who are largely responsible for acting appointments.

¹⁷² Here, for example, the Mahomed Guidelines (discussed below in n 176) refer to "a person with appropriate *potential*, so that any lack of technical experience could be made up by intensive training". Standardised questions regarding technical experience may automatically disqualify a candidate of otherwise extraordinary potential.

The Constitution itself provides limited but important guidance as to the criteria against which to assess prospective judges, requiring in section 174(1) that judicial officers be “appropriately qualified” and “fit and proper”;¹⁷³ while section 174(2) states that “The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.”¹⁷⁴

It is in the often vexed interaction between these two sets of requirements that much of the confusion has arisen. Section 174(1) demands unequivocally, as its primary requirement, that a candidate has to be appropriately qualified. There is no warrant for selecting any candidates, particularly for appellate courts, on the basis merely of their perceived potential, the common justification offered for appointing apparently un- or underqualified persons. This constitutional criterion is doubly disregarded when unqualified candidates are selected in preference to qualified candidates on the basis that this is justified by s 174(2). Fundamentally, not only are qualified candidates disadvantaged when the primary requirement is ignored, but the administration of justice and the rule of law are undermined as a result.

There have been various attempts to elaborate on these constitutional requirements to establish more detailed guidelines, including some admirable attempts by academic authors¹⁷⁵ and popular commentators alike. However, from a formal perspective, little has been suggested or adopted. The late Chief Justice Mahomed in 1998 developed a series of guidelines which were agreed to by the JSC sitting during his chairmanship (the Mahomed Guidelines).¹⁷⁶ At a special sitting in 2010, the JSC resolved – after reviewing the Mahomed Guidelines – to publish a set of

¹⁷³ Constitution, s 174(1).

¹⁷⁴ Constitution, s 174(2).

¹⁷⁵ The working paper for the DGRU by Cowen (2013, with the same content as the 2010 report earlier referred to in n 162) provides a helpful analysis of the criteria and processes relevant to judicial selection.

[http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/Judicial%20Selection%20in%20SA%2028%20August%20print-ready.pdf]

¹⁷⁶ The Mahomed Guidelines are discussed in Tilley and Ndlebe’s (2021) (above n 38) recent paper at 463. These guidelines suggest that, in elaborating on the constitutional criteria, the following should also be considered: “The applicant had to be a person of integrity; a person with the necessary energy and motivation; a competent person, both technically as a lawyer, and with respect to the capacity and ability to give expression to the values in the Constitution; an experienced person, with appropriate potential, so that any lack of technical experience could be made up by intensive training; and whether the applicant’s appointment would be symbolic in sending a message to the community at large.”

criteria used when considering candidates for judicial appointments, which essentially repeat these guidelines.¹⁷⁷ More recently, in 2018, the Southern African Chief Justices' Forum adopted the Lilongwe Principles, which set out detailed guidelines regarding the procedural prerequisites for an effective appointments process, and which also expand on the minimally necessary criteria to be used when considering judicial candidates.¹⁷⁸ These have, however, not been formally adopted. The National Development Plan 2030 recorded that “the criteria should include a *progressive philosophy and an understanding of the socioeconomic context* in which the law is interpreted and enforced. While the JSC published a broad list of criteria for judicial appointments in September 2010, they require further development and a clear understanding of their meaning and application.” (Emphasis added).¹⁷⁹

Suggesting precisely what these guidelines or criteria should be, might be seen as an attempt to usurp the role of the JSC as the body constitutionally mandated to oversee the judicial appointments process. The JSC then, as the constitutionally mandated selection body, should be urgently proactive in developing a draft set of criteria to be used as benchmarks against which candidates for judicial office may be recommended for appointment. It should, in so doing, consider the extensive body of writing on the topic in the South African context, together with the existing local guidelines (including the Mahomed Guidelines, re-adopted in 2010) and the more recently developed Lilongwe Principles. Recourse may also be had to other international guidelines and best practices with a view to taking from these what would work within the uniquely South African context. In the process of drafting and adopting such criteria, an appropriate measure of public consultation should be provided.

In addition to these theoretical guidelines, we would add that the JSC is required to take into account the specific intellectual or subject-expertise needs of the court which has the vacancy/vacancies. This is an important consideration that ensures

¹⁷⁷ JSC (2022) Summary of the criteria used by the Judicial Service Commission when considering candidates for judicial appointments. Available at https://www.judiciary.org.za/images/news/2022/Judicial_Service_Commission_-_2010_Criteria_for_Judicial_Appointment.pdf (accessed July 2022).

¹⁷⁸ Lilongwe Principles above n 165.

¹⁷⁹ National Development Plan (2012) above n 32 at 453.

that a gap in unique expert knowledge or experience in a particular area of law created by a vacancy is addressed in the new round of appointments. For example, the discharge from active service of a high court's renowned tax, intellectual property or corporate law judge should trigger the appointment of someone with the knowledge and experience to fill the gap. This requires extensive consultation with the head of the court where the vacancy exists and is an issue that the JSC has not considered – or at least not openly. One must assume that this is precisely why the relevant Judge President is specifically included in the process. With a JSC focused on its real job, a Judge President could actually urge suitably qualified expert advocates, attorneys or academics to let their names go forward.

After a special sitting on 4 April 2022 the JSC released a statement confirming that it would use the 2010 criteria in conducting the April interviews,¹⁸⁰ possibly reacting to criticism of the JSC's failure to articulate adequate criteria, which had been building up ever since the CASAC litigation the previous year. The guidelines suddenly reappeared on the OCJ website at this point, having been absent from any official website for several years before. It is important to note that when the "re-adoption" was announced, the JSC also announced that a committee would be tasked with further investigating the question of criteria. Although a document was reportedly presented to the JSC at the October 2022 sitting, there was been no public communication in this regard – once again illustrating the highly problematic lack of transparency on such an important issue.¹⁸¹ It is widely agreed that the guidelines are insufficiently detailed and require greater elaboration if they are to be of actual practical assistance at the interview stage, and this has been belatedly acknowledged.¹⁸²

¹⁸⁰ Judges Matter (2022) "JSC articulates criteria to be used in April 2022 session of interviews." Available at <https://www.judgesmatter.co.za/opinions/jsc-articulates-criteria-to-be-used-in-april-2022-session-of-interviews/> (accessed July 2022).

¹⁸¹ A commissioner, when confidentially asked about the issue, declined to respond on the basis that it was an official secret, the disclosure of which would constitute a criminal offence.

¹⁸² Ibid, n 180. Subsequent to the writing of this report, the JSC has published draft guidelines and criteria for public comment: see JUDITH TO ADD REF!!!!

3.3.2 Inconsistency between focus, range and duration of interviews

Many commentators raise the issue of inconsistency in the length and depth of candidates' interviews.¹⁸³ Tilley and Ndlebe have undertaken a helpful review and analysis of all interviews conducted by the JSC between October 2015 and October 2019 – a total of 119 candidates in 123 interviews. By way of illustration of this unevenness, they highlight that the shortest interview lasted three minutes whilst the longest ran for 114 minutes.¹⁸⁴ More recent interviews have run in excess of this.

It is difficult to tease this single complaint out from others, such as political interference, as they are inevitably linked. For example, there are allegations that certain interviewees are given a much easier (and shorter) interview because their appointments have been politically ordained. It is tempting to assume that if the JSC were to take steps to address the other complaints, discrepancies in the length and depth of questioning in the interviews would be resolved.

However, there are various other steps it can take to bring about greater standardisation of interviews. The introduction of a more structured interview process, with a fixed time period and controlled by a competent chair, would go a considerable way toward addressing discrepancies. There is also a need to standardise broadly the areas of questioning¹⁸⁵ – rather than the questions themselves – so that candidates can be compared fairly, each having had an opportunity to traverse comparable topics.

Another problematic aspect of long interviews, especially earlier in a day's sitting, is the knock-on effect of candidates not only being kept waiting, but also being interviewed late at night, in circumstances where neither they nor the commissioners can be expected to function effectively. In an especially extreme example, one day's

¹⁸³ See, for example, Tilley and Ndlebe (2021) above n 38; Oxtoby (2021) above n 29; Olivier (2014) above n 38; Gravett (2017) above n 72.

¹⁸⁴ Tilley and Ndlebe (2021) above n 38 at 475.

¹⁸⁵ For example, after completing their analysis of the interviews, Tilley and Ndlebe suggest that the questions asked of each candidate should traverse, at least: the experience of their acting appointment, if any; the issue of transformation; their technical legal knowledge; and their jurisprudential philosophy. (Ibid at 477-478.)

sitting at the October 2022 interviews finished close to 3 a.m. the following morning. It is surely highly irresponsible to make decisions about appointments to judicial office under such circumstances.

3.3.3 Section 174(2) and “transformation”

Section 174(2) of the Constitution states that the “[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed”.¹⁸⁶ As canvassed above, in 1990 the judiciary was exclusively white and – with one exception – male.¹⁸⁷ There can be no doubt that, with the dawn of the constitutional dispensation, a radical overhaul of these demographics was required in order to bring a new perspective and diverse viewpoints and values to the bench and ultimately to give it a sense of legitimacy.¹⁸⁸

In the JSC’s latest Annual Report, the following race and gender statistics are reported in respect of all permanent judges in all courts as at 31 March 2021:¹⁸⁹

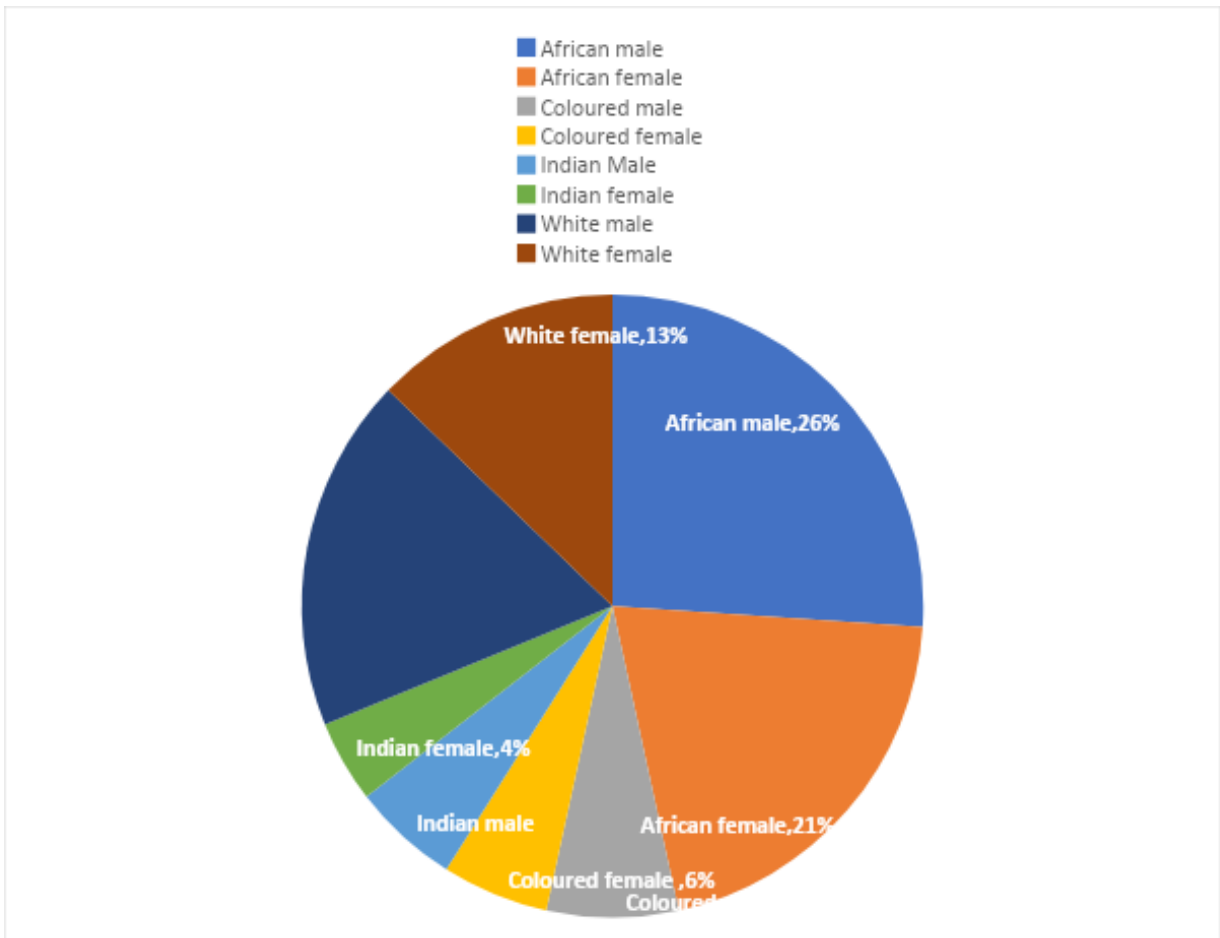
AFRICAN		COLOURED		INDIAN		WHITE		TOTAL
Male	Female	Male	Female	Male	Female	Male	Female	
61	48	16	13	13	10	43	30	234

¹⁸⁶ Constitution, s 174(2).

¹⁸⁷ Oxtoby (2021) above n 29 at 35.

¹⁸⁸ Kriegler (2009) above n 77.

¹⁸⁹ JSC Annual Report 2020-2021 (above n 7) at 11.



If one were to look at this set of numbers in a vacuum, the JSC has made significant progress in achieving a constitutional ideal, being a more demographically representative judiciary. However, this approach glosses over the ongoing issues that the JSC has faced in interpreting and applying the section 174(2) injunction, including the meaning given to the concept of representativeness in the context of the judiciary; the interpretation and application of section 174(2) and, in particular, its relationship with section 174(1); and the relationship between section 174(2) and some broader, more amorphous but equally vital concept of transformation within the judiciary.

3.3.3.1 Representativeness

The need for judges to be independent and impartial means that we should not talk about a representative judiciary in the same way as we might the legislature and executive. Judges are not there to

*represent the interests of any particular group but to ensure that the law is applied fairly and equally to all.*¹⁹⁰

It is true that judges do not represent any particular group and we should be sceptical of the idea that justice may be served only by a judge of the same race or gender as the litigant.¹⁹¹ Cowen, however, highlights the important objectives sought to be attained by a more diverse, or representative, bench.¹⁹² The first is that given South Africa's lengthy history of racial discrimination in various guises, a wholly unrepresentative judiciary would lack legitimacy.¹⁹³ The second is that diversity of experience can enhance the deliberative process¹⁹⁴ – this is important particularly on appellate courts which sit as full benches.

Representation is, however, only one factor that lends legitimacy to the judiciary. A judiciary that is crudely representative of the country's demographics is not automatically a strong, independent, diverse and legitimate one. Ultimately, legitimacy rests on the judiciary as a whole competently fulfilling its constitutional mandate.¹⁹⁵

Representativeness, legitimacy and transformation are words freely bandied about without adequate attempts to define them. Nevertheless, it can surely be said that representativeness does not relate only to ethnicity and gender, which are singled out because of s 174(2). There are many other factors, e.g. socio-economic class, geographic origin, language, religion, political orientation, age and so on. Legitimacy

¹⁹⁰ Malleson (2007) at 216 as cited in Cowen (2010) above n 162 at 66.

¹⁹¹ A sentiment echoed by Justice Cachalia in his interview for the Constitutional Court where he said "If I or my family ... appear before a judge, I don't want a judge that looks like me, I want a judge who is fair." (Staff Reporter (2009) "We can't play numbers game, says Cachalia." *IOL* available at <https://www.iol.co.za/news/politics/we-cant-play-numbers-game-says-cachalia-459159> (accessed July 2022).)

It is a philosophical and jurisprudential debate beyond the scope of this report to examine the extent to which judges' race, gender and background ultimately influence their adjudication.

¹⁹² Cowen (2010) above n 162 at 66 et seq.

¹⁹³ Cowen (2010) above n 162 at 67 quotes Chief Justice Langa as saying that justice "had a white unwelcoming face with black victims at the receiving end of unjust laws administered by courts alien and generally hostile to them".

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

does not depend only or even primarily on race- and gender-identity. Proven competence and integrity are essential prerequisites.

The need for the judiciary broadly to reflect South Africa's race and gender make-up is an unquestionable constitutional imperative and therefore an objective which must be pursued by the JSC. We raise these issues, however, to clarify the underlying goals sought to be achieved by greater representation on the bench and to highlight that this alone will not advance the legitimacy of the judiciary. It is these considerations that should guide the way in which the JSC fulfils its section 174(2) mandate.

3.3.3.2 *Interrelationship between section 174(1) and (2)*

What has seemed to be a particularly vexed question is what exactly this imperative requires of the JSC in the appointments process and, in particular, how it relates to the requirements in section 174(1) and the relative weight accorded to each of these considerations.

Given the lack of transparency in the JSC's decision-making and the fact that it does not provide reasons for its recommendations, it is difficult to ascertain how it balances the requirements of section 174(1) and (2).¹⁹⁶ There have been instances in its history of appointments, discussed above,¹⁹⁷ where the JSC's decision not to appoint highly qualified and competent white or other non-African candidates can seemingly only be attributed to its reliance on the prescription in section 174(2). This has resulted in the JSC being accused of race and gender essentialism whereby a candidate's demographic make-up is the metric on which they are deemed suitable for appointment.¹⁹⁸

¹⁹⁶ Davis (2010) above n 89 at 42.

¹⁹⁷ See also a discussion of the historical non-appointment of eminently qualified white candidates: Staff Reporter (2011) "Legal fraternity's finest struggle to find a place at the Bar." *Mail & Guardian* available at <https://mg.co.za/article/2011-05-09-legal-fraternitys-finest-struggle-to-find-a-place-at-the-bar/> (accessed July 2022).

¹⁹⁸ Oxtoby (2021) above n 29 at 40 discusses the criticisms levelled against the JSC on this score including that it has "elevated demographic redress over merit"; that there have been "numerous instances where demographic considerations have trumped lawyerly excellence and experience"; that the "JSC has ... over-emphasised race or other factors and paid less attention to skill and

How should these constitutional imperatives be balanced? Section 174(1) requires candidates to be “appropriately qualified” and “fit and proper”. These are objective criteria in respect of which candidates may be assessed. If they are taken together with any other guidelines that the JSC develops, candidates can be ranked. Once this exercise has been undertaken and the JSC is satisfied that each candidate has a suitable level of competence and qualification, it is then called on to consider the mandate in section 174(2). This mandate should not be applied blindly, but rather with consideration of the current race and gender representation both on the bench as a whole and on the court in question in particular. Simply put, considerations of race and gender are clearly factors that must be taken into account, but they cannot be the only or even predominant factors that trump other considerations.

Perhaps one of the primary difficulties with section 174(2) is that what it requires of the JSC, and the extent to which it ultimately influences appointments, must necessarily change over time. It does not create a static obligation. The race and gender composition of the judiciary as a whole, and of each court specifically, changes with each new judicial appointment.

This is illustrated in the interviews held in April 2022 for vacancies on the Constitutional Court. The JSC interviewed five candidates.¹⁹⁹ Judge Rogers, a white male, was ultimately appointed.²⁰⁰ During his interview with the JSC, when asked specifically about the mandate in section 174(2), Judge Rogers responded that in a small court, “the ability to get a broad representivity is compromised because you only have 11 positions to work with”.²⁰¹

competence in the appointment process” and that the judiciary has been “denuded of skills” as a result. See too Justice Kriegler’s 2009 speech regarding the inversion of these two constitutional mandates (above n 77).

¹⁹⁹ Judge Rogers, Adv Dodson SC, Judge Kathree-Setiloane, Judge Molemela and Judge Unterhalter. Judge Unterhalter was the only interviewee not placed on the shortlist of four that was given to the President. Yet he was the only candidate actually acting on the Constitutional Court bench at the time.

²⁰⁰ The Presidency (2022) President Ramaphosa appoints Judge Rogers as Constitutional Court judge. Press Statement available at <https://www.thepresidency.gov.za/press-statements/president-ramaphosa-appoints-judge-rogers-constitutional-court-judge> (accessed July 2022).

²⁰¹ Mabuza (2022) “Judge Rogers makes his views known about representativeness in apex court.” *Times Live* available at

He went on to say that, given the importance of the Constitutional Court, “Judicial excellence, coupled with the commitment to constitutional values, should be the most important criterion” in appointments, rather than a quota.²⁰²

At the time of Justice Rogers’s appointment, none of the permanent justices on the Constitutional Court was white, and three were women. The weight to be accorded to the injunction in section 174(2) was, by necessity, less because of these demographics. There was no longer an urgent and pressing need to transform the demographics of this court that would, perhaps at another time, have necessitated the appointment of a different candidate.²⁰³ Indeed, it could be argued that the absence of a white judge on the Constitutional Court, for the first time in its existence, favoured Justice Rogers’s appointment.

The reception of his comments and his shortlisting and ultimate appointment can (optimistically) be seen as a positive indication that the JSC, and the President, are grappling with the idea of the section 174(2) mandate being dynamic, dependent on the overall make-up of the judiciary – and a particular court – at any point. The October 2022 recommendations for appointments to the SCA show a similar awareness.

<https://www.timeslive.co.za/news/south-africa/2022-04-06-judge-rogers-makes-his-views-known-about-representivity-in-apex-court/> (accessed July 2022).

²⁰² Ibid.

²⁰³ In his interview Adv Dodson SC said, “I don’t think my appointment, at this point in time, given the demographic makeup of the Constitutional Court, would be a negative factor, given that, frankly, there are no white members serving on the Constitutional Court ... If anything, I would respectfully suggest that it would operate as a positive one.” (Bhengu (2022) JSC interviews: “Candidate says appointment should be based on judicial contribution, not race or gender.” *News24* available at <https://www.news24.com/news24/southafrica/news/jsc-interviews-candidate-says-appointment-should-be-based-on-judicial-contribution-not-race-or-gender-20220405> (accessed July 2022)).

Subsequent to the announcement of his appointment, Justice Rogers was asked in a televised interview about his comments during his JSC interview that considerations of judicial excellence should trump considerations of race and gender. Judge Rogers reiterated that because of the small size of the court and the importance of its decisions, decisions regarding appointment should not be motivated solely by a “numbers game” of representation. That interview is available at https://www.youtube.com/watch?v=nagaVR_MA5w (accessed July 2022).

Beyond the language of diversity or representativeness in terms of race and gender is the more amorphous concept, often raised by the JSC in its interviews, of transformation. As with so many of the other issues raised by the JSC during interviews, there seems to be no shared understanding of what this concept entails and what candidates are required to do to satisfy the JSC that they have contributed, are contributing, or would contribute in some way to transformation. This creates several issues in the interview and appointment process.

First, a commitment or contribution to transformation in the broader sense must entail something apart from the candidate’s race and/or gender. However, in some lines of questioning, the JSC conflates the idea of transformation with the race and gender of the candidate. This is problematic for two primary reasons. The first is that it furthers the false idea that race and/or gender is determinative of a candidate’s attitude and contribution to transformation; that for example, a black woman will always be a transformative appointment and that a white man will never be. The second is that it leads to uneven questioning (and likely evaluation) between white and black and male and female candidates on the issue of transformation.²⁰⁴ It creates an imbalance wherein white or male candidates are required to answer multiple questions on this issue to justify their commitment to transformation while black or female candidates’ contributions to transformation are taken for granted. Mavedzenge,²⁰⁵ in examining the October 2018 JSC interviews, summarises this issue as follows:

Uneven questioning is problematic because it means the candidates are not being treated equally, as some are spared questions which others are required to respond to. Views on such an important constitutional issue as transformation should be solicited from every candidate who appears before the JSC, regardless of their race or gender.

²⁰⁴ Mavedzenge (2018) “The JSC’s uneven line of questioning on judicial transformation.” *Daily Maverick* available at <https://www.dailymaverick.co.za/opinionista/2018-06-15-the-jscs-uneven-line-of-questioning-on-judicial-transformation/> (accessed July 2022).

²⁰⁵ Ibid.

He goes on to examine, as an example of what he asserts, the differential questioning of two candidates interviewing for a position in the KwaZulu-Natal Division of the High Court: Ms Hadebe, a black female candidate, and Ms Law, a white female candidate.

Ms Hadebe was asked a single question on transformation:

“... Ms Hadebe I have got one question to ask. The issue of transformation of the Judiciary is a challenge. It remains a reality that black Africans, more especially women are still under-represented on the Bench and the situation had not improved in the post-1994 era taken into consideration the demographics in KwaZulu-Natal. What is going to be your contribution in trying to remedy the imbalance, taking into consideration Section 174(2) of our Constitution and in your own words you just heard your story is a story of hope, we hope you will contribute to change the situation.”

Ms Law was asked multiple questions on the topic:

[1] “Can you elaborate on the contribution you can make in transforming the judiciary? In ensuring that there is fair representation of black Africans and women in particular on the Bench considering the demographics and Section 174(2) of the Constitution?”

[2] “Can you share with us your understanding about the rate of transformation of the judiciary in our country?”

[3] “What I would like to find out from you is what has been your contribution towards the transformation of the profession?”

[4] “I am just trying to understand ... Whether it is a systemic issue where you can only be approached, or does it take a situation of – in other words, I am trying to understand whether you are a transformation agent inherent in yourself or whether transformation is not quite part of what your orientation is at.”

[5] “Okay, right. Now the second issue is to do, you know, this transformation thing has got to do with the numbers and all the cosmetic stuff. But more seriously it has to with softer issues such as empathy, which I described as the ability to put yourself into somebody else’s shoes. Having gone through the experiences that you went through in the UK, and I appreciate what you say it was the first time you experienced it. Maybe it was the first time you experienced it as a person but surely being South African you had seen other people being degraded and assumed just because of the biological appearances to be incompetent, stupid, inferior or lazy. Did you, coming back from that experience, not find it necessary to yourself make sure that other people in the profession are not put in that position?”²⁰⁶

²⁰⁶ Ibid. Excerpts extracted from transcripts by the author.

The JSC's conflation of the notion of race and transformation is demonstrated clearly by these examples.

Also highlighted by the two different lines of questioning above, there is no consensus among commissioners as to what transformation, or a commitment thereto, entails. For example:

- i. *“what contribution are you making to ensuring fair representation on the bench in accordance with section 174(2)”* requires a response relating only to a candidate's race or gender;
- ii. *“are you a transformation agent inherent in yourself?”* requires some kind of unclear commitment deeper than a candidate's race or gender; and
- iii. *“this transformation has got to do with the numbers and all the cosmetic stuff ... but it [also] has to do with softer issues such as empathy”* requires a response relating to the candidate's race and gender and some other underlying personality trait.

Precisely what candidates are required to show in order to demonstrate a commitment to transformation as a broader concept remains unclear.

Thirdly, this lack of clarity has opened the door to lines of questioning on certain topics – ostensibly under the guise of assessing a candidate's commitment to transformation – that have the effect of elevating certain requirements to the level of prerequisites for appointment. This is despite an unclear connection to the judicial potential of a candidate.

For example, since 2014 – coinciding with the commencement of Mr Malema's term as a commissioner – candidates have been asked whether they can speak an African language.²⁰⁷ Mr Malema has even gone so far as to accuse someone who has not learned an African language of white supremacy.²⁰⁸ Another example is

²⁰⁷ Oxtoby (2021) above n 29 at 39.

²⁰⁸ See the October 2016 interview of Adv Topping discussed by Judges Matter (2017) “Malema's questions for Judges at the JSC interviews.” Judges Matter website available at

questioning regarding a candidate's involvement with community organisations.²⁰⁹ Whilst these certainly reflect some ways in which a candidate might be said to demonstrate commitment to transformation, they are not determinative even though they have, in recent history, been seen to be elevated to the level of supplementary appointment criteria.²¹⁰

What then does transformation or a commitment thereto entail? We would suggest that the answer to this question must be found in a candidate's firm and demonstrable commitment to the transformative constitutional project and its underlying values, whatever form those may take. In the latest round of interviews for the Constitutional Court, Mr Malema asked Adv Dodson SC whether his appointment would advance any transformation agendas (interestingly indicating that there is a plurality of transformation agendas), to which the response was:

Yes, and the reason I say that is because I accept and adopt, and have always accepted and adopted the transformational ethos of the Constitution. Suppose you have a judge that accepts and adopts the ethos of the Constitution and a transformational approach to constitutionalism. In that case, it is going to be reflected in the judgments they hand down.²¹¹

This response seems to strike at the heart of the issues that underlie the questioning on issues of transformation. The JSC is, however, often remiss in the way in which it expects candidates to have demonstrated this particular commitment.

On our assessment of the JSC's interviews, the repeated questioning on issues of transformation, often contingent on the race or gender of a candidate, reveals that the JSC uses this as a supplementary criterion on which it relies for appointment. This means that it is required first to confirm this and then to: (i) delineate in greater detail what is meant by transformation or a commitment thereto as distinct from racial and gender representativeness; (ii) indicate the ways in which candidates may demonstrate this; and (iii) address questions relating to transformation more evenly

<https://www.judgesmatter.co.za/opinions/malemas-questions-for-judges-at-the-jsc-interviews/> (accessed July 2022).

²⁰⁹ Oxtoby (2021) above n 29 at 39.

²¹⁰ Ibid.

²¹¹ Bhengu (2022) above n 203.

between candidates of different races and genders, allowing candidates the opportunity to showcase their unique contributions to the transformative agenda.

3.3.4 Political interference

The JSC is, by virtue of its composition representative of all three branches of government, not an apolitical body. Most would agree that it is appropriate in a constitutional democracy such as pertains in South Africa that all three branches of government participate in the appointment of those who act as the ultimate interpreters and guardians of the Constitution. However, in order to best preserve the independence of the judiciary through the appointment of robust and independent-minded judges, the JSC should carry out its mandate in as apolitical a way as possible. While this may be an unattainable ideal, it is at least the direction in which the JSC should be moving. However, party-political considerations and influence have pervaded almost every round of interviews undertaken during the period under review.

For many of its critics, the 2009 overhaul of the JSC's composition marked the commencement of a period of greater political interference.²¹² Political influence in the JSC's operations manifests on a continuum from subtle (although no less insidious) to more overt.

It includes the differential treatment of candidates on the basis of their political palatability. The narrative above provides multiple examples of preferred candidates being given an easier interview and the JSC rubber-stamping politically pre-ordained appointments.²¹³ The flipside of this is the outright harassment of candidates deemed politically unsuitable. These candidates' interviews are characterised as openly hostile and are often derailed by inappropriate, if not racist, lines of questioning.²¹⁴ Mr Malema's questioning of Judge Pillay in the April 2021 round of interviews – which

²¹² Olivier and Hoexter above n 38 at 171.

²¹³ See, for example, the discussion of the Chief Justice interview of former Chief Justice Mogoeng and subsequent complaints from non-governmental organisations.

²¹⁴ See, for example, Judge Mlambo being called on repeatedly to answer rumours of sexual misconduct in his latest JSC interview.

were ultimately set aside – is a clear example of how these interviews can descend into blatant political mudslinging.²¹⁵

Political influence has also been felt more unmistakably as a result of commissioners and their constituencies cynically misusing or fundamentally misunderstanding their role on the JSC. When political-party representatives sit on the JSC, they do not do so to promote party interests. Despite this, there have been instances of political-party representatives being briefed by their party deployment committee on which candidates for judicial appointment would be the most politically acceptable.²¹⁶ Evidence emerged during the “State Capture Inquiry” that the ANC Deployment Committee recommended specific candidates for judicial vacancies.²¹⁷ It seems that most ANC members who sit on the JSC ultimately toe the party line in contrast to applying the criteria for appointment and making an independent decision in respect of each candidate. That such conduct would be found to be constitutionally impermissible is beyond dispute. Interviews have also been used by parliamentary representatives to gauge the extent to which prospective candidates would be sympathetic to party-political interests and to overtly challenge candidates on their previous decisions involving political parties.²¹⁸

²¹⁵ Chabalala (2021) “You are nothing but a political activist’ - Malema tells ConCourt judge candidate Dhaya Pillay.” *News24* available at <https://www.news24.com/news24/southafrica/news/you-are-nothing-but-a-political-activist-malema-tells-concourt-judge-candidate-dhaya-pillay-20210413> (accessed July 2022) contains the following quote from the interviews: “Malema said: ‘Judge, I am going to argue in a closed session that you are nothing but a political activist. You are no judge, and you deserve no high office. If anything, you are also factional and belong to Pravin’s [Gordhan’s] faction and you are pursuing factional battles using the bench.’”

²¹⁶ Judges Matter (2022). “On the ANC deployment committee’s influence on the appointment of judges – we need to reform the JSC.” Judges Matter website available at <https://www.judgesmatter.co.za/opinions/on-the-anc-deployment-committees-influence-on-the-appointment-of-judges-we-need-to-reform-the-jsc/> (accessed July 2022).

²¹⁷ Extract from the transcript of President Cyril Ramaphosa’s testimony to the Commission of Inquiry into State Capture, 11 August 2021 available at <https://www.politicsweb.co.za/documents/cyril-ramaphosa-on-cadre-deployment-and-the-judici> (accessed August 2022).

²¹⁸ See for example Julius Malema’s questioning of Judge Matojane in relation to an order granted against the EFF. Maughan (2022) “Malema launches urgent bid to block recommendation he apologise to JSC, Judge Matojane.” *News24* available at <https://www.news24.com/news24/southafrica/news/just-in-malema-launches-urgent-bid-to-block-recommendation-he-apologise-to-jsc-judge-matojane-20220214> (accessed July 2022).

Political tensions between branches of government,²¹⁹ as well as tensions and conflict between the commissioners themselves,²²⁰ have frequently found their way into the interviews, bringing the process into disrepute.

There is a debate amongst commentators as to whether the reduction in the number of party-political representatives would go some way toward addressing these issues or whether many of the issues result from the personalities of specific commissioners. While the inclusion of parliamentary representatives was the result of a political compromise, it seems that – in light of the well-founded accusations of political interference – the time has come to rethink whether they are to be represented in quite so great a number. At the same time it should be acknowledged that by no means all the cases of manifest political motivation have involved commissioners nominated by political parties.

3.4 **Proposals – appointments**

The problems that have plagued the JSC’s appointment process during the period under review can be characterised as issues of structure; process or procedure; and personality and behaviour (of individual commissioners, in particular the Chair). Many problems faced by the JSC span all three of these levels, and proposals that seek to address these issues adequately and effect real change need to take cognisance of this.

For example, reducing political interference requires change at all three levels. It requires structural changes (by reducing the number of political appointees); procedural or process changes (by adopting clearer guidelines for interviews to avoid candidates being treated unfairly and/or allowing the interviews to be misused for political ends); and changes to commissioners and/or their individual behaviours (this can be controlled in a variety of ways: the Chair better managing some of the

²¹⁹ For example, the pointed “elephant in the room” questioning of candidates following the al-Bashir incident.

²²⁰ For example, Ronald Lamola and Julius Malema’s heated exchange in the recent Chief Justice interview, which can be viewed at Hawker (2022) “Shouting match between Malema and Lamola at JSC hearing as body interviews Zondo.” *Sowetan live* available at <https://www.sowetanlive.co.za/news/south-africa/2022-02-05-watch-shouting-match-between-malema-and-lamola-at-jsc-hearing-as-body-interviews-zondo/> (accessed July 2022).

individual commissioners' behaviour during interviews; clear rights of, and effective processes for, the recall of errant commissioners by their constituencies; and enacting disciplinary mechanisms for commissioners within the JSC structure).

3.4.1 Changes to structure and infrastructure

3.4.1.1 *Infrastructure*

We argue that introducing changes to the JSC's internal support infrastructure would have a positive effect on the execution of both its appointment and accountability functions. The JSC fulfils an important constitutional function, a role vital to the administration of justice and the rule of law. Not only is membership of the body constitutionally critical but the task entails an increasingly burdensome workload. Commissioners cannot be expected to perform their task without adequate administrative back-up. As reflected in the latest Annual Report,²²¹ the JSC had a budget of R3 457 000 for employees; however, its actual expenditure on this line item was R2 761 502.²²² This indicates that there is existing budgetary allocation for expansion of the secretariat.

What became apparent in reviewing the JSC's structure and performance is that, despite its being a vitally important constitutional body tasked with gatekeeping the judiciary and, by implication, ensuring its independence and an appropriate standard of competence, its membership changes from time to time and it functions more like an ad hoc committee than a body in its own right. For example, unlike almost all other constitutional bodies, it does not have its own website nor does it regularly publish its decisions (including those of the Judicial Conduct Committee or the Judicial Conduct Tribunals) in an easily accessible way. In addition, particularly in relation to disciplinary matters, it does not meet sufficiently regularly to execute its mandate swiftly.

²²¹ Above n 7, 2020-2021.

²²² See Annual Report (above n 7) at 26.

In some ways this is unavoidable because the JSC's constituency is a result of a compromise intended to involve a wide and varied range of participants in the process of judicial selection. All JSC members already have time-intensive full-time work commitments by virtue of the positions they hold. Decisions require the whole JSC which, even when it sits without the parliamentary appointees, is a large body to co-ordinate. This is a possible reason for the time lag in disciplinary matters.

It is also a reason for it to have a strong, capable and independent secretariat (or at bare minimum a section of the staff in the Office of the Chief Justice) which can perform a multitude of functions, including: (i) providing a sense of constancy over time to ensure institutional memory in an institution with a shifting membership; (ii) preparation of dossiers on candidates and fact-checking of the content of candidates' applications in order to reduce reliance on information provided by external organisations; (iii) making and maintaining a complete database of documentation recording correspondence with and the activities of the JSC; and (iv) taking charge of making publicly available all the decisions of the JSC, its JCC and the relevant JCTs in a coherent and accessible way.

3.4.1.2 *Structure*

There are two structural changes that we would propose to the composition of the JSC, which would require constitutional amendment. We understand this to be a long-term proposal but nonetheless strongly suggest: first, an increase in the number of senior judges on the JSC, by including – for example – a judge from each of the Constitutional Court and the Supreme Court of Appeal elected by their peers; and second, a reduction in the number of political-party appointees, by reducing the number of MPs appointed from the NA to four (from six); reducing the number of MPs appointed from the NCOP to two (from four) (with provision made expressly for NA and NCOP representatives to include opposition party representatives); and a reduction in the number of presidential appointees to two (from four). These suggestions are necessitated by the current imbalance in the JSC, which requires only eight of the 23 members to have qualifications in law and only seven actual experience in the administration of justice.

As explained above, whilst changing the number of political appointees will not alone eliminate undue political influence in the JSC, it would go some way toward alleviating the problem of a single political party dominating the appointment of commissioners.

3.4.2 Changes to processes / procedure

There are several steps that can be taken in order to address some of the criticisms levelled against the JSC's appointment process. The primary step, which would inform much of the process, must be the adoption of clearer guidelines for the appointment, promotion and transfer of judicial officers. Such guidelines would ensure, amongst other things, the JSC being more readily held to account for its decisions because of the existence of an objective yardstick against which they may be assessed.

In particular, as argued above, the JSC needs to discuss and agree on -- and then adhere to -- a constitutionally acceptable approach to the reading of sections 174(1) and 174(2), which provide the highest-level criteria to which the commissioners are bound. The assessment of candidates' understanding of and commitment to the transformative ethos which suffuses the Constitution must not be based crudely on their race and gender, but rather on their professional and community record.

In addition, before conducting interviews for vacancies, there are two steps that the JSC *should* take in order to ensure that it does not enter this process blindly. The first is that it should consult with the head of each court in respect of which there is a vacancy to ascertain whether the court is, as a result of the vacancy, in need of any specialist assistance / knowledge / skillset, which may then inform the interview process. Second, the JSC should prepare and publish a written report detailing the judiciary's overall race and gender make-up, as well as the make-up of the particular court, ahead of each round of interviews in order to ensure that the section 174(2) mandate is applied appropriately and not within an information vacuum.

Greater standardisation needs to be introduced into the interview process. Interviews need to be consistent and even-handed. This can be done in a way that yet respects

the diversity of each candidate's experience and potential by requiring interviews to uniformly cover at least certain areas, on the basis of the adopted criteria. For example, each candidate may receive a technical legal question and a jurisprudential question and also be given an opportunity to traverse their background experience and field questions regarding their suitability for the particular vacancy in light of what the court requires.

It is here that the role of the Chair is critically important. The Chair is required to ensure equitable treatment between candidates in terms of both length and breadth of interviews; to ensure the relevance of all lines of questioning (having regard to the adopted criteria); and to bring about a swift end to inappropriate lines of questioning. In partial defence of the Chair's performance in the recent past, it must be noted that Mogoeng CJ had his hands full with several forceful, indeed unruly, commissioners, the regulation of whom was weakened by the fact that the JSC resorted to virtual meetings necessitated by the COVID-19 pandemic. Despite these mitigating factors, however, the weak leadership of the JSC was at times palpable.

A further and mostly ignored aspect of the JSC's proceedings is that greater weight and deference should be accorded informally to the role and views of the senior judges in its ranks, because they in the final analysis are responsible for leading the judiciary as a whole.

The JSC may promote accountability by providing reasons for its shortlists which refer to its adopted guidelines, candidates' prospective judicial potential and any section 174(2) considerations that may be relevant (based on its prepared report). In addition, and in order to decrease the influence of cadre deployment and the development of party voting blocs on the Commission, each individual commissioner should be required, as a matter of routine recording, to articulate cogent reasons in confidence for their choice of candidates to support, with due deference to the secrecy of the ballot. Such a record may become relevant should any decision be challenged. We suggest this as a way to ensure the responsible fulfilment of their role by the commissioners, but we recognise that this may well lead to unintended negative consequences, so will need to be thoroughly debated and carefully formulated, if deemed necessary.

A further matter should be reviewed, being the manner in which the President's consultation with the JSC about his appointment of the four most senior judicial leaders (Chief Justice and Deputy, President of the SCA and Deputy) is discharged. The practice of public interview became established about 15 years ago, but it has produced both awkwardness and some embarrassment for both commissioners and candidates. It must be remembered that each such candidate has already been put through a public interview when appointed to the bench. While appointment to judicial leadership positions naturally needs a different type of assessment, is it necessary to pursue this goal through public interview? Could this perhaps be done through written questions and answers and then a discussion among the members of the JSC? While there are no easy ways forward in this regard, we argue that the current processes ought to be reviewed, perhaps also after consultation with the President.

3.4.3 Changes to individual commissioners / their behaviour

It is a sad truth, illustrated by some of the more recent blow-ups involving more prominent personalities on the JSC, that the introduction of procedural safeguards and changes will be ineffectual if individual commissioners are intent on pursuing external and irrelevant objectives, thus bringing the process into disrepute. The impact of individual personalities is difficult to temper by means of rules and regulations; however, in addition to the importance of the Chair's ruling commissioners out of order during the interview process, there are various steps that could contribute toward ensuring that individual commissioners perform their constitutionally mandated duty properly.

The first is the introduction of compulsory orientation and training, perhaps by a retired judge, before commissioners attend a session of the JSC, which training should include detailed information on the guidelines for selection, proper interview decorum (including the appropriateness of lines of questioning) and a detailed examination of the JSC's and the commissioners' mandate to address problems arising from cadre deployment and commissioners operating on the erroneous assumption that they are on the JSC to represent a specific constituency.

The JSC also needs to develop a code of conduct for commissioners. It should set out a standard, for example, for appropriate conduct during interviews. Breaches of this code must be addressed through an internal disciplinary mechanism with the necessary feedback being given to the commissioner's appointing constituency. Coupled with this, each constituency needs to be given a clear right of recall for errant commissioners, on clear grounds and after due process has been observed. None of these additional arrangements needs constitutional sanction: indeed, each may be seen as strengthening the underlying values of the constitutional enterprise as a whole.

4. JUDICIAL ACCOUNTABILITY

The courts must stand guard over the Constitution and the Bill of Rights with no weapon other than their moral authority. It is therefore indispensable that the judiciary enjoys public confidence in its competence, impartiality and integrity. Without public trust and confidence the courts cannot fulfil their constitutional role. Judges are fallible and people do not expect perfection. But what they do expect – and are entitled to demand – is, at least, honesty and impartiality. When judges are no longer seen to be administering justice to all alike, without fear, favour or prejudice, the immediate casualty is the administration of justice. Then the rule of law suffers and, ultimately, individual rights and freedoms.²²³

4.1 Brief background to judicial discipline in South Africa²²⁴

Before 1994 matters of judicial discipline were dealt with informally. As far as discipline against judges was concerned, there were no formal regulatory rules or mechanisms. Complaints about minor judicial indiscretions, such as rudeness to counsel or colleagues, were dealt with informally, through the 'word-in-the-ear' method, by the Judge President or Chief Justice as heads of the various divisions.

²²³ Kriegler (2007) "Judge Hlophe betrayed the nation with his greed." *Advocate* (December, 2017). Available at <https://www.gcbsa.co.za/law-journals/2007/december/2007-december-vol020-no3-pp33-34.pdf> (accessed July 2022).

²²⁴ We have borrowed from the chapter by Corder and Solik (2021) "Judge and be Judged: judicial discipline in South Africa." In *Disciplining Judges: Contemporary Challenges and Controversies*. UK: Edward Elgar Publishing, pp 308 – 333.

Judicial misconduct in the public domain and even some sort of scandal emanating from a judge's private life were dealt with in similar manner.²²⁵

Where strong professional peer pressure held sway, these informal methods seem to have worked. There is no evidence of a forced resignation of a judge resulting from peer pressure. The removal of a judge from office was possible, but only by the head of state (the Governor-General, later the State President) "upon address of both Houses of Parliament in the same session praying for removal" on the grounds of misbehaviour or incapacity.²²⁶ No such address was made, and no judge was dismissed, between 1910 and 1994.²²⁷

4.2 **Disciplinary processes of the JSC**

It is important to note the context of the passage of legislation focused on the JSC. The JSC Act was one of the first statutes adopted by the Mandela administration and contained very little detail. It was then extensively amended in 2008, chiefly by the addition of many new provisions relating to processes for judicial discipline. The Act in its 2008 form created an elaborate, circumlocutory and inquisitorial disciplinary system controlled entirely by judges, which effectively excluded the complainant from the management of its complaint. It has inevitably proved time-consuming. As a result, the striking features of the disciplinary process are complexity, dilatoriness and in-house inquisitorial confidentiality. Section 10 of the Act requires reports on its activities from the Judicial Conduct Committee (JCC) to the JSC, but these appear not to be in the public domain, if they exist at all.

In terms of the preamble to the amending Act the process should balance the need to protect judges against unfair criticism (i.e. to protect their dignity and the legitimacy of the judiciary) on the one hand, and the need for transparency in order to promote the credibility of the process (and hence protect the legitimacy of the judiciary) on the other. The essential details of this process are now considered.

²²⁵ Ibid at 313.

²²⁶ s 101 of the South Africa Act, a provision later replaced by s 10(7) of the Supreme Court Act 59 of 1959. The latter Act has been repealed in its entirety by the Superior Courts Act 10 of 2013.

²²⁷ Corder and Solik (2021) n 224 at 313.

Chapter 2 of the JSC Act as amended is headed 'Oversight over judicial conduct and accountability of judicial officers', and it contemplates the establishment of the JCC as part of the JSC. This committee is chaired by the Chief Justice and includes the Deputy Chief Justice and four other judges – of whom at least two must be women – designated by the Chief Justice in consultation with the Minister of Justice.²²⁸ The JCC meets as and when necessary, as determined by the chair, and its meetings are generally closed to the public “unless the Committee on account of public interest and for good cause decides otherwise”.²²⁹ The objects of the JCC are “to receive, consider and deal with complaints” against judges, on which it must report to the JSC every six months.²³⁰ Section 14 of the Act duly provides for the lodging of complaints about judicial incapacity to perform the office, willful or grossly negligent breach of the Code of Judicial Conduct²³¹ and other willful or grossly negligent conduct.

A complaint may be disposed of in one of three ways:

- i. a “lesser complaint” may be summarily dismissed under certain conditions;²³²
- ii. where the misconduct is serious but non-impeachable, provision is made for an inquiry held by the chair or a member designated by him or her;²³³ or
- iii. where the complaint is impeachable, section 16 makes provision for the appointment of an investigative Judicial Conduct Tribunal (JCT).²³⁴ The JCC

²²⁸ s 8(1) of the JSC Act above n 8.

²²⁹ Ibid, s 9(3).

²³⁰ Ibid, s 10.

²³¹ Ibid, governed by s 12 of the JSC Act.

²³² Ibid, s 15. A complaint must be dismissed if it does not fall within the grounds for complaint; is not properly lodged; relates solely to the merits of a judgment; is frivolous or lacking in substance; or is hypothetical (s 15(2)).

²³³ Ibid, s 17. The nature and form of the inquiry are provided for in great detail, and possible sanctions are an apology to the complainant, a reprimand, a written warning, a form of compensation, appropriate counselling, attendance at a specific training course and “any other appropriate corrective measure” (s 17(8)).

²³⁴ Ibid, s 16. For reference to a Tribunal the committee must consider “whether the complaint, if established, will *prima facie* indicate incapacity, gross incompetence or gross misconduct”. If this is its finding, the committee must refer the complaint to the chairperson for a s 17 inquiry, or recommend to the JSC that a Tribunal investigate the complaint (s 16(4)).

chairperson refers the complaint to the JCC, which may then recommend that the complaint be investigated by a JCT.²³⁵ The appointment of the JCT is requested by the JSC itself.

JCTs are dealt with in further detail in Chapter 3 of the JSC Act. There is provision for the composition of such a Tribunal (two judges and one other member in terms of section 22), the making of rules regulating Tribunal procedures,²³⁶ the appointment of administrative and investigative support for the Tribunal,²³⁷ the functions and powers of the Tribunal²³⁸ and the obligations of a Tribunal as regards its findings and reporting.²³⁹

Once a JCT has done its work and has reported to the JSC, the JSC must meet to consider the report, inviting both the complainant and respondent judge to make representations.²⁴⁰ After considering all the material before it, the JSC must make a finding either that the misconduct is so grave that impeachment is called for, in which case it sends a report to the Speaker of the National Assembly, or that the misconduct is not so serious as to warrant impeachment, but still needs corrective action, in which case it may impose any of the sanctions set out in s 17(8). The sanctions for non-compliance with the jurisdiction and the process of a Tribunal are serious.²⁴¹

The combination of a JCC, which is a standing committee of the JSC, and a JCT, which is convened as the need for such a forum arises, seemed on paper to offer good prospects for ensuring that instances of gross judicial misconduct are resolved fairly and promptly. However, the JSC's track record during the period under review

²³⁵ Ibid, s 19. The JSC must also inform the President that it has requested the appointment of a Tribunal, and advise him as to the desirability of suspending the respondent judge from office while the investigation runs its course (s 19(4)).

²³⁶ Ibid, s 25.

²³⁷ Ibid, s 24.

²³⁸ Ibid, ss 27-32. The Tribunal must proceed with its work without unreasonable delay, generally functions behind closed doors, may subpoena witnesses, must report any evidence which discloses the commission of an offence to the National Director of Public Prosecutions, and so on.

²³⁹ Ibid, s 33.

²⁴⁰ Ibid, s 20.

²⁴¹ Ibid, s 34.

has shown that the current system of dealing with judicial complaints – at least in respect of gross misconduct – is broken.

We have divided our discussion into two parts: the JSC’s management of complaints regarding conduct that is short of gross misconduct, and the JSC’s management of complaints of gross misconduct in respect of which it has established a JCT.

4.3 JSC’s performance in resolving complaints of conduct short of gross misconduct

Given the JSC’s failure to file Annual Reports for most of the period under review and the often understandable confidentiality afforded to complaints made against judges, there is limited information available regarding complaints that do not warrant the establishment of a JCT.

Annexure E sets out the number of complaints filed, resolved and outstanding in respect of each court. In the 2017-2018 financial year 71 out of 90 complaints were resolved; in the 2018-2019 financial year 57 out of 77 complaints were resolved; in the 2019-2020 financial year 70 out of 99 complaints were resolved; and in the 2020-2021 financial year 81 out of 162 complaints were resolved. These statistics are very basic and distinctly unhelpful: rolling over statistics from year to year cannot accurately or reliably indicate the time-lag, especially in respect of “difficult” cases. However, the numbers alone indicate that the JSC has had some success in resolving these complaints relatively timeously, although reported and anecdotal accounts seem to belie this conclusion.

Two recent examples serve as an illustration. In the first, a complaint was made against Judge Kathree-Setiloane by a former law clerk shortly after the April 2019 round of interviews.²⁴² It related to an incident where Judge Kathree-Setiloane had apparently created an impression that her clerks had made an error that was in fact

²⁴² Rabkin (2022) “High court judge should apologise to clerk for wrongly implying mistake.” *Sunday Times* available at <https://www.timeslive.co.za/sunday-times-daily/news/2022-07-15-high-court-judge-should-apologise-to-clerk-for-wrongly-implying-mistake/> (accessed July 2022).

hers.²⁴³ It was only in July 2022 that the JCC made a finding on this complaint.²⁴⁴ It is inexplicable that the resolution of a relatively straightforward complaint took over three years.

A second example further illustrates the breakdown in the disciplinary machinery of the JSC. In a televised interview after his appointment to the Constitutional Court was announced,²⁴⁵ Judge Rogers was asked about a complaint filed against him with the JSC by attorney (for Judge Hlophe, among others) Barnabas Xulu for refusing to share a bench with Judge Parker. In response, he said that the complaint had been filed 15 months before and that the JSC had never informed him or asked for a response (and that it was, in any event, a baseless claim that would be fully defended if needed).

The JSC has shown, recently, that its disciplinary arm can act swiftly when there is sufficient internal will. Justice Kriegler, the chair of FUL, has been an outspoken critic of the JSC's failure to act decisively in respect of the complaints lodged against Judge Hlophe. In April 2021, Vuyani Ngalwana SC lodged a complaint against Justice Kriegler alleging that he had contravened the Code of Judicial Conduct on several occasions by his public criticism of another judge.

Judge Zondi, on behalf of the JCC, moved relatively quickly (13 months), handing down his decision in late July 2022.²⁴⁶ He dismissed all but one of the complaints, finding that a reported statement attributed to Justice Kriegler in early March 2021 – that Judge Hlophe was unfit to be a judge – contravened the Code. While Justice Kriegler was found to have breached the Code by making a disparaging remark about Judge Hlophe, the latter's allegation that Langa CJ and Moseneke DCJ had conspired to block his career and his more recent allegation that Mogoeng CJ had plotted against him were not taken up as manifestations of misconduct. Justice

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Interview with Judge Rogers (2022) available at https://www.youtube.com/watch?v=nagaVR_MA5w (accessed July 2022).

²⁴⁶ Judicial Conduct Committee Ref No: JSC/904/21.

Kriegler was ordered to retract the statement²⁴⁷ but has subsequently appealed this decision.

It is difficult then to draw any conclusions on the JSC's performance in dealing with complaints of this kind during the period under review. It is unclear whether the statistics represent a true reflection of the number of complaints filed (given the experience of Judge Rogers) and whether some of the complaints marked "unresolved" have been outstanding for many years (as is the case with the complaint against Judge Kathree-Setiloane). It is obviously undesirable to have complaints against judges either being mislaid or remaining unresolved for extended periods, first, because of the obvious prejudice both to the administration of justice and to the judge who is the subject of the complaint, and secondly, given the disabling effect on candidacies while complaints remain undetermined. To this end, we have made proposals below for streamlining what seems to be a cumbersome and time-consuming process.

4.4 Review of the JSC's performance in matters necessitating the establishment of a JCT

During the period under review a few disciplinary matters have dominated both the JSC's and the media's attention. They are all matters in which the complaints lodged with the JSC led to the convening of a JCT. They involve serious accusations against judges that, if substantiated, would bring the reputation of the judiciary into disrepute. Each of these matters has, in turn, been compounded in its negative impact by the JSC's inability to bring them to satisfactory finality within a reasonable timeframe. It is telling that only one of these complaints of gross misconduct has been finalised during the period under review.

In fairness to the JSC, it cannot be said that *all* of the delays in the finalisation of these matters are its fault, with the implicated judges and others commencing related litigation. However, there is no doubt that the JSC has not pursued these matters

²⁴⁷ Ibid at para 43.

with any degree of fervour and, to compound this, has made grave errors of process and judgement along the way.

We shall look at the background and current status of each of these matters in turn before proposing amendments to streamline the process.

4.4.1 Judge Hlophe

At the commencement of the period under review in this report, 2009, Judge Hlophe was already well entrenched in the media spotlight, primarily for his involvement in two matters.

In the first,²⁴⁸ it had come to light that the judge had received regular monthly payments from an asset management company, Oasis, which had then sought and obtained his permission to sue one of his fellow judges, Judge Desai, for defamation.²⁴⁹ After initially denying that any money had been received, Judge Hlophe explained that these had been “travelling expenses” incurred in his service as chair of a trust run by the company. However, the size and regularity of the payments belied this explanation and they seemed more in the nature of a retainer.²⁵⁰ Whatever the pretext for the payments, they fell foul of the statutory and ethical rule that judges may receive no remuneration other than what is paid to them by the State unless they have the permission of the Minister of Justice to do so.²⁵¹ Judge Hlophe claimed that he had been given oral permission by the former Minister,

²⁴⁸ For a detailed explanation of the lengthy history of this matter, see Myburgh (2007) “Judge Hlophe and Oasis.” *Politicsweb* available at <https://www.politicsweb.co.za/news-and-analysis/judge-hlophe-and-oasis> (accessed July 2022).

²⁴⁹ In terms of s 11 of the Supreme Court Act (above n 226), leave to sue a judge in a civil matter had to be sought from that judge’s head of court. The requirement now appears in s 47 of the Superior Courts Act.

²⁵⁰ Joubert and Dawes (2007) “Hlophe – damning new facts.” *Mail & Guardian* available at <https://www.pressreader.com/south-africa/mail-guardian/20070713/281586646190586> (accessed July 2022). The documents subsequently discovered by Oasis in the defamation suit against Judge Desai described the amounts as “consulting fees” or “advisory fees”. The amounts totalled approximately R467 500 (Kriegler (2007) above n 223).

²⁵¹ s 11 of the Supreme Court Act (above n 226) and s 2(6) of the Judges’ Remuneration and Conditions of Employment Act 47 of 2001.

by then deceased, but not that he had been permitted to receive any form of remuneration, and no record of such permission existed.²⁵²

However, in October 2007, by the narrowest majority, the JSC as then composed resolved that no formal hearing would be held because the available evidence did not amount to *prima facie* proof of gross misconduct.²⁵³ The JSC declined to conduct a proper inquiry (a hearing and the testing of oral evidence), the inarticulate premise being that judges do not lie and cannot be cross-examined to test the veracity of their averments. This fiction persisted and hamstrung the 2008/9 inquiry into the Constitutional Court complaint. The JSC's unwillingness to proceed to the next stage caused a public outcry as well as deep unease in the legal community.²⁵⁴

In the second matter, Judge Hlophe had submitted, direct to the Minister and without notice to those named in it, a substantial report on what he described as racist practices within the Cape legal community.²⁵⁵ The report found its way into the media. The heads of court²⁵⁶ then issued a report on racism and sexism in the judiciary which, while acknowledging the presence of racist practices and attitudes within the legal profession and courts generally, noted that those named by Judge Hlophe had largely denied his allegations.²⁵⁷ The heads of court recommended a

²⁵² This was contrary to the practice in almost every other such grant of permission by the Minister, as subsequent enquiries revealed. This information was supplied in a letter from the Minister of Justice in response to an enquiry from the DGRU at the University of Cape Town. The letter, dated 9 May 2009, cannot be traced by the DGRU.

See Myburgh (2007) above n 248. In August 2006, "the Minister of Justice and Constitutional Development, Bridgette [sic] Mabandla, stated - in response to a parliamentary question from the Democratic Alliance - that she 'could not find any indication in our system that Judge President Hlophe applied for and/or was given permission by any of my predecessors to perform remunerated work outside his judicial office (before his October 2005 application)'."

²⁵³ Hoffman (2018) "The Justice John Hlophe Inquiry Papers: Going nowhere fast." *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2018-08-08-the-justice-john-hlophe-inquiry-papers-going-nowhere-fast/> (accessed July 2022).

²⁵⁴ See, for example, Kriegler (2007) above n 223; Public Statement by Senior Counsel at the Cape Bar. *Advocate* (December 2017) available at <https://www.gcbsa.co.za/law-journals/2007/december/2007-december-vol020-no3-pp33-34.pdf> (accessed July 2022); Hoffman, (2018) above n 253. One can but wonder how much of the damage done to the credibility and standing of the JSC and the WCHC judiciary could have been spared if only the JSC had done its duty in regard to Judge Hlophe back in October 2007.

²⁵⁵ *Report on Racism in the Cape Provincial Division* (2005). For discussion see Davis, Marcus & Klaaren "The administration of justice" 2005 AS 816 at 817 *et seq.*

²⁵⁶ An informal grouping, comprising the Chief Justice as Chair, the President of the SCA, and all Judges President.

²⁵⁷ *Report and Recommendations on Racism and Sexism Adopted by the Heads of Courts* (2005).

dispute resolution mechanism for incidents that might arise in the future, while endorsing the necessity for judicial training on issues of diversity.²⁵⁸

Shortly after the resolution of these two issues, on 30 May 2008 the Justices of the Constitutional Court registered a complaint with the JSC against Judge Hlophe. The complaint alleged that the judge had attempted to interfere improperly with the resolution of an appeal to that court by Mr Jacob Zuma and Thint Pty Limited. Judge Hlophe had allegedly done so by meeting two of the justices – Justice Nkabinde and Acting Justice Jafta – at his request, and discussing various aspects of the case with each of them, during which he sought to influence them in favour of Mr Zuma.²⁵⁹ Judge Hlophe filed a countercomplaint alleging that his rights to dignity, privacy, equality, procedural fairness and access to courts had been infringed and that the complaint had ultimately been politically motivated and aimed at removing him from office at all costs.²⁶⁰

The JSC started its investigations with some energy, deciding to refer the matter to oral evidence on 5 July 2008, shortly after the complaint and countercomplaint were made.²⁶¹ After multiple postponements ostensibly due to Judge Hlophe's ill health and to his appointing new counsel who then needed time to prepare, the JSC refused a further postponement on 7 April 2009 and commenced proceedings in his absence. After these proceedings were adjourned to enable the parties to make written submissions, Judge Hlophe launched proceedings in the South Gauteng High Court to have the proceedings declared unlawful and void *ab initio*. The Court ordered that the proceedings be started *de novo*.²⁶²

When the JSC reconvened on the matter in July 2009, it appointed a sub-committee consisting of Judge Ngoepe (Judge President of the Gauteng High Court), Adv

²⁵⁸ Ibid. The mechanism emphasised speed, mediation and informality, with the creation of national and local committees to which complaints about racist or sexist practices could be made.

²⁵⁹ *Justices of the Constitutional Court v Hlophe* 2021 JCT (Hlophe JCT decision). The JCT summarises – as far as is possible – the background to this matter. This decision is available at https://www.judiciary.org.za/images/news/2021/Tribunal_Decision_on_Complaint_Against_Hlophe_JP.pdf (accessed July 2022).

²⁶⁰ Ibid at paras 8 and 12.

²⁶¹ Ibid at para 13.

²⁶² *Hlophe v The Judicial Service Commission & others* [2009] ZAGPJHC 19.

Moerane SC and Adv Semenya SC to conduct interviews with the parties behind closed doors.²⁶³ Crucially, despite a direct conflict as to what was said by Judge Hlophe to the two justices, the sub-committee decided and the JSC accepted not to test the conflicting versions by cross-examination. In August 2009, the JSC inexplicably decided that neither the complaint nor the countercomplaint disclosed *prima facie* evidence of gross judicial misconduct so as to warrant a full inquiry and the JSC considered the matters finalised.²⁶⁴ In the time between the lodging of the complaint and the countercomplaint, the initial investigations and this ultimate decision, the JSC's membership had changed substantially.²⁶⁵ Commentators were shocked by this decision and applications for its review were launched in two different High Courts.

In the WCHC, Western Cape Premier Helen Zille sought to set aside the decision on the basis that the JSC was not properly constituted when it took the decision and that the decision was not supported by a majority as required by section 178(6) of the Constitution. The High Court upheld these contentions and set aside the decision.²⁶⁶ The Supreme Court of Appeal dismissed the JSC's subsequent appeal.²⁶⁷

In the North Gauteng High Court, FUL sought to set aside the JSC's decision taken in mid-2009 to hold a preliminary inquiry on the basis of which it arrived at its final decision, as well as that final decision.²⁶⁸ Judge Mabuse made a number of findings as to the status of particular meetings, the decisions taken at them and the rights of certain members to attend, but found the process generally to have been lawful and not tainted by irrationality. The application was thus dismissed. On appeal to the

²⁶³ Hlophe JCT decision above n 259 at para 16.

²⁶⁴ Ibid.

²⁶⁵ This was directly the result of the intervening general election in 2009, which meant that the Minister of Justice and the four presidential nominees had been replaced. In addition, the Chief Justice had recused himself as an interested party. The acting chair of the JSC, the President of the SCA, was newly in office, as was the academic representative and one of the advocates. The decision was taken by a majority vote of six to four.

²⁶⁶ *Premier, Western Cape v Acting Chairperson, Judicial Service Commission* 2010 (5) SA 634 (WCC).

²⁶⁷ *Acting Chairperson: Judicial Service Commission & others v Premier of the Western Cape Province* [2011] ZASCA 53 (Premier SCA judgment).

²⁶⁸ Hlophe JCT decision above n 259 at para 18.

SCA, the court set aside the High Court order insofar as the JSC's decision to dismiss the complaint by the Constitutional Court judges was concerned but upheld it in respect of the JSC's decision to dismiss Judge Hlophe's countercomplaint.²⁶⁹

Both the SCA judgments were critical of the manner in which the JSC had conducted itself throughout the proceedings²⁷⁰ and in particular of the JSC's disconcerting and unconstitutional argument, in both matters, that the decisions should stand, despite the numerous irregularities, owing to concerns regarding the intervening delay and the associated costs.²⁷¹

Judge Hlophe appealed both of these decisions to the Constitutional Court, notwithstanding the presence on the bench of several judges who had complained against him in mid-2008.²⁷² The applications for leave to appeal by Judge Hlophe were dismissed on 30 March 2012 and the court referred the complaint of the Constitutional Court justices back to the JSC despite its apparent reluctance to deal with it. (Judge Hlophe's countercomplaint was, however, no longer a live issue as it had been dismissed by the SCA in the *Freedom Under Law* decision).

²⁶⁹*Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* [2011] ZASCA 59 (FUL SCA judgment).

²⁷⁰ For example, in dismissing the JSC's arguments about the majority required for it to make a decision, in the *Premier* SCA judgment the court censured the JSC for its apparent reluctance to account for its internal processes – for it had refused on “policy grounds” to disclose how members had voted when the JSC decided not to pursue the investigation. Cloete JA remarked at para 19:

An evasive answer like this by senior counsel [the deponent member of the JSC] on behalf of a body like the JSC cannot be countenanced. It is the number of members who voted either way, not their identities, that is relevant. ... Nor is this attitude reconcilable with our constitutional democracy which values openness and transparency.

²⁷¹ At para 25 of the *Premier* SCA judgment, the court notes:

I pause to remark that it would indeed be a sorry day for our constitutional democracy were serious allegations of judicial misconduct to be swept under the carpet for reasons of pragmatism and practicality. ... The public interest demands that the allegations be properly investigated, irrespective of the wishes of those involved.

Again, at paras 71 and 73 of the *FUL* SCA judgment, the court says:

It cannot be in the interests of the judiciary, the legal system, the country or the public to sweep the allegation under the carpet because it is being denied by the accused judge, or because an investigation will be expensive, or because the matter has continued for a long time.

²⁷² *Hlophe v Premier of the Western Cape Province; Hlophe v Freedom Under Law* [2012] ZACC 4.

In the interim, the JSC Act had been amended in 2008 and a new statutory regime to deal with complaints against judges had come into force in 2010. The amendments provided for the establishment of a JCC and a JCT to deal with complaints against judges. The new provisions of the Act set out in some detail the procedures to be followed in relation to the adjudication of complaints. During April 2012, the JSC referred the complaint by the Justices of the Constitutional Court to the JCC, chaired by Judge Musi (Judge President of the Free State High Court). On 17 October 2012, the JCC recommended to the JSC that a JCT be appointed to investigate the complaint.

The JCT began hearing the Hlophe matter on 30 September 2013; however, on 1 October 2013 Justices Nkabinde and Jafta – the two judges approached by Judge Hlophe – challenged the jurisdiction of the JCT to hear the matter, essentially on the grounds that the complaint, lodged in 2008, should have been adjudicated in terms of the Rules existing at that time and not in terms of the subsequently amended regulations.²⁷³ The JCT rejected these contentions in a written ruling.²⁷⁴ The two justices then launched a High Court application challenging the jurisdiction of the tribunal as well as the constitutionality of a provision of the JSC Act.²⁷⁵ The High Court application was dismissed on 26 September 2014 by Justices Mayat, Claassen and Kgomo.²⁷⁶ The High Court refused leave to appeal, but the SCA granted leave on the basis that this was a matter where leave ought to be granted for reasons of finality given the importance of the case in relation to the administration of justice.²⁷⁷

On 10 March 2016, the SCA, in a judgment penned by Navsa ADP, dismissed the appeal in a scathing manner. Throughout the judgment, the Court expressed its

²⁷³ Hlophe JCT decision above n 259 at paras 23-24.

²⁷⁴ Ibid at para 24.

²⁷⁵ Above n 8, s 24(1), which empowers the president of a tribunal to appoint a public prosecutor to gather and present evidence against a judge charged with misconduct. See e.g. Rabkin (2013) "Judges not backing off in Hlophe case." *Business Day* 22 October 2013 available at <https://www.businesslive.co.za/bd/national/2013-10-22-judges-not-backing-off-in-hlophe-case/> (accessed July 2022).

²⁷⁶ *Nkabinde and Another v Judicial Service Commission President of the Judicial Conduct Tribunal and Others* [2014] ZAGPJHC 217.

²⁷⁷ *Nkabinde and another v Judicial Service Commission and others* [2016] ZASCA 12.

great dismay with the fact that the matter had remained unresolved since 2008 and said the following in respect of the attendant damage that this undue delay had caused to the judicial image in South Africa:

The judicial image in South Africa cannot afford to be further tarnished in this manner. As can be seen from the extensive litigation referred to above, each of the protagonists, including the JSC, has contributed to the delay. There should be a concerted effort and determination on the part of everyone concerned for the matter finally to be put to rest. It should be dealt with and finalised with all deliberate speed, with due regard to the rights of all concerned. After all, as observed by Horace as long ago as approximately 13 BC, '[a] good and faithful judge ever prefers the honourable to the expedient'. The country expects nothing less.²⁷⁸ (Footnotes omitted; emphasis added.)

In a lengthy judgment, the Court examined and rejected each argument raised by Justices Nkabinde and Jafta. The Court held that the matter had proceeded, lawfully and correctly, in terms of the amended legislation, saying that given *inter alia* the lengthy history of the matter and the change in the composition of the JSC, “the most sensible, fair and just method of proceeding would be to start the inquiry in terms of the provisions of the [amended Act].”²⁷⁹ The Court rejected the argument that there was no proper complaint, made on oath, before the Tribunal, finding that the Justices’ argument on this score was “difficult to comprehend”.²⁸⁰ Finally, the Court held that the impugned provisions of the JSC Act were constitutionally compliant.

Given the tone of the SCA’s judgment, it was surprising that Justices Nkabinde and Jafta appealed this decision to the Constitutional Court. On 16 May 2016, the Constitutional Court dismissed the application for leave to appeal “... in the light of the principle regulating the position where a court is incapacitated because of conflicts disabling its members from sitting to determine the merits of the application, as set out in *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Others 2012 (6) SA 13 (CC) ...*”.²⁸¹

²⁷⁸ Ibid at para 104.

²⁷⁹ Ibid at para 85.

²⁸⁰ Ibid at para 87.

²⁸¹ See *Nkabinde and another v Judicial Service Commission and others* [\[2016\] ZACC 25](#) at para 1.

In an even more incomprehensible turn of events, Justices Nkabinde and Jafta then applied for the rescission of this order in terms of Rule 42(1)(a) of the Constitutional Court Rules, which allows that court to rescind an order in circumstances where it is erroneously granted in the absence of one of the parties affected by it.²⁸² The Justices argued first, that the court decided the matter on the basis of an issue not raised by the parties, thereby depriving them of their right to make representations and ultimately infringing their right of access to courts, and second, that the order was irregular in that disqualified members of the Court participated in the decision.

The Court dismissed this decision on 24 August 2016. It held that the Justices' reliance on Rule 42(1)(a) was wholly inappropriate given that the order was made at the Judges Conference, where no applicant has a right to make representations, a procedure with which the applicants were *au fait* – this rule could be relied on only when a decision was made in circumstances where a litigant was entitled to be present in court but a decision was made in their absence. The Court held that this error by the applicants was sufficient alone to dismiss the application but went on to address and dismiss the other arguments they had raised. The Court concluded by saying:

*[W]e would be failing in our duty if we did not take this opportunity to emphasise that it is in the interests of justice that the matter of the complaint against Judge President Hlophe be dealt with and concluded without any further delay. The events that gave rise to the complaint occurred in 2008. ... It is in the interests of justice that this matter be brought to finality.*²⁸³

After the dismissal of this application, the JCT was scheduled to reconvene on 2 July 2018. However, the matter was postponed *sine die* when one of the members of the panel, Judge Musi, recused himself after Judge Hlophe applied for his recusal alleging that he had made disparaging remarks about Judge Hlophe at a social gathering in 2017, even though he denied these allegations.²⁸⁴ On 20 August 2018,

²⁸² Ibid.

²⁸³ Ibid at para 29.

²⁸⁴ Maughan (2018) "Mogoeng Mogoeng warns John Hlophe's misconduct matter will take 'very long'." *Business Day* available at <https://www.businesslive.co.za/bd/national/2018-11-26-mogoeng-mogoeng--warns-john-hlophes-misc-onduct-matter-will-take-very-long/> (accessed July 2022).

the Chief Justice appointed a new member to replace Judge Musi.²⁸⁵ However, on account of several further delays occasioned by a dispute between Judge Hlophe and the State Attorney in respect of responsibility for settling his legal fees, the unavailability of Judge Hlophe's lead counsel – Griffiths QC – and the indisposition of Justice Jafta, the matter was heard by the JCT only in December 2020. This was more than twelve years after the complaint had been lodged with the JSC.

The JCT gave its decision on 9 April 2021, unanimously concluding that Judge Hlophe was guilty of gross misconduct as envisaged in section 177 of the Constitution.²⁸⁶ On 25 August 2021 the JSC announced that by a majority of eight to four it endorsed the findings of the JCT and would recommend impeachment.²⁸⁷ Subsequent to this, Judge Hlophe instituted proceedings in the High Court to set aside the JSC's decision and his counsel was vocal about the JSC's "sloppy handling" of the matter throughout the lengthy disciplinary process.²⁸⁸ The High Court dismissed this application on 5 May 2022.²⁸⁹ Leave to appeal to the SCA has subsequently been granted by reason of the "issues of public importance that will have an effect on future matters".²⁹⁰

On 26 July 2022, almost a full year after the JSC endorsed the JCT's findings and recommended impeachment, the JSC finally recommended Judge Hlophe's suspension.²⁹¹ It is astonishing that it took so long to do so: first, pending the finalisation of the disciplinary process, which Judge Hlophe has obstructed at each

²⁸⁵ Hlophe JCT decision above n 259 at para 27.

²⁸⁶ Hlophe JCT decision above n 259 at para 124.

²⁸⁷ Judges Matter "Judicial Conduct Tribunal for Judge Hlophe." Judges Matter website available at <https://www.judgesmatter.co.za/conduct/hlophe-tribunal-2008-2019/> (accessed July 2022).

²⁸⁸ Evans (2022) "Hlophe Lawyer slams JSC's mishandling of misconduct case." *News24* available at <https://www.news24.com/news24/southafrica/news/hlophe-lawyer-slams-jscs-sloppy-handling-of-misc-onduct-case-20220216> (accessed July 2022).

²⁸⁹ *Hlophe v Judicial Service Commission and Others* [2022] ZAGPJHC 276.

²⁹⁰ Wicks (2022) "Hlophe refuses to go down without a fight as he battles to hold onto his office." *EWN* available at <https://ewn.co.za/2022/05/20/hlophe-refuses-to-go-down-without-a-fight-as-he-battles-to-hold-onto-his-office> (accessed July 2022).

²⁹¹ Kobokana (2022) "JSC recommends Western Cape Judge President John Hlophe is suspended." *SABCnews* available at <https://www.sabcnews.com/sabcnews/jsc-recommends-western-cape-judge-president-john-hlophe-be-suspended/> (accessed August 2022).

opportunity,²⁹² and second, even after it had found him guilty of gross misconduct and recommended his impeachment.

While the JCT phase of the complaint by the Constitutional Court justices was being ground out slowly, as described, further mischief occurred, which might have been avoided had the JSC recommended suspension of Hlophe JP at an appropriately early stage. In January 2020, Judge Goliath, Deputy Judge President of the WCHC, filed a complaint against Judge Hlophe and his wife, Judge Salie-Hlophe. In it, Judge Goliath alleged, *inter alia*, that Judge Hlophe had assaulted the WCHC's Judge Parker; that he had used abusive language in his interactions with her; and that he had unlawfully used his power to divert duties away from her as Deputy Judge President.²⁹³ Judge Hlophe, in response, filed a complaint against Judge Goliath alleging disclosure of confidential information relating to active matters; gross incompetence; acts of racism; and leaking her complaint to the media. The matter was referred by then Deputy Chief Justice Zondo to a three-person panel of the JCC. On 17 March 2020, it decided that the complaint against Judge Hlophe as well as Judge Hlophe's complaint against Judge Goliath were to be referred to an inquiry in terms of section 17(2) of the JSC Act.

Chief Justice Mogoeng²⁹⁴ then, in terms of section 17(4)(c) of the JSC Act, recommended that the JCC consider recommending to the JSC that a JCT be established to investigate "allegations of assault, use of abusive language and abuse of power in relation to the office of DJP levelled by Goliath DJP against Hlophe JP."²⁹⁵ In the same decision, Judge Hlophe's complaints levelled at Judge Goliath

²⁹² This is a recommendation that FUL has called for on several occasions: Mabuza (2022) "Now that Mkhwebane has been suspended why not Judge John Hlophe: Freedom Under Law." *Sowetan Live* available at <https://www.sowetanlive.co.za/news/south-africa/2022-06-11-now-that-mkhwebane-has-been-suspended-why-not-judge-john-hlophe-freedom-under-law/> (accessed July 2022).

²⁹³ This is a matter that has drawn almost all the judges of the WCHC into the fray and is discussed further below in part 4.4.5 of this section.

²⁹⁴ The Chief Justice was necessarily seized of the matter because all three judges (Zondi and Dambuza JJA and Mojapelo DJP) had prior involvement in the dispute, see para 3 of the CJ's decision, n 295.

²⁹⁵ *Goliath DJP v Hlophe JP; Hlophe JP v Goliath DJP* Judicial Conduct Committee decision per Chief Justice Mogoeng available at <http://www.saflii.org/images/CJdecision.pdf> (accessed July 2022).

were dismissed.²⁹⁶ This matter is not referred to in the JSC's latest Annual Report and its current status within the JSC's disciplinary process is difficult to ascertain with no information being publicly available. It does seem, however, to be following the JSC's general trend of inordinate delay in resolving matters timeously – the complaint by Judge Goliath having been filed at the beginning of 2020.

In subsequent correspondence with the JSC, FUL has confirmed that Judge Hlophe appealed to the JCC's Appeal Committee against the findings and recommendations given by Chief Justice Mogoeng following on from the section 17 inquiry. This appeal was heard in January 2021 and judgment was reserved. At the time of writing, some 22 months later, the JCC's Appeal Committee is, inexplicably, yet to give a decision.

It should be noted that at the October 2022 sitting of the JSC Judge Hlophe, notwithstanding the JSC's finding that he was guilty of gross misconduct, notwithstanding its recommendation that he be suspended, and notwithstanding the pending proceedings against him arising from the grave allegations by his deputy, not only attended the session dealing with appointments to the WCHC but actively engaged in interrogating candidates.

4.4.2 Judge Motata

The matter of Judge Nkola John Motata shares two important characteristics with the Hlophe saga. It reveals the JSC's ineptitude or unwillingness to exercise its disciplinary powers decisively, even where, as in this instance, criminal conduct has been established in a court of law, and also that the judge concerned has used every avenue provided by the law (as is his right under the Constitution) to stall the process by seeking the assistance of the courts.²⁹⁷

Judge Motata of the North Gauteng High Court was convicted in the Johannesburg Regional Court of driving a vehicle while under the influence of intoxicating liquor and sentenced to pay a fine of R20 000 or serve 12 months' imprisonment. In

²⁹⁶ Ibid at para 25.

²⁹⁷ Corder and Solik (2021) above n 224 at 329.

November 2010 a full bench of the South Gauteng High Court dismissed Judge Motata's appeal against this conviction.²⁹⁸

Three complaints were lodged with the JSC, by the Catholic Commission for Justice and Peace, Afriforum (Afriforum Complaint) and Advocate GC Pretorius SC (Pretorius Complaint). The first two complaints were similar and addressed the way in which Judge Motata had acted at the scene of his drunk-driving accident and his alleged abusive and racist comments. The essence of Advocate Pretorius's complaint was that the way in which Judge Motata conducted his defence in the criminal trial²⁹⁹ was at odds with the ethics of a judicial officer.³⁰⁰

In May 2011 the JCC determined that if the conduct complained of was found to have been committed it would constitute gross misconduct³⁰¹ and, as a result, referred the matter to a JCT to investigate the complaints. Early in 2012 Judge Motata launched proceedings to review the decisions of the JSC and to demand, among other things, that the JSC be directed to stop its investigation and that his suspension from the bench be lifted.³⁰² This application was dismissed.

The JCT constituted to deal with this matter held hearings in January 2018³⁰³ – some eight years after the conduct giving rise to the complaint – and on 12 April 2018 it handed down its findings and recommendation. The JCT concluded that Judge

²⁹⁸ *Motata v S* [2010] ZAGPJHC 134.

²⁹⁹ Judge Motata denied having driven under the influence of alcohol. As Advocate Pretorius put it in his complaint "it is one thing for an accused person to put the State to the proof of its case, but it is an entirely different matter for a Judge to publicly state a fact that he knows is false, build a defence on such an untruth and then accuse witnesses of manipulating evidence and being racist" (para 11 of *In re: Judge NJ Motata* (2018) Report of the Judicial Conduct Tribunal available at <http://www.judgesmatter.co.za/wp-content/uploads/2018/04/Judge-Motata-Tribunal-Report-April-2018.pdf> (accessed July 2022) (Motata JCT decision)).

³⁰⁰ *Ibid* para 6.

³⁰¹ *Ibid* at para 7. The JCC did remark that, out of context, a conviction for driving under the influence may not constitute gross misconduct and that a judge – as is any accused – is entitled to plead not guilty. However, a judge may not testify falsely or put false versions to witnesses.

³⁰² *Motata v Minister of Justice and Constitutional Development* [2012] ZAGPPHC 196. In terms of s 177(3) of the Constitution the President, acting on the advice of the JSC, may suspend from office a judge in respect of whom allegations of gross misconduct are being investigated. Judge Motata was suspended on full pay from the time of the incident of drunk driving and has subsequently retired from active service.

³⁰³ Because the JSC failed to provide Annual Reports during this period, there are no publicly available reasons for the delay between 2011/2012 and 2018.

Motata's conduct at the scene of his accident and the remarks that were made were racist and thus "impinged on and are prejudicial to the impartiality and dignity of the courts"³⁰⁴ and similarly that the lack of integrity in the manner in which the judge conducted his defence at trial, arguing that he was not drunk, a patently indefensible position given the overwhelming evidence to the contrary, was "unbecoming of a judicial officer".³⁰⁵ In conclusion, the Tribunal said the following:

*As to whether the provision of section 177(1)(a) of the Constitution is to be invoked, the question to be asked is if Judge Motata is to retain the office of a judicial officer, would this negatively affect the public confidence in the justice system? If the answer is in the affirmative, as we suggest it is, then in the discharge of our mandate we recommend to the Judicial Service Commission that the provisions of section 177(l)(a) of the Constitution be invoked in this instance.*³⁰⁶

Having considered the report from the JCT, the JSC inexplicably resolved to reject the recommendation and found that the conduct of Judge Motata did not meet the required standard of gross misconduct.³⁰⁷ The JSC found Judge Motata guilty of misconduct and imposed a fine amounting to 12 months of his current net salary, made payable to the South African Judicial Education Institute over 24 months from the date of the decision.³⁰⁸

This decision by the JSC to reject the JCT's recommendation shows a fundamental misunderstanding of both the necessary minimum standard for judicial conduct as well as its role in relation to the JCT as the primary, and specialist, fact-finding body within the disciplinary process.

FUL launched an application in the South Gauteng High Court to review and set aside the JSC's decision to reject the recommendation of the JCT on the grounds that it was unlawful, unconstitutional and irrational, and sought to substitute its

³⁰⁴ Motata JCT decision above n 299 at para 58.

³⁰⁵ Ibid at para 59.

³⁰⁶ Ibid at para 60.

³⁰⁷ JSC Annual Report 2019-2020 available at <https://www.judiciary.org.za/index.php/judicial-service-commission/jsc-annual-reports> (accessed July 2022).

³⁰⁸ Ibid.

decision with a finding of gross misconduct.³⁰⁹ The JSC opposed this application. On 12 April 2022 the High Court dismissed the application in respect of the Afriforum Complaint and remitted the Pretorius Complaint back to the JSC for consideration in terms of section 20 of the JSC Act. On 9 May 2022 FUL noted an appeal against the High Court's judgment.

Judge Motata was put on leave of absence in 2007 and retired as a judge in 2018. Whilst an impeachment would therefore have no practical effect on Motata's ability to perform day-to-day judicial functions, it would bring an end to all benefits that he receives as a retired judicial officer.

4.4.3 Judges with reserved judgments

A different area in which the JSC has exercised its disciplinary role relates to delays in the administration of justice at superior court level. After having received multiple complaints from litigants and their representatives, Judge Ngoepe (Judge President of the Gauteng High Court) lodged formal complaints with the JSC against four judges in the Pretoria High Court, Judges Mavundla, Poswa, Preller and Webster, for having reserved judgments for excessive time periods (ranging from 12 months to six years).³¹⁰ The importance of delivering judgments timeously cannot be gainsaid – it is vital not only to the individual litigants and the true fulfilment of their respective rights of access to courts but more broadly to public confidence in the judiciary.³¹¹

These complaints were lodged with the JSC in December 2008 and January 2009. As discussed above, the regulatory regime governing complaints was changed with effect from 1 June 2010.³¹² In June 2011, the JSC resolved to establish a JCT to hear

³⁰⁹ *FUL v JSC and Motata* above n 4.

³¹⁰ *Poswa v President of the Republic of South Africa and Others* [2014] ZAGPJHC 218.

³¹¹ *Ibid* at para 14. See too, for example, in respect of the impact of reserved judgments: Thamm (2022) "Backlog of WC High Court judgments affecting service delivery and livelihoods." *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2022-04-24-backlog-of-wc-high-court-judgments-affecting-service-delivery-and-livelihoods/> (accessed July 2022).

³¹² This intervening amendment also led to the litigation instituted by Justices Nkabinde and Jafta discussed above.

the complaints against the judges.³¹³ Judge Poswa, who was medically boarded and discharged from active service on 1 August 2011, instituted an application to review and set aside the JSC's decisions and to bar the JSC from pursuing any proceedings that might ultimately lead to his impeachment.³¹⁴ Ironically, the primary basis of Judge Poswa's argument was the inordinate delay by the JSC in prosecuting the complaints.³¹⁵ He also argued – similarly to the argument made by Justices Nkabinde and Jafta in their protracted rounds of litigation in the Hlophe matter – that the amendments to the disciplinary processes in the JSC Act should not have been applied retrospectively.³¹⁶ Additional grounds of review were also raised, but these were all ultimately rejected, with the following warning:

*For the applicant to complain about the delay in prosecuting the complaints lodged against him, after he had delayed in rendering judgments for up to six years, smacks of impertinence which should cause this court to show its displeasure in an appropriate way.*³¹⁷

The first time that these complaints are mentioned in the available Annual Reports of the JSC is in the 2017-2018 report, where it is recorded that the JCT met to “to take stock of what needs to be done to commence with the proceedings”. It is not entirely certain what the JCT meant by this as the regulations published in 2012³¹⁸ provide sufficient detail on the procedure for JCTs. It had, in any event, already utilised this excuse in justifying the earlier delay complained of in Judge Poswa's review application. We have been unable to locate any publicly available explanation for the delay between early 2013 and late 2017.³¹⁹

The subsequent history of this matter is set out in the available Annual Reports. The JCT hearings in respect of Judges Mavundla and Preller were held on 18-21 September 2018 and in respect of Judge Poswa, who had requested more time, on

³¹³ *Poswa v President of the Republic of South Africa and Others* above n 312 at 43.

³¹⁴ *Ibid.*

³¹⁵ *Ibid* at para 48.

³¹⁶ *Ibid.*

³¹⁷ *Ibid* at paras 50-53.

³¹⁸ *Government Gazette* No. 35802 (volume 568) 18 October 2012. Available at <http://www.saflii.org/za/gaz/ZAGovGaz/2012/767.pdf> (accessed July 2022).

³¹⁹ This is largely due to the fact that during this time the JSC did not file Annual Reports in which it is obliged to report on matters in respect of which a JCT has been convened.

5-6 December 2018. The JCT postponed Judge Webster's hearing indefinitely because of his ill health.³²⁰ In September 2019 the JCT filed its report. In respect of Judges Mavundla, Poswa and Preller, the JCT found that the judges might have made themselves guilty of misconduct not amounting to gross misconduct, and that it was open to the JSC to impose the remedies set out in section 17(8) of the JSC Act.³²¹ The JSC invited the judges to make submissions.

In the latest Annual Report,³²² the JSC reported that at its meetings held in October 2020 and January 2021 it unanimously agreed to endorse the JCT's finding of misconduct not amounting to gross misconduct. The JSC was split on the sanction to be imposed³²³ with the majority ultimately deciding that the judges, all now retired, should be directed to issue an unconditional apology to the Judge President and the litigants involved in all the cases in respect of which judgments were delayed. The minority had, in addition, wanted the respondent judges to pay the equivalent of three months' salary to the cause of training judges. The JSC, in addition, resolved to issue a reprimand to all three judges to convey its expression of disapproval for their breach of the judicial function. Further proceedings against Judge Webster are not mentioned in the latest Annual Report.

There is a tragic irony in the fact that it took the JSC almost 14 years ultimately to rap a group of judges over the knuckles for not handing down judgments timeously. One can only wonder whether an apology issued by a now retired judge would be of any value to an aggrieved litigant who had filed a complaint with the Judge President over 14 years ago.

³²⁰ JSC Annual Report 2018-2019 available at <https://www.judiciary.org.za/index.php/judicial-service-commission/jsc-annual-reports> (accessed July 2022) at 17. The JCT has been unable to continue proceedings against Judge Webster because of his ill health.

³²¹ JSC Annual Report 2019-2020 above n 307 at 21. These remedial steps include: (a) apologising to the complainant, in a manner specified; (b) a reprimand; (c) a written warning; (d) any form of compensation; (e) subject to ss (9) appropriate counselling; (f) subject to ss (9) attendance at a specific training course; (g) subject to ss (9) any other appropriate corrective measure.

³²² JSC Annual Report 2020-2021 above n 7.

³²³ Ibid.

4.4.4 Judge Makhubele

In early 2018 the civil society group #UniteBehind lodged a complaint with the JSC against Judge Makhubele.³²⁴ It alleged, *inter alia*, that Judge Makhubele had improperly held a dual status as both a judge of the High Court and Chairperson of the Interim Board of Control of the Passenger Rail Agency of South Africa (PRASA) and that, during that period, she had engaged in certain other conduct that constituted gross misconduct.³²⁵

Judge Makhubele originally challenged the JSC's jurisdiction to investigate the matter, arguing that the conduct complained of had been committed before she became a judge. Although she was appointed a High Court judge with effect from 1 January 2018, Judge Makhubele contends that she was not yet a judge because she had not yet taken the oath of office.³²⁶ Judge Makhubele subsequently conceded the JSC's authority to investigate the matter.

The JCC recommended that a JCT be constituted to investigate the conduct which, if proven, would likely lead to a finding of gross misconduct.³²⁷ On 9 October 2020, the JSC considered this recommendation and submissions from the parties and recommended the establishment of a JCT. It further resolved to advise the President that it was desirable to suspend Judge Makhubele from office in terms of section 177(3) of the Constitution with the condition that she be allowed to finalise her

³²⁴ Stent (2022(a)) "New Judge appointed to take over Judge Makhubele conduct hearing." *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2022-06-14-new-judge-appointed-to-take-over-judge-makhubele-conduct-hearing/> (accessed July 2022).

³²⁵ #UniteBehind v Judge TN Makhubele JCC decision. Available at <https://www.groundup.org.za/media/uploads/documents/JCCDecisionUniteBehindvMakhubeleJ23March2020.pdf> (accessed July 2022) (Makhubele JCC decision). The further conduct complained of is discussed by Judges Matter (2022) "The JSC's failure to deal with judicial misconduct: the Makhubele case." Judges Matter website available at <https://www.judgesmatter.co.za/opinions/the-jscs-failure-to-deal-with-judicial-misconduct-the-makhubele-case/> (accessed July 2022). The piece includes the complaint that "during her stay as PRASA board chairperson Makhubele improperly interfered with litigation brought against the rail agency, going so far as assisting Siyaya Group – a company they allege to have been involved in corruption and state capture – to obtain a court settlement worth over R50 million against PRASA. These latter allegations also form part of the Zondo Commission's investigation ..."

³²⁶ Makhubele JCC decision above n 325 at para 2.

³²⁷ Ibid.

part-heard matters and reserved judgments during her suspension.³²⁸ The JCT was established and Judge Makhubele was duly suspended by the President.³²⁹

Judge Makhubele instituted proceedings in November 2020 to review the JSC's recommendation of suspension;³³⁰ however, when the JSC filed a counter-application which asked the Court to set aside her appointment as a judge, and to bar her from performing any judicial functions or practising as an advocate, Judge Makhubele withdrew her application, tendering costs.³³¹

However, almost two years later, the JCT has not yet convened to investigate the complaint. The most recent delay was caused by the unwilling recusal of Judge Brand from the JCT in January 2022 after Judge Makhubele highlighted and complained of his involvement in certifying a settlement against PRASA.³³² #UniteBehind has criticised Judge Brand's decision to recuse himself at this late stage and in circumstances where he believed it was not warranted.³³³ This was likely a decision made for the sake of advancing the prosecution of the claim timeously and without leaving room for potential complaint by Judge Makhubele.³³⁴

Six months have passed since Judge Brand's recusal and the JSC has only just, at the time of writing, appointed a replacement on the JCT, retired Judge President

³²⁸ JSC Annual Report 2020–2021 above n 7.

³²⁹ Ibid.

³³⁰ Stent (2020) Judge Makhubele backs down from fight with JSC. *Ground Up* available at <https://www.groundup.org.za/article/judge-makhubele-backs-down-fight-jsc/> (accessed July 2022).

³³¹ Ibid.

³³² Stent (2022(a)) above n 324.

³³³ Stent (2022(b)) "Judge criticised for recusing himself from Makhubele misconduct hearing." *Ground Up* available at <https://www.groundup.org.za/article/tribunal-president-recuses-himself-gross-misconduct-hearing-against-judge-makhubele/> (accessed July 2022). "Achmat told GroundUp that Judge Brand's recusal was unacceptable. 'There cannot be one legal standard on recusal for the public and another that privileges judges to choose the members of tribunals expected to hear matters, big or small, involving complaints to the JSC about judicial conduct. There can be no excuse for a judge who decides to recuse themselves on the basis that their refusal to do so would embarrass the judiciary and the JSC.'"

³³⁴ This is under circumstances similar to Judge Musi's recusal from the Hlophe JCT.

Achmat Jappie.³³⁵ In correspondence dated 13 June 2022, it stated that the date and location of the JCT's hearings are yet to be confirmed.³³⁶

4.4.5 Judge Parker

The final, and most recent, matter in which the JSC has resolved to establish a JCT to investigate a complaint is the matter of Judge Parker. Two complaints have been made against Judge Parker.

The first relates to an incident which has brought the entire Western Cape Division into disrepute. We have discussed above the complaint lodged against Judge Hlophe by Judge Goliath in January 2020. Part of that complaint was an allegation that Judge Hlophe had physically assaulted Judge Parker following an altercation between the two judges regarding Judge Hlophe's wife.³³⁷ Judge Parker had, at the time of the alleged assault, deposed to an affidavit on 25 February 2019 in which he confirmed that he had been assaulted by Judge Hlophe.³³⁸ Almost a year later, and only after Judge Goliath's complaint was lodged against Judge Hlophe, did Judge Parker seek to retrieve the affidavit from Judge Wille, to whom he had entrusted it for safekeeping.³³⁹ Judge Parker subsequently denied that the assault had ever taken place, about a year after he had deposed to the affidavit.³⁴⁰

On 23 March 2020, ten judges of the Western Cape Division³⁴¹ filed a complaint with the JSC against Judge Parker in consequence of the conflicting versions of the event

³³⁵ Stent (2022(a)) above n 324.

³³⁶ Ibid.

³³⁷ Thamm (2020(a)) "Ten WC High Court judges file official complaint to the JSC in Judge President John Hlophe assault saga." *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2020-03-26-breaking-ten-wc-high-court-judges-file-official-complaint-to-the-jsc-in-judge-president-john-hlophe-assault-saga/> (accessed July 2022).

³³⁸ Thamm (2020(b)) Judiciary in crisis. *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2020-06-02-judge-president-hlophe-struck-me-with-his-fist-on-my-chest-after-repeatedly-threatening-to-f-me-up-judge-parker/> (accessed August 2022).

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ Judges D Davis, S Desai, Y S Meer, L J Bozalek, A G Binns-Ward, E T Steyn, P A L Gamble, R C A Henney, O L Rogers and M L Sher.

that he had provided over time, claiming that, as a result, he had failed to uphold the integrity of the judiciary and to act honourably in the discharge of his duties.³⁴²

The second complaint against Judge Parker was brought by the Cape Bar Council and relates to the professional affairs of Judge Parker's former law firm, which is accused by the Legal Practice Council of running client trust accounts at a deficit in the amount of R8m, and the non-disclosure of this information when Judge Parker applied for appointment to the bench.³⁴³

The JCC considered these complaints and recommended to the JSC that they be investigated by a JCT because, if the allegations were proven true, they would amount to gross misconduct. In October 2020, the JSC resolved to request the establishment of a JCT and also to advise the President that it was desirable to suspend Judge Parker, on condition that he finalise part-heard matters and reserved judgments pending the investigation.³⁴⁴ The Chief Justice appointed the JCT and the President accepted the JSC's recommendation and suspended Judge Parker from office pending finalisation of the complaints.³⁴⁵

It is at the time of writing almost two years since this decision and the JCT is yet to conduct the hearing of these complaints.

4.5 The JSC's performance in managing complaints of gross misconduct

It is difficult not to despair when reviewing the JSC's handling of these complaints which has been characterised by delay, inconsistency in the approach to suspension and constitutionally questionable decision-making.

³⁴² Thamm (2020(a)) above n 337.

³⁴³ Judges Matter "Judicial Conduct Tribunal for Judge Mushtak Parker." Judges Matter website available at <https://www.judgesmatter.co.za/conduct/parker-tribunal/#:~:text=7%20February%202020%3A%20Judge%20President,based%20on%20rumour%20and%20gossip> (accessed July 2022).

³⁴⁴ JSC Annual Report 2020-2021 above n 7 at 17.

³⁴⁵ Ibid.

The conduct alleged in each of these complaints was sufficiently egregious to warrant the establishment of a JCT and yet only one matter, that of the outstanding reserved judgments, has come to finality throughout the entire period under review. It is impossible to reconcile the JSC's sluggish approach with the need for complaints regarding misconduct – particularly impeachable conduct – to be managed with a sense of extreme urgency in order to protect the reputation and legitimacy of the bench.

Whilst there is some redemption of the JSC's conduct in its decision to recommend suspension pending the finalisation of the complaints lodged against Judges Motata, Makhubele and Parker, it makes the fact that it has repeatedly chosen not to do so (until very recently) in respect of Judge Hlophe even more astounding. This is so, particularly when regard is had to the controlling influence that a Judge President exercises over a division, by virtue of the broad managerial role played, in the allocation of work and in the selection of judges at JSC interviews.

When the Constitutional Court justices laid their complaint against Judge Hlophe, he had already had a fairly significant run-in with the JSC's disciplinary arm in the Oasis matter. The complaint was of attempting to interfere with the outcome of a decision in the country's highest court. And yet Judge Hlophe remained the Judge President of the Western Cape Division. It seems that the matter of a possible suspension at that stage was met by an agreement between the then Minister of Justice and Judge Hlophe that he would voluntarily take leave for the latter part of 2008, Traverso DJP serving as Acting JP. Unilaterally, and against the wishes of the Minister, Hlophe JP returned to office in February 2009. Despite this, in the ensuing decade, the JSC failed to recommend suspension. When Judge Goliath lodged the subsequent complaint alleging various instances of gross misconduct, including the misuse of his power as the Judge President of the Division, Judge Hlophe remained in office.

The JSC's decision on this score is difficult to understand and is made even harder to justify in light of its decision to suspend other judges accused of gross misconduct. It is difficult not to infer that Judge Hlophe has been doggedly protected in his position by some underlying political motive. It has been said (and a full eight years ago) that:

*Perhaps the most striking point of this long-running saga [Hlophe matter] is that the courts' repeated reversal of the JSC's decisions, as well as the manner in which the JSC attempted to justify its actions has betrayed a degree of incompetence as well as an arrogant pursuit of political interests by the majority in the JSC rather than the fulfilment of its constitutional duty to ensure judicial accountability.*³⁴⁶

This seemingly inexplicable decision not to recommend suspension has undermined public trust in the JSC's ability to fulfil its constitutional mandate of disciplining judges with the ultimate goal of maintaining a competent and independent judiciary.

The JSC's adjudication of these complaints has also revealed constitutionally questionable conduct on more than one occasion. For example, its decision to appeal matters with no prospects of success; its indefensible position in the Hlophe matters that blatantly unconstitutional conduct should stand for reasons, essentially, of convenience; and its inconsistent treatment of respondent judges regarding suspension.

Whilst this is a review of the performance of the JSC, it would be remiss not to highlight the conduct of each of the individual judges involved. In almost each case of serious misconduct, the respondent judge has commenced some form of litigious proceedings and often appealed through multiple rounds. Whilst every person has a right of access to courts and to use every opportunity afforded them to defend themselves with the necessary vigour, it would seem that each of these judges has lost sight of the impact that their actions have on overall confidence in the judiciary.

4.6 Proposals – disciplinary jurisdiction of the JSC

We have already discussed increasing the capacity of the JSC's Secretariat in respect of general support for the JSC and we have set out how this would contribute to assisting in the appointments processes – for example, the preparation of dossiers on prospective candidates and fact-checking nominees' applications.

³⁴⁶ Corder (2014) "Judicial Accountability." In Hoexter and Olivier (eds) *The Judiciary in South Africa*. Cape Town: Juta, pp 200 – 244 at 219.

Given the seemingly increasing volume of complaints lodged against judges (121 in the latest financial year), there is also a need for increased infrastructure to deal with these complaints to ensure, at a bare minimum, that no complaints fall through the cracks and that those that have been lodged proceed through the JSC's disciplinary mechanisms at a better pace.

We would suggest that a small, dedicated group of people within the JSC be mandated to assist with the management of complaints. They would perform a hybrid function of acting as a court registrar – taking receipt of, and responsibility for, all filed documents, preparing bundles for hearings etc – and a law or research clerk who can perform an initial triage or screening function for the JCC, prepare preliminary reports and offer any other kind of research assistance that may help streamline and manage the process.³⁴⁷

The discussion of the JSC's handling of complaints has shown multiple shortcomings with the current processes. It is clear that whatever initial potential the new procedural regime offered for handling complaints expeditiously, by dedicated bodies within the JSC, it has failed dismally to produce the desired results. As we have reported, it is hard to know to what extent the failings of the JSC's disciplinary apparatus are due to the seemingly cumbersome procedures as opposed to failings in the appetite of the JSC to pursue these claims with the requisite level of fervour.

There are several normative values which have been identified as important in the design of any disciplinary system for judges, including independence, accountability, impartiality, fairness, transparency, representativeness, proportionality and efficiency.³⁴⁸ The current disciplinary regime, at least in theory, incorporates some of these norms – for example, independence and impartiality. However, as discussed, the relative speed at which complaints against different judges have proceeded through the disciplinary apparatus indicates that these may not be values prized particularly highly in the implementation of these systems. The current system is,

³⁴⁷ It is interesting to note that some jurisdictions (for example England, Wales and New Zealand) appear to have organisations dedicated solely to dealing with complaints against judges. This may not be feasible in the South African context, but it does serve to illustrate the scale of the task.

³⁴⁸ Devlin and Wildeman "Introduction: disciplining judges – exercising statecraft" (pp 1-23) in *Disciplining Judges* (above n 224) at 5.

however, woefully lacking in accountability, transparency and efficiency. While a radical overhaul of the disciplinary regime may be necessary, there are incremental changes that may be made that would, taken together, foster greater levels of accountability, transparency and efficiency in the implementation of the existing processes.

First, timelines for the resolution of different kinds of complaints from date of receipt to date of final action by the JSC should be introduced, although these timelines need to be flexible enough to accommodate subsequent litigation. There are currently no timelines in place and no benchmark against which the JSC's progress with complaint resolution can be measured. Any departures from these timelines would need to be explained fully by the JSC. This would encourage greater accountability and efficiency.

Second, complainants need to be brought back in some capacity into the complaint resolution process. In order to alleviate any concerns that potential complainants would misuse this involvement as a judicial "witch hunt", thereby compromising the independence and impartiality of the process, it is important to emphasise that their role would be a supportive one, rather than a prosecutorial one. In many instances, complainants are both the ones with the most intimate and detailed knowledge of the impugned conduct as well as the ones most invested in seeing the complaint to finality. We would suggest then, at a minimum, that they be informed of each step taken by the JSC in the resolution of the complaint – something akin to an interested party in litigious proceedings – and that, given their oftentimes unique knowledge, they be invited to assist the JSC with the "prosecution" of the complaint at the appropriate juncture. The external assistance may alleviate some of the JSC's capacity issues and the external monitoring may, in turn, encourage greater efficiency within the JSC.

Third, increased reporting requirements need to be placed on the JSC in respect of all complaints filed. At the moment the only information is that which is contained in the Annual Report, which merely records the number of complaints filed, number of complaints resolved and number of complaints outstanding. There are obvious concerns regarding anonymity for judges in the initial stages of complaints

investigation, but this reporting can be done in such a way that this is preserved. For example, the following information should be recorded and reported in respect of each complaint:

- complaint made against a judge in the [insert] Court / retired judge for [insert] conduct;
- reported on [insert] date;
- JCC made preliminary investigation on [insert] date and dismissed the matter / referred it for investigation on [insert] date.

This information should be easily compiled but its non-availability is likely due to lack of capacity within the JCC and the JSC Secretariat. Recording and publishing more detailed information is also likely to foster greater accountability within the JSC in terms of the time taken to resolve complaints.

Fourth, we suggest that the JSC make recommending the suspension of judges pending the resolution of complaints of impeachable conduct its default policy – which, absent its failure to do so timeously in respect of Judge Hlophe, it seems to have done routinely. This would mean that departures from this policy would require express justification from the JSC.

Fifth, the JCTs (and perhaps also the JCC, with the exception of the CJ and DCJ *ex officio*) should be constituted entirely by retired judges. This has a twofold effect of both ensuring that sitting judges do not have to sit in judgment on their colleagues and addressing the problem of inordinate delay because sitting judges have ongoing obligations to attend to within their own courts. By definition, retired judges (no longer on “active service”) have more flexible schedules.

5. CONCLUDING REMARKS

In this report we have sought to address the JSC’s lack of accountability by providing an account of its performance in discharging its two primary functions -- of appointing judicial officers and holding them to account -- during the period under review. Overall, from what can be gleaned from the public record, its performance is open to very serious criticism in the respects that have been detailed. The problems that

have plagued it are manifold, and urgent reform is required from a structural, infrastructural and procedural perspective in order to change its course.

Structurally, the JSC is cumbersomely large and has a high proportion of political appointees. While this may have served an historically important purpose of legitimising the selection body, the damaging effect of the demonstrated instances of political interference on the independence of the judiciary has resulted in an urgent and pressing need to rethink the structure. While some have placed the blame on the squabbles and spectacles occasioned by the prominent personalities of some of the commissioners, recent history indicates that this is a problem that runs deeper. Many of the commissioners (and their appointing constituencies), as well as the JSC on occasion, seem to fundamentally misunderstand the important constitutional role of the JSC as well as their mandate as individual commissioners. The interview forum in particular has been repeatedly misused as a battleground to air political grievances. While a change to the number of political appointees (or to the specific appointees themselves) may offer some respite, there needs to be a more fundamental shift in perspective by both those sitting on the JSC and those who deal with it, in order for it to be recognised as a constitutional body expressly designed to protect judicial independence and not to serve at the behest of any other arm of government, political party or individual.

From an infrastructural perspective, the JSC lacks sufficient internal support to assist it in carrying out its mandate. This manifests in a variety of ways, including its failure to file Annual Reports, its failure to prepare dossiers on applicants for judicial office internally (relying instead on those prepared by other interested bodies), the delays that form part and parcel of the management of complaints against judges (for both misconduct and gross misconduct) and its failure to have an independent public presence – for example, through a website where it publishes its publicly available decisions, such as the decisions of the JCT. This is an issue more easily addressed with the strengthening of the JSC Secretariat and, as we have suggested, the development of a specific internal body to assist with the initial triage and ongoing management of the complaints process.

From a procedural perspective, many of the complaints levelled at the appointments process, other than those of political interference, can be addressed by introducing clearer guidelines for judicial appointment, promotion and transfer and by requiring greater accountability in adhering to these guidelines. The JSC should, in each round of appointments and in respect of each appointment (i) consult the Head of Court on which the vacancy exists regarding any specific needs occasioned by the vacancy; (ii) prepare a report on the current gender and race demographics of the court which has the vacancy; (iii) interview candidates in accordance with developed guidelines and rank candidates accordingly; and (iv) provide reasons in respect of each nomination with reference to the guidelines and section 174(2) considerations. This would increase transparency, and in so doing reduce political interference and also ensure the decisions of the JSC can be assessed objectively.

The JSC's disciplinary procedures have proved ineffective and it is difficult to discern what extent of delay is due to structural and procedural inefficiencies and what is due to a lack of appetite to pursue complaints to their finality. It is clear that the JCC requires greater internal support given the volume of complaints received, which has shown an increase in the latest Annual Reports. The procedure needs to be streamlined significantly and complainants brought back into the process in order to ensure that it proceeds expeditiously. The JSC should also develop realistic timeframes for the resolution of complaints of different types and any failure to adhere to these should be accompanied by a reasonable explanation.

The development of a large and inclusive judicial selection body that held publicly open interviews was lauded and the performance of the JSC in the initial stage of its existence was predominantly well received. However, it is clear from the deterioration of its performance in recent history, documented in this report, that the current structure and processes no longer serve the underlying goal of the JSC: to work toward creating and maintaining a strong and independent judiciary.

The role of the courts, as the protectors of the rule of law in South Africa, is critical and urgent, and immediate change to the structure and processes of the JSC is required in order that the rule of law be preserved.

ANNEXURES

Disclaimer: Several annexures relating to aspects of the work of the JSC over the period under review appear in the following pages. As was noted in the section on research methodology, accessible and reliable records have not been kept by the Office of the Chief Justice in which the Secretariat of the JSC is housed, or if such records exist, they are not publicly available. Those writing this report have thus had to rely on any number of unofficial media and other sources in order to compile the tables appearing in the annexures below. This work has been done in good faith and to achieve as reliable as possible a set of facts relating to both the membership and the activities of the JSC. Nonetheless, there are many omissions, some contradictions and inconsistencies, and even some errors, which we have tried to reconcile and correct. The information in the annexures must therefore be read and interpreted with some circumspection.

Annexure A – Membership of the JSC for the period October 2009-April 2022

	2009	2010	2011	2012	2013	2014	2015	2016	2017-2018 349	2018-2019 50
Chief Justice (178(a))	Chief Justice Langa Chief Justice Ngcobo	Chief Justice Ngcobo	Chief Justice Ngcobo Chief Justice Mogoeng	Chief Justice Mogoeng	Chief Justice Mogoeng	Chief Justice Mogoeng	Chief Justice Mogoeng (Deputy Chief Justice Moseneke Oct)	Chief Justice Mogoeng	Chief Justice Mogoeng	Chief Justice Mogoeng
President of the SCA (178(b))	Justice Mpati	Justice Mpati	Justice Mpati	Justice Mpati	Justice Mpati	Justice Mpati	Justice Mpati (Justice Maya Oct)	Justice Mpati Justice Maya	Justice Maya	Justice Maya
One JP designated by the Judges President (178(c))				Judge Ngoepe			Judge Mlambo Judge Davis Judge Kgomo	Judge Mlambo	Judge Hlophe	Judge Lee

³⁴⁹ Judicial Service Commission Annual Report 2017-2018.

³⁵⁰ Judicial Service Commission Annual Report 2018-2019.

³⁵¹ Judicial Service Commission Annual Report 2019-2020.

³⁵² Judicial Service Commission Annual Report 2020-2021.

³⁵³ As reported on the Judiciary website at the time of writing, although this information is already outdated. By way of example, Justice Maya is no longer the President of the SCA.

	2009	2010	2011	2012	2013	2014	2015	2016	2017-2018 349	2018-2019 50
								Judge Jappie		
Cabinet member responsible for the administration of justice (178(d))	Minister Radebe	Minister Radebe	Minister Radebe	Minister Radebe	Minister Radebe	Minister Radebe Minister Masutha	Minister Masutha	Minister Masutha	Minister Masutha	Minister Masutha
Two practising advocates nominated from within the profession (178(e))	Adv Smuts SC	Adv Smuts SC	Adv Smuts SC	Adv Smuts SC	Adv Smuts SC	Adv Gcabashe	Adv Gcabashe SC	Adv Hellens SC Adv Motimele SC	Adv Mpofu SC Adv Cane SC	Adv ... SC Adv ... SC
Two practising attorneys nominated from within the profession (178(f))			Mr Fourie	Mr Fourie	Mr Fourie	Mr Fourie	Mr Fourie	Mr Fourie Mr Notyesi	Mr Notyesi Mr Fourie	Mr ... Mr ...
One teacher of law designated by teachers of law at South African	Prof Schlemmer	Prof Schlemmer	Prof Schlemmer	Prof Schlemmer	Prof Schlemmer	Prof Schlemmer	Prof Schlemmer	Prof Ntlama	Prof Ntlama	Pro ... Ntla

	2009	2010	2011	2012	2013	2014	2015	2016	2017-2018 349	2018-2019 50
universities (178(g))										
Six MPs designated by the National Assembly, at least three of whom must be members of opposition parties represented in the Assembly (178(h))	Mr Ramatlhodi MP (ANC) Mr van der Merwe (IFP)	Mr Ramatlhodi MP (ANC) Mr van der Merwe (IFP) Ms Chohan (ANC)	Mr Ramatlhodi MP (ANC) Mr van der Merwe (IFP) Ms Chohan (ANC)	Mr Ramatlhodi MP (ANC) Mr van der Merwe (IFP) Ms Chohan (ANC)	Mr Ramatlhodi MP (ANC) Mr van der Merwe (IFP) Ms Chohan (ANC)	Dr Motshekga MP (ANC) Mr Singh MP (IFP) Ms Didiza MP (ANC) Mr Malema MP (EFF) Mr Schmidt MP (DA) Mr Schmidt MP (DA) Ms Magadzi MP (ANC) Ms Magadzi MP (ANC)	Dr Motshekga MP (ANC) Ms Didiza MP (ANC) Mr Malema MP (EFF) Mr Schmidt MP (DA) Ms Magadzi MP (ANC) Mr Singh MP (IFP)	Dr Motshekga MP (ANC) Ms Didiza MP (ANC) Mr Malema MP (EFF) Mr Schmidt MP (DA) Ms Magadzi MP (ANC) Mr Singh MP (IFP)	Dr Motshekga MP (ANC) Ms Didiza MP (ANC) Ms Magadzi MP (ANC) Mr Schmidt MP (DA) Mr Malema MP (EFF) Mr Singh MP (IFP)	Dr Motshekga MP (ANC) Ms Didiza MP (ANC) Ms Magadzi MP (ANC) Mr Schmidt MP (DA) Mr Malema MP (EFF) Mr Singh MP (IFP)
Four permanent delegates to the National Council of Provinces						Ms Modise (ANC) Ms Mampuru (ANC)	Ms Modise (ANC) Ms Mampuru (ANC)	Ms Modise (ANC) Ms Mampuru (ANC)	Ms Modise (ANC) Ms Mampuru (ANC)	Ms Modise (ANC) Ms Mampuru (ANC)

	2009	2010	2011	2012	2013	2014	2015	2016	2017-2018 349	2018-2019 50
designated together by the Council (178(i))						Mr Stock (ANC) Mr Ximbi (ANC)	Mr Stock (ANC)	Mr Stock (ANC)	Mr Stock (ANC) Mr Nyambi MP (ANC)	Mr Stock (ANC) Mr Nyambi MP (ANC)
Four persons designated by the President after consulting the leaders of all the parties in the National Assembly (178(k))	Adv Bizos SC Mr Ernstzen Adv Moroka SC Adv Nthai SC Replaced in July ³⁵⁴ by: Adv Semenya SC Adv Ntsebeza SC Adv Soni SC	Adv Semenya SC Adv Ntsebeza SC Adv Soni SC Ms Ndoni	Adv Semenya SC Adv Ntsebeza SC Adv Soni SC Ms Ndoni	Adv Semenya SC Adv Ntsebeza SC Adv Soni SC Ms Ndoni	Adv Semenya SC Adv Ntsebeza SC Ms Ndoni	Adv Semenya SC Adv Ntsebeza SC Ms Ndoni	Adv Semenya SC Adv Ntsebeza SC Ms Ndoni	Adv Nkosi-Thomas SC Adv Semenya SC Ms Ndoni Mr Stemmet	Adv Norman SC Adv Nkosi-Thomas SC Adv Masuku SC Mr Msomi	Adv Norman SC Adv Nkosi-Thomas SC Adv Masuku SC Mr Msomi

³⁵⁴ Statement from the Presidency (19 July 2009) Announcement of new designated members of the JSC. Available at <https://www.thepresidency.gov.za/content/announcement-new-designated-members-jsc> (accessed October 2022).

	2009	2010	2011	2012	2013	2014	2015	2016	2017-2018 349	201 50
	Ms Ndoni									

Annexure B – Interviews conducted by the JSC for the period April 2009-April 2022

Where a transcript is available for an interviewee, their name appears in **bold and underline** with the transcript hyperlinked to their name. All hyperlinked sources in this annexure were last accessed July 2022.

Where shortlists are available for Constitutional Court appointments, these are included in full with the ultimate appointees in **bold**.

<u>DATES</u>	POSTS INTERVIEWED FOR	INTERVIEWEES	JSC NOMINATIONS / NOTES
September 2009 ³⁵⁵	Constitutional Court (four vacancies)	Judge Azhar Cachalia Judge Chris Jafta Judge Mandisa Maya Judge Dunstan Mlambo Judge Raymond Zondo Judge Eberhard Bertelsmann Judge Dennis Davis Judge Johan Froneman Judge John Hlophe Judge Mohammed Jajbhay Judge Sisi Khampepe Judge Frank Kroon Judge Francis Legodi Judge Yasmin Meer (withdrew) <u>Judge Mogoeng Mogoeng</u>	Justice Jafta Justice Froneman Justice Khampepe Justice Mogoeng

³⁵⁵ DGRU (2009) A study of the judicial records of the nominees for the Constitutional Court 2009. *DGRU* available at http://www.publiclaw.uct.ac.za/usr/public_law/dgru/judges_report.pdf (accessed July 2022).

		Justice Robert Nugent (withdrew) Judge Ntsikelelo Poswa Judge Kathleen Satchwell Judge Willie Seriti Judge Leona Theron Justice Belinda van Heerden (withdrew) Judge Nigel Willis Judge James Yekiso Advocate Geoff Budlender SC Advocate Jeremy Gauntlett SC	
12-29 April 2010	Eastern Cape High Court (Judge President) (one vacancy)		Judge CT Sangoni
	Eastern Cape High Court, Grahamstown (three vacancies)		M NG Beshe Mr M Makaula Mr J Smith
	Eastern Cape High Court, Port Elizabeth (one vacancy)		Judge I Schoeman
	Eastern Cape High Court, Mthatha (one vacancy)		Adv RE Griffiths SC
	Western Cape High Court, Cape Town (three vacancies)		Adv P Gamble SC Adv E Steyn SC Ms CM Fortuin
	KwaZulu-Natal High Court (Judge President) (one vacancy)		Deputy Judge President HQ Msimang

	KwaZulu-Natal High Court (two vacancies)		Judge D Pillay Adv G Lopes SC
	North and South Gauteng High Court (Deputy Judge President) (one vacancy)		Judge WJ Van der Merwe
	North and South Gauteng High Court (six vacancies)		Adv NB Tuchten SC Adv HJ Fabricius SC Adv MM Mabesele Mr PM Mabuse Mr MA Makume Mr N Ranchod
	North West High Court (Judge President) (one vacancy)		Judge MM Leeuw
	Labour Appeal Court and Labour Court (Judge President) (one vacancy)		Judge D Mlambo
	Labour Appeal Court (six vacancies)		Judge SK Ndlovu Judge PL Tialetsi Judge MDJ Wallis
	Labour Court (three vacancies)		Mr DH Gush Mr RGO Lagrange Mr AJ Steenkamp

4-15 October 2010 ³⁵⁶	Supreme Court of Appeal (three vacancies)	Judge S Ebrahim Judge BM Griesel Judge SA Majiedt Judge WL Seriti Judge L Theron Judge MJD Wallis Judge RMM Zondo	Not indicated
	Competition Appeal Court (two vacancies)	Judge NC Dambuza	Not indicated
	Eastern Cape High Court (Bhisho) (one vacancy)	Adv RM Dilizo Adv B Hartle Mr LD Kemp Ms NG Mjali Adv MI Mkhize Adv SD Ndengezi Adv NG Ndzondo	Not indicated
	Eastern Cape High Court, Mthatha (one vacancy)	Adv RM Dilizo Ms NG Mjali Adv MI Mkhize Adv SD Ndengezi	Not indicated
	Electoral Court (one vacancy)	None	None

³⁵⁶ DGRU (September 2010) Report on prospective candidates. DGRU available at <http://www.dgru.uct.ac.za/usr/dgru/downloads/septJSC.pdf> (accessed July 2022), read with DGRU (October 2010) Report on the JSC interviews in Cape Town, October 2010. DGRU available at http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/AnalysisOctober2010%20%20.pdf (accessed July 2022). See also Judicial Service Commission, Media Statement, Undated, “Shortlisted Candidates for Judicial Positions” as provided by the DGRU; and Judicial Service Commission, Undated, Schedule for Interviews – October 2010 as provided by the DGRU (accessed July 2022).

	KwaZulu-Natal High Court (Deputy Judge President) (one vacancy)	Judge SR Balton Judge CN Patel	None
	KwaZulu-Natal High Court (two vacancies)	Ms W Hughes-Madondo Adv MI Mkhize Adv AE Motala SC Adv JA Ploos van Amstel SC Ms NH Radebe Adv R Seegobin SC	Not indicated
	Labour Appeal Court (three vacancies)	Judge RD Hendricks Judge AA Landman Judge D Pillay	Not indicated
	Labour Court (one vacancy)	None	None
	Limpopo High Court (Thohoyandou) (one vacancy)	Adv MI Mkhize Adv MJ Mushasha	Not indicated
	North and South Gauteng High Courts (six vacancies)	Adv AJ Bam SC Adv HJ de Vos SC Adv JJ Goodey SC Mr MHE Ishmail Adv F Kathree-Setiloane Mr NJ Kollapen Adv JW Louw SC Adv MI Mkhize Mr RE Monama Adv SP Mothle SC Adv WHG van der Linde SC Adv WL Wepener SC	Not indicated

	North West High Court (one vacancy)	Adv N Gutta Mr DI Matlapeng Adv MI Mkhize	Not indicated
	Western Cape High Court (three vacancies)	Ms PJ Ngewu Adv MI Mkhize Adv BK Pincus SC Dr MI Samela	Not indicated
4-13 April 2011 ³⁵⁷	Supreme Court of Appeal (two vacancies)	Judge E Bertelsmann Judge S Ebrahim Judge R Pillay Judge MJD Wallis	Judge Wallis The JSC was unable to recommend a candidate to fill the other vacancy
	Competition Appeal Court (one vacancy)	Judge DH Zondi	Judge Zondi
	Electoral Court (two vacancies)	Adv M M Mthembu	Adv Mthembu The JSC was unable to recommend a candidate to fill the other vacancy
	KwaZulu-Natal High Court (three vacancies)	Ms YT Mbatha Ms S Naidoo Mr SJ Ngwenya	Ms Mbatha Adv Ploos van Amstel SC

³⁵⁷ DGRU (April 2011) A study of the judicial records of nominees for the Supreme Court of Appeal, Competition Appeal Court, Electoral Court and High Court. DGRU available at <http://www.dgru.uct.ac.za/usr/dgru/downloads/Final%20JSC%20submission%20April%202011%20pdf.pdf> (accessed July 2022) read with JSC (undated) "Schedule for Interviews – April 2011" as provided by the DGRU; and JSC Press Release (20 April 2011).

		Adv JA Ploos van Amstel SC Judge JNM Poswa Adv A Rall SC	The JSC was unable to recommend a candidate to fill the other vacancy
	Northern Cape High Court (one vacancy)	Adv JI Henriques Adv LG Lever Ms MV Phatshoane	Ms Phatshoane
	North and South Gauteng High Courts (six vacancies)	Adv AJ Bam SC Mr GL Bhikha Adv LS de Klerk SC Adv M Kolbe SC Mr NJ Kollapen Adv JW Louw SC Ms BM Pakati Mr ND Tshabalala Adv SE Weiner SC	Mr Kollapen Adv Louw SC Mr Tshabalala Adv Weiner SC The JSC was unable to recommend candidates to fill the other two vacancies
	Western Cape High Court (three vacancies)	Adv RA Brusser SC Ms J Cloete Adv MJ Fitzgerald SC Mr RCA Henney Mr S Koen Adv S Olivier SC Adv OL Rogers SC	Mr Henney The JSC was unable to recommend candidates to fill the other two vacancies
3 September 2011	Constitutional Court (Chief Justice) (one vacancy)	Justice Mogoeng Mogoeng	Justice Mogoeng

10-19 October 2011 ³⁵⁸	Supreme Court of Appeal (Deputy President) (one vacancy)	Judge KK Mthiyane	Judge Mthiyane
	Eastern Cape High Court (Grahamstown) (one vacancy)	Mr DZ Dukada Adv G Goosen SC Ms M Kahla Adv SD Mdengezi Ms N Seti-Nduna	Adv Goosen SC
	Electoral Court (one vacancy)	Adv BJ Buthelezi Ms B Majiki Mr JB Mthembu	Ms Majiki
	Free State High Court (two vacancies)	Adv JP Daffue SC Adv PU Fischer SC Ms EM Kubushi Mr LJ Lekale Adv H Murray	Adv Daffue SC Mr Lekale
	KwaZulu-Natal High Court (Judge President) (one vacancy)	Judge MI Madondo Judge LP Pakade Judge CN Patel	Judge Patel
	KwaZulu-Natal High Court (three vacancies)	Mr P Govindasamy Adv JI Henriques Ms S Naidoo Mr SP Nkosi Adv AJ Rall SC	Adv Henriques Mr Nkosi Adv Vahed SC

³⁵⁸ DGRU (October 2011) Submission and research report on the judicial records of nominees for appointment to the Supreme Court of Appeal High Court, Electoral Court, and Labour Court. DGRU available at <http://www.dgru.uct.ac.za/usr/dgru/downloads/Octreport2011.pdf> (accessed July 2022) read with JSC Press Release (undated) "Shortlisted Candidates for Judicial Positions for October 2011 interviews" as provided by the DGRU; and JSC Press Release (25 October 2011).

		Adv RAK Vahed SC	
	Labour Court (two vacancies)	Judge EJ Francis Adv MZN Lallie Adv HM Rabkin-Naicker	Adv Lallie Adv Rabkin-Naicker
	North and South Gauteng High Courts (five vacancies)	Adv K Bailey SC Adv G Farber SC Judge EJ Francis Advocate TJ Kruger SC Mr DI Matlapeng Mr TA Maumela Mr IMM Motloung Adv R Stockwell SC Adv RT Sutherland SC Ms MJ Teffo	Judge Francis Mr Maumela Adv Sutherland SC Ms Teffo The JSC decided not to recommend a candidate for the remaining vacancy
	Western Cape High Court (three vacancies)	Ms JI Cloete Mr SJ Koen Ms BP Mantame Advocate JJ Moses Advocate OL Rogers SC Ms N Saba	The JSC decided to postpone the interviews for the Western Cape High Court pending finalisation of the appeal in the litigation initiated by the Cape Bar Council
16-19 April 2012 ³⁵⁹	Supreme Court of Appeal (two vacancies)	Judge S Ebrahim Judge XM Petse Judge R Pillay	Justice Petse Justice Pillay

³⁵⁹ DGRU (March 2012) Submission and research report on the judicial records of nominees for the Supreme Court of Appeal and High Court. *DGRU* available at <http://www.dgru.uct.ac.za/usr/dgru/downloads/DGRU%20JSC%20Report%20final%2031%20March%202012.pdf> (accessed July 2022) read with JSC (undated) “Schedule for Interviews – April 2012” as provided by the DGRU; and JSC Press Release (24 April 2012).

		Judge CM Plasket Judge BR Southwood	
	Eastern Cape High Court (Bhisho) (one vacancy)	Ms N Conjwa Mr DZ Dukada Ms VT Gqiba Ms M Kahla	Mr Dukada
	KwaZulu-Natal High Court (Deputy Judge President) (one vacancy)	Judge M Madondo Judge FE Makgoloa	None
	Northern Cape High Court (one vacancy)	Advocate S Erasmus Ms BM Pakati	Ms Pakati
	North and South Gauteng High Court (Judge President) (one vacancy)	Judge F Legodi Judge President D Mlambo Deputy Judge President PJ Mojapelo	Judge President Mlambo
	North and South Gauteng High Court (six vacancies)	Advocate AF Arnoldi SC Advocate SAM Baqwa Ms EM Kubushi Advocate GC Muller SC Advocate B Vally SC	Adv Baqwa Ms Kubushi Adv Vally SC The JSC was unable to recommend candidates to fill the other three vacancies
9 June 2012 ³⁶⁰	Constitutional Court (one vacancy)	Judge Bosielo Judge Maya Judge Nugent	Judge Bosielo Judge Maya Judge Nugent

³⁶⁰ DGRU (June 2012) Submission and research report on nominees for appointment to the Constitutional Court. DGRU available at <http://www.dgru.uct.ac.za/usr/dgru/downloads/junereport2012.pdf> (accessed July 2022), read with <http://www.dgru.uct.ac.za/research-reports-0>.

		Judge Zondo	Judge Zondo
15-19 October 2012 ³⁶¹	Eastern Cape High Court (Port Elizabeth and Mthatha) (two vacancies)	Mr D Hinxa Ms S Jacobs Adv MJ Lowe SC Mr PP Majeke Ms B Majiki Adv IT Stretch SC	Adv Lowe SC Ms Majiki
	Electoral Court (two vacancies)	Judge MM Mabesele Judge DSS Moshidi Judge WL Wepener	Judge Moshidi Judge Wepener
	KwaZulu-Natal High Court (Deputy Judge President) (one vacancy)	Judge AN Jappie Judge MI Madondo	Judge Jappie
	Labour Court (Judge President) (one vacancy)	Judge B Waglay	Judge Waglay
	North and South Gauteng High Court (Deputy Judge President) (one vacancy)	JSC deferred vacancy to April 2013 sitting	
	North and South Gauteng High Courts (three vacancies)	Ms TD Brenner Adv DS Fourie SC	Adv Fourie SC The JSC was unable to recommend candidates to fill the other two vacancies

³⁶¹ DGRU (October 2012) Submission and research report on the judicial records of nominees for appointment to the High Court, Electoral Court and Labour Court. DGRU available at <http://www.dgru.uct.ac.za/usr/dgru/downloads/DGRU%20Report%20JSC%20October%202012%20email%20version.pdf> (accessed July 2022). See also JSC Press Release (undated) "Shortlisted Candidates for Judicial Positions" as provided by the DGRU).

	Western Cape High Court (four vacancies, became five prior to interviews)	Ms JI Cloete Mr MJ Dolamo Adv JJ Gauntlett SC Mr SJ Koen Ms BP Mantame Adv OL Rogers SC Ms N Saba Adv A Schippers SC	Ms Cloete Mr Dolamo Ms Mantame Adv Rogers SC Adv Schippers SC
22 February 2013 ³⁶²	Constitutional Court (one vacancy)	Judge Selby Baqwa Judge Ronnie Bosielo Adv Jeremy Gauntlett SC Adv Mbuyiseli Madlanga SC Judge Brian Spilg	Adv Madlanga
8-12 April 2013 ³⁶³	Supreme Court of Appeal (two vacancies)	Judge CM Plasket Judge HK Saldulker Judge NP Willis	Judge Saldulker Judge Willis
	Competition Appeal Court (Judge President) (one vacancy)	Judge DM Davis	Judge Davis

³⁶² DGRU (February 2013) Submission and research report on the judicial records of nominees to the Constitutional Court. DGRU available at http://www.dgru.uct.ac.za/usr/dgru/downloads/JSC%20submission%20print%20Feb%2013_printfinal.pdf (accessed July 2022) read with <http://www.dgru.uct.ac.za/research-reports-0> (accessed July 2022).

³⁶³ DGRU (April 2013) Submission and research report on the judicial records of nominees to the Supreme Court of Appeal, High Court, Competition Appeal Court and Electoral Court. DGRU available at http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/April%202013.pdf (accessed July 2022), read with JSC (undated) "Schedule for Interviews – April 2013" as provided by the DGRU; and The Presidency (16 May 2013) President Jacob Zuma appoints judges. Available at <https://www.gov.za/president-jacob-zuma-appoints-judges> (accessed July 2022).

	Eastern Cape High Court (Bhisho) (number of vacancies unknown)	Ms X Bacela Adv Chuma Cossie Adv Elizabeth Crouse Mr PP Majeke Ms B Ndzondo	
	Electoral Court (one vacancy)	Ms S Chesuwe Adv MJ Maluleke	
	North Gauteng High Court (Deputy Judge President) (one vacancy)	Judge AP Ledwaba Judge LM Molopa-Sethose Judge C Pretorius	Judge Ledwaba
	North and South Gauteng High Court	Adv AJ Bam SC Ms W Hughes Ms NV Khumalo Mr BA Mashile Ms DS Molefe Ms SS Mphahele Mr VRSN Nkosi Ms L Windell Adv GC Wright SC	In Johannesburg: Adv Wright SC Mr Mashile Ms Windell In Pretoria: Ms Hughes Ms Khumalo Ms Molefe
7-13 October 2013	Eastern Cape High Court (Bhisho) (one vacancy)	Mr D Hinx Mr PP Majeke Adv IT Stretch SC	Adv Stretch SC
	Electoral Court (one vacancy)	Ms S Pather	Ms Pather
	Free State High Court (one vacancy)	Mr JJ Mhlambi Ms S Naidoo Mr NW Phalatsi Adv RM Sepato	Ms Naidoo

		Adv P Zietsman SC	
	Labour Court and Labour Appeal Court (Deputy Judge President) (one vacancy)	Judge LP Tlaletsi	Judge Tlaletsi
	Labour Courts (one vacancy)	Ms NP Boqwana Mr MP Shai	None
	North and South Gauteng High Court (four vacancies)	Adv AJ Bam SC Adv SK Hassim SC Adv MM Jansen SC Adv N Janse van Nieuwenhuizen SC Ms SS Mphahele Adv R Strydom SC	Adv Bam SC Adv Jansen SC Adv Janse van Nieuwenhuizen SC Ms Mphahlele
	Western Cape High Court (one vacancy)	Ms NP Boqwana Adv DM Davis Adv RM Nyman Ms KM Savage	Ms Boqwana
7-10 April 2014 ³⁶⁴	Supreme Court of Appeal (three vacancies)	Judge NC Erasmus Judge BM Mbha Judge PA Meyer Judge BS Spilg Judge KGB Swain Judge CHG Van der Merwe	

³⁶⁴ DGRU (April 2014) Submission and research report on the judicial records of nominees to the Supreme Court of Appeal, Electoral Court, High Court and Labour Appeal Court. DGRU available at http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/DGRU%20submission%20and%20research%20report%20JSC%20April%202014.pdf (accessed July 2022) read with <http://www.dgru.uct.ac.za/research-reports-0> (accessed July 2022). See also JSC (undated) "Shortlisted Candidates for Judicial Position" for the April 2014 interviews as provided by the DGRU; and JSC (undated) "Schedule for Interviews – April 2014" as provided by the DGRU.

		Judge DH Zondi	
	Electoral Court (Chairperson) (one vacancy)	Judge JBZ Shongwe	Judge Shongwe
	Free State High Court (Judge President) (one vacancy)	Judge BC Mocumie Judge KJ Moloji Judge MH Rampai	
	Labour Appeal Court (eleven vacancies)	Judge P Coppin Judge AA Landman Judge MB Molemela Judge JR Murphy Judge CJ Musi Judge RT Sutherland	
	KwaZulu-Natal High Court (three vacancies)	Adv PC Bezuidenhout SC Mr MR Chetty Mr NE Chili Ms SM Marks Mr SB Msani Mr MT Ncube Mr ES Nzimande Adv PJ Olsen SC Mrs TP Poyo-Dlwati	
6-8 October 2014 ³⁶⁵	Eastern Cape High Court (Bhisho) (one vacancy)	Adv CTS Cossie Ms S Jacobs	

³⁶⁵ DGRU (October 2014) Submission and research report on the judicial records of nominees to the High Court and Labour Court. *DGRU* available at http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/Final%20report%20October%202014%20email.pdf (accessed July 2022) read with <http://www.dgru.uct.ac.za/research-reports-0> (accessed July 2022). See also JSC (undated) "Shortlisted Candidates for Judicial Positions" for the October 2014 interviews as provided by the DGRU and JSC (undated) "Schedule for Interviews – October 2014" as provided by the DGRU.

		Mr T Malusi Judge GNZ Mjali	
	Free State High Court (Judge President) (one vacancy)	Judge BC Mocumie Judge MB Molemela Judge KJ Moloji Judge MH Rampai	Judge Molemela
	Labour Court (one vacancy)	Mr ET Tlhotlhemaje Ms BM Witcher	Ms Witcher
	Western Cape High Court (two vacancies)	Adv DM Davis Ms G Salie-Samuels Ms KM Savage	Ms Salie-Samuels Ms Savage
	Water Tribunal	Adv TA Bailey Adv HJ Choma Adv TAN Makhubele SC Ms M Mohlala-Mulaudzi Ms TM Shabangu Adv H Thompson	Not indicated
13-17 April 2015 ³⁶⁶	Supreme Court of Appeal (two vacancies)	Judge N Dambuza Judge N Erasmus (does not appear on interview schedule, presumably withdrew) Judge TR Gorven Judge RS Mathopo	Judge Dambuza Judge RS Mathopo

³⁶⁶ DGRU (April 2015) Submission and research report on the judicial records of nominees to the Supreme Court of Appeal, High Court and Land Claims Court. DGRU available at http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/DGRU%20JSC%20report%20April%202015.pdf (accessed July 2022) read with <http://www.dgru.uct.ac.za/research-reports-0> (accessed July 2022). See also Office of the Chief Justice (undated) "Schedule for JSC Interviews – April 2015" as provided by the DGRU; and The Presidency (1 June 2015) President Zuma appoints judges to some of the Superior Courts. Available at <https://www.gov.za/speeches/president-zuma-appoints-judges-some-superior-courts-1-jun-2015-0000> (accessed July 2022).

		Judge PA Meyer Judge DSS Moshidi Judge D Van Zyl	
	Eastern Cape High Court (Bhisho and Grahamstown) (two vacancies)	Adv GH Bloem SC Adv RWN Brooks SC Mr T Malusi Mr PLC Maseti Adv SM Mbenenge SC Adv NCD Msizi	Adv Bloem SC Adv Mbenenge SC
	KwaZulu-Natal High Court (Judge President) (one vacancy)	Judge AN Jappie	Judge Jappie
	Limpopo High Court (Judge President) (one vacancy)	Judge NF Kgomo Judge MF Legodi Judge K Makhafola Judge EM Makgoba Judge TM Masipa Judge AML Phatudi Judge TJ Raulinga	Judge Makgoba
9-10 July 2015 ³⁶⁷	Constitutional Court (one vacancy)	Justice NZ Mhlantla Judge D Pillay Justice LV Theron Justice ZLL Tshiqi	Justice Mhlantla Judge Pillay Justice Theron Justice Tshiqi

³⁶⁷ JSC Press Release (October 2015) Shortlisted candidates for a judicial vacancy at the Constitutional Court and a vacancy of Deputy President at the Supreme Court of Appeal. Available at https://www.judiciary.org.za/images/judicial_vacancies_2015/JSC_Media-announcement-June-2015.pdf (accessed July 2022).

	Deputy President of the Supreme Court of Appeal (one vacancy)	Justice Mandisa Muriel Lindelwa Maya (as nominated by President Zuma)	Justice Maya
5-9 October 2015 ³⁶⁸	Gauteng Division of the High Court (six vacancies)	<u>Judge AC Basson</u> Ms CJ Collis <u>Adv N Davis SC</u> <u>Adv RM Keightley</u> Ms NP Mali Mr PLC Maseti Mr MPN Mbongwe <u>Ms LT Modiba</u> <u>Mr TP Mudau</u> <u>Adv R Strydom SC</u> <u>Mr ML Twala</u> <u>Adv WHG van der Linde SC</u>	Judge Basson Adv Keightley Ms Mali Ms Modiba Mr Mudau Adv van der Linde
	Northern Cape Division of the High Court (one vacancy)	<u>Adv SL Erasmus</u> <u>Adv LG Lever SC</u> <u>Ms MC Mamosebo</u>	Ms MC Mamosebo

³⁶⁸ Judges Matter (2015) Transcripts October 2015. Available at <https://www.judgesmatter.co.za/the-jsc/2015-interviews/transcripts/> (accessed July 2022).

	Free State Division of the High Court (two vacancies)	Adv PU Fischer SC Ms NM Mbhele Mr JJ Mhlambi Ms SC Mia Mr NW Phalatsi Adv L Le Pohl SC Adv C Reinders	Not indicated
	Labour Courts (two vacancies)	Adv C Prinsloo Mr Tlhothalemaje	Not indicated
	Kwazulu-Natal Division of the High Court (Deputy Judge President) (one vacancy)	Judge S Gyanda Judge GN Kruger Judge MI Madondo Judge SK Ndlovu Judge K Pillay	Not indicated
	KwaZulu-Natal Division of the High Court (two vacancies)	Adv PC Bezuidenhout SC Prof K Govender Ms SM Marks Adv GR Thatcher SC	Not indicated
	Eastern Cape Division of the High Court, Bhisho (Deputy Judges President) (one vacancy)	Judge M Makaula Judge SM Mbenenge Judge D van Zyl	Not indicated
	Eastern Cape Division of the High Court, Mthatha (Deputy Judges President) (one vacancy)	Judge ZM Nhlangulela	Not indicated

	Eastern Cape Division of the High Court (one vacancy Port Elizabeth)	Adv RWN Brooks SC Adv E Crouse Adv MG Ndzondo	Not indicated
4-8 April 2016 ³⁶⁹	Constitutional Court (one vacancy)	No interviews conducted ³⁷⁰	N/A
	Supreme Court of Appeal (two vacancies)	Judge ED Baartman Judge TR Gorven Judge MF Legodi (withdrew) Judge PA Meyer Judge BC Mocumie Judge D Pillay Judge CHG van der Merwe	Judge Mocumie Judge van der Merwe
	Eastern Cape Division of the High Court (Mthatha and Port Elizabeth) (two vacancies)	Adv RWN Brooks SC Adv TCS Cossie Adv NCD Msizi Ms B Ndzondo Ms N Saba	For Mthatha: Adv Brooks SC For Port Elizabeth: No nominations
	KwaZulu-Natal Division of the High Court (Deputy Judge President) (one vacancy)	Judge S Gyanda Judge MI Madondo Judge BJ Mnguni	Judge Madondo

³⁶⁹ Judges Matter (2016) Shortlisted candidates for judicial positions. Available at <https://www.judgesmatter.co.za/the-jsc/2016-2/jsc-candidates-2/> (accessed July 2022).

³⁷⁰ Only three nominations for the vacancy were received, and therefore fell below the threshold in [section 174\(4\) of the Constitution](#).

	KwaZulu-Natal Division of the High Court (two vacancies)	<u>Adv PC Bezuidenhout SC</u> <u>Ms S Maphumulo</u> <u>Ms BS Masipa</u> <u>Adv IL Topping SC</u>	Adv Bezuidenhout SC Ms Masipa
	Limpopo Division of the High Court (Deputy Judge President)	<u>Judge NF Kgomo</u> <u>Judge FE Mokgohloa</u> <u>Judge AML Phatudi</u>	Judge Mokgohloa
	Limpopo Division of the High Court (two vacancies)	<u>Ms MC De Klerk</u> <u>Mr MF Kganyago</u> <u>Ms A Lamminga</u> <u>Adv GC Muller SC</u> <u>Mr MG Phatudi</u>	Adv Muller SC Mr Phatudi
	Western Cape Division of the High Court (Deputy Judge President) (one vacancy)	<u>Judge R Allie</u> <u>Judge PL Goliath</u> <u>Judge A Le Grange</u>	Judge Goliath
	Western Cape Division of the High Court (two vacancies)	<u>Adv M Donen SC</u> <u>Mr SJ Koen</u> <u>Mr LG Nuku</u> <u>Mr JF Riley</u>	Mr Nuku

3-7 October 2016 ³⁷¹	Constitutional Court (one vacancy)	Judge LO Bosielo Judge NJ Kollapen Judge SA Majiedt Judge MJD Wallis	Interviews of Judges Kollapen, Majiedt and Wallis cancelled when Judge Bosielo withdrew following his interview
	Eastern Cape Division of the High Court (Bhisho and Port Elizabeth) (two vacancies)	Adv E Krouse Mr T Malusi Adv BR Tokota SC	Mr Malusi Adv Tokota SC
	Competition Appeal Court (two vacancies)	Judge NP Boqwana Judge OL Rogers Judge B Vally	Judge Boqwana Judge Rogers
	Electoral Court (two vacancies)	Judge C Lamont Judge WL Wepener	Judge Lamont Judge Wepener
	Free State Division of the High Court (Deputy Judge President) (one vacancy)	Judge KJ Moloji (withdrew) Judge CJ Musi	Judge Musi
	Free State Division of the High Court (three vacancies)	Ms S Chesuwe Adv PU Fischer SC Mr MA Mathebula Mr JJ Mhlambi Adv L Le Roux Pohl SC Adv P Zietsman SC	Mr Mathebula Mr Mhlambi

³⁷¹Judges Matter (October 2016) Transcripts October 2016. Available at <https://www.judgesmatter.co.za/october-2016-interviews/transcripts/> (accessed July 2022).

	Gauteng Division of the High Court (six vacancies)	<u>Mr LA Adams</u> <u>Adv N Davis SC</u> <u>Adv DC Fischer SC</u> <u>Prof TS Madima SC</u> <u>Adv PG Malindi SC</u> <u>Mr MPN Mbongwe</u> <u>Judge EM Molahlehi</u> <u>Adv I Opperman SC</u> <u>Ms NTY Siwendu</u> <u>Mr EL Swartz</u> <u>Mr SA Thobane</u> <u>Mr ML Twala</u> <u>Adv CJ van der Westhuizen</u>	Mr Adams Adv Fischer SC Judge Molahlehi Adv Opperman SC Ms Siwendu Mr Twala
	KwaZulu-Natal Division of the High Court (one vacancy)	<u>Prof K Govender</u> <u>Adv FM Moola SC</u> Ms S Maphumulo (withdrew) <u>Adv IL Topping SC</u>	None
	Limpopo Division of the High Court (one vacancy)	<u>Mr F Kganyago</u> <u>Dr AA Lamprecht</u> <u>Ms MV Semanya</u>	Mr Kganyago Ms Semanya

3-7 April 2017 ³⁷²	Constitutional Court (one vacancy)	Judge NJ Kollapen Judge SA Majiedt Judge BH Mbha Judge LV Theron Judge MJD Wallis	Judge Kollapen Judge Majiedt Judge Theron Judge Wallis
	Constitutional Court (Deputy Chief Justice) (one vacancy)	Judge RMM Zondo	Judge Zondo
	Supreme Court of Appeal President (one vacancy)	Justice MML Maya (as nominated by President Zuma)	Justice Maya
	Eastern Cape Division of the High Court (Judge President) (one vacancy)	Judge M Makaula Judge ZM Nhangulela Judge JE Smith Judge D van Zyl	None
	Eastern Cape Division of the High Court (Mthatha) (one vacancy)	Ms S Jacobs Mr SL Mgxaji (withdrew) Ms LF Monakali Adv V Reddy	None
	Electoral Court (one vacancy)	Mr T Bailey Ms S N Ndlovu Adv MPN Nkutha-Nkontwana (withdrew)	None

³⁷² Judges Matter (April 2017). Transcripts April 2017. Available at <https://www.judgesmatter.co.za/interviews/april-2017-interviews/transcripts/> (accessed July 2022).

Labour Court (two vacancies)	Adv RG Beaton SC Mrs WI Everett (withdrew) Ms D Mahosi Mr G GN Moshwana Adv MPN Nkutha-Nkontwana	Ms Mahosi Mr Moshwana Adv Nkutha-Nkontwana
Mpumalanga Division of the High Court (Judge President) (one vacancy)	Judge MF Legodi	Judge Legodi
Northern Cape Division of the High Court (Judge President) (one vacancy)	Judge LP Tlaetsi Judge CC Williams (withdrew)	Judge Tlaetsi
Northern Cape Division of the High Court (Deputy Judge President) (one vacancy)	Judge MV Phatshoane Judge CC Williams (withdrew)	None
North West Division of the High Court (Deputy Judge President) (one vacancy)	Judge RD Hendricks Judge AM Kgoele	None
North West Division of the High Court (one vacancy)	Ms T Djaje Ms MB Mahalelo	Ms Djaje

2-6 October 2017 ³⁷³	Eastern Cape Division of the High Court (Judge President) (one vacancy)	Judge SM Mbenenge Judge XM Petse (withdrew) Judge D van Zyl	Judge Mbenenge
	Eastern Cape Division of the High Court (Grahamstown) (one vacancy)	Mr NP Jaji Adv MS Ruguanan Ms O van Papendorp	Mr Jaji
	Eastern Cape Division of the High Court (Mthatha) (one vacancy)	Ms N Conjwa Mr MS Jolwana	Mr Jolwana
	Electoral Court (one vacancy)	None	None
	Free State Division of the High Court (two vacancies)	Ms S Chesuwe Adv PJ Loubser SC Adv L Le Roux Pohl SC	Adv Loubser SC

³⁷³ Judges Matter (October 2017) Transcripts October 2017. Available at <https://www.judgesmatter.co.za/interviews/october-2017-interviews/transcripts-oct-2017/> (accessed July 2022) read with Office of the Chief Justice, (undated) "Schedule for JSC Interviews – October 2017" as provided by the DGRU; and The Presidency (2 November 2017) President Zuma appoints Judges in various High Courts. Available at <https://www.gov.za/speeches/president-jacob-zuma-appoints-judges-various-high-courts-2-nov-2017-0000> (accessed July 2022).

	Gauteng Division of the High Court (six vacancies)	<u>Ms TD Brenner</u> <u>Ms CJ Collis</u> <u>Adv N Davis SC</u> <u>Adv TS Madima SC</u> <u>Ms MB Mahalelo</u> <u>Adv TAN Makhubele SC</u> <u>Ms SNI Mokose</u> <u>Mr CM Sardiwalla</u> <u>Adv DN Unterhalter SC</u> <u>Adv CJ van der Westhuizen SC</u>	Ms Collis Adv Davis SC Ms Mhalelo Adv Makhubele SC Mr Sardiwalla Adv Unterhalter SC Adv van der Westhuizen SC
	North West Division of the High Court (Deputy Judge President) (one vacancy)	<u>Judge RD Hendricks</u>	None
	Northern Cape Division of the High Court (Judge President) (one vacancy)	<u>Judge BM Pakati</u> <u>Judge MV Phatshoane</u>	None

	Western Cape Division of the High Court (four vacancies)	Adv LL Burger SC Mr SJ Koen Prof S Lotter Dr LT Makansi Ms SM Marks Ms M Opperman Mr TD Papier Mr MK Parker Adv ML Sher SC Mr ED Wille	Mr Papier Mr Parker Adv Sher SC Mr Wille
9-13 April 2018 ³⁷⁴	Supreme Court of Appeal (three vacancies)	Judge ED Baartman Judge TR Gorven Judge CG Lamont (withdrew) Judge TM Makgoka Judge YT Mbatha Judge PA Meyer Judge MB Molemela Judge A Schippers Judge I Schoeman Judge MP Tsoka	Judge Makgoga Judge Molemela Judge Schippers
	Competition Appeal Court (three vacancies)	Judge BJ Mnguni Judge B Vally Judge M Victor	Judge Mnguni Judge Vally Judge Victor

³⁷⁴ Judges Matter (April 2018) Transcripts April 2018. Available at <https://www.judgesmatter.co.za/interviews/april-2018-interviews/transcripts-april-2018/> (accessed July 2022).

	Electoral Court (two vacancies)	Mr RJ Lawrence Ms S Pather	Ms Pather
	Free State Division of the High Court (two vacancies)	Ms S Chesuwe Mr PE Molisoane Ms M Opperman	Ms Chesuwe Mr Molisoane Ms Opperman
	KwaZulu Natal Division of the High Court (Durban) (two vacancies)	Ms KQ Hadebe Adv ES Law Mr M Maharaj Mr SB Mngadi Mr ME Nkosi Adv GR Thatcher SC Adv IL Topping SC	Ms Hadebe Mr Mngadi
1-5 October 2018 ³⁷⁵	Electoral Court (Chairperson) (one vacancy)	Judge BH Mbha	Judge Mbha
	Electoral Court (one vacancy)	None	None
	Free State Division of the High Court (Judge President) (one vacancy)	Judge CJ Musi	Judge Musi

³⁷⁵ Judges Matter (October 2018) Transcripts October 2018. Available at <https://www.judgesmatter.co.za/interviews/october-2018-interviews/> (accessed July 2022) read with JSC (undated) “Shortlisted Candidates for Judicial Positions” for the October 2018 interviews as provided by the DGRU; and Office of the Chief Justice (undated) “Schedule for JSC Interviews – October 2018” as provided by the DGRU.

	Gauteng Division of the High Court (five vacancies)	Adv EF Dippenaar SC Ms SNI Mokose Adv MJ Mosopa Adv B Neukircher SC Mr ML Senyatsi Adv JJ Strijdom SC Adv R Strydom SC Adv S Yacoob SC	Adv Dippenaar SC Ms Mokose Adv Mosopa Adv Neukircher SC Adv Yacoob SC
1-5 April 2019 ³⁷⁶	Constitutional Court (two vacancies)	Judge AC Basson Judge PL Goliath Judge NJ Kollapen Judge F Kathree-Setiloane Judge SA Majiedt Judge ZLL Tshiqi	Judge Basson Judge Goliath Judge Kollapen Judge Majiedt Judge Tshiqi
	Supreme Court of Appeal (Deputy Judge President) (one vacancy)	Judge XM Petse	Judge Petse

³⁷⁶ Judges Matter (April 2019) Transcripts April 2019. Available at <https://www.judgesmatter.co.za/interviews/april-2019-interviews/transcripts-april-2019/> (accessed July 2022) read with JSC (undated) “Shortlisted Candidates for Judicial Positions” for the April 2019 interviews as provided by the DGRU.

	Supreme Court of Appeal (five vacancies)	Judge DM Dlodlo Judge TR Gorven Judge CEH Nicholls Judge YT Mbatha Judge PA Meyer Judge FE Mokgohloa Judge SP Mothle Judge CM Plasket Judge OL Rogers	Judge Dlodlo Judge Nicholls Judge Mbatha Judge Mokgohloa Judge Plasket
	Eastern Cape Division of the High Court (Grahamstown) (one vacancy)	Ms FY Renqe (withdrew) Ms O van Papendorp	None
	Electoral Court (one vacancy)	None	None
	Labour and Labour Appeal Court Deputy Judge President (one vacancy)	Judge EM Molahlehi Judge AJ van Niekerk (interviews cancelled)	None
	Northern Cape Division of the High Court (Deputy Judge President) (one vacancy)	Judge BM Pakati Judge MV Phatshoane	None
7-11 October 2019 ³⁷⁷ (transcripts)	Electoral Court (one vacancy)	Ms SC Lushaba Mr GJ Williams	None

³⁷⁷ Judges Matter (October 2019) Transcripts October 2019. Available at <https://www.judgesmatter.co.za/interviews/october-2019-interviews/> (accessed July 2022) read with Office of the Chief Justice (undated) "Shortlisted Candidates for Judicial Positions" for the October 2019 interviews. Available at https://www.judiciary.org.za/images/news/2019/JSC_Shortlisted_Candidates_October_2019_-_Media.pdf (accessed July 2022).

unavailable via Judges Matter website, but there is a complete resource of the videos from this interview round available under ' Videos Oct 2019 ')	Eastern Cape Division of the High Court (Bhisho) (one vacancy)	Adv ML Beard Adv PHS Zilwa	Adv Zilwa
	Eastern Cape Division of the High Court (Grahamstown) (two vacancies)	Adv ML Beard Ms AM Da Silva Adv MS Rugunanan	Adv Rugunanan
	Eastern Cape Division of the High Court (Mthatha) (one vacancy)	None	None
	Eastern Cape Division of the High Court (Port Elizabeth) (two vacancies)	Adv ML Beard Adv NW Gqamana Judge BM Pakati Adv MS Rugunanan	Adv Gqamana Judge Pakati (transfer)
	Free State Division of the High Court (one vacancy)	Ms NS Daniso Ms T Ramdeyal Adv I Van Rhyn	Ms Daniso

	Gauteng Division of the High Court (five / seven vacancies) (five were advertised; during the course of the interviews the JSC was advised of two additional vacancies, so nominated seven candidates)	Mr D Dosio Adv J Holland-Muter Adv A Maier-Frawley Mr D Makhoba Adv MMP Mdalana-Mayisela Ms SC Mia Mr AP Millar Adv CI Moosa Mr ML Senyatsi Adv R Strydom SC Dr E van der Adv BC Wanless SC	Adv Maier-Frawley Mr Makhoba Adv Mdalana-Mayisela Ms Mia Mr Senyatsi Adv Strydom SC Dr van der Schyff
	Limpopo Division of the High Court (Deputy Judge President) (one vacancy)	Judge TP Mudau Judge GC Muller Judge AML Phatudi Judge MG Phatudi	None
	North West Division of the High Court (Deputy Judge President) (one vacancy)	Judge RD Hendricks	Judge Hendricks
	Western Cape Division of the High Court (two vacancies)	Adv DM Davis SC Adv DS Kusevitsky Adv FSG Sievers SC Adv HM Slingers Mr DF Thulare	Adv Kusevitsky Adv Slingers

2020 Interviews (postponed and eventually held on 12-23 April 2021)	Constitutional Court (one vacancy in 2020, two vacancies in 2021)	Adv AC Dodson SC Judge NJ Kollapen Judge RS Mathopo Judge D Pillay Judge B Vally	After nine candidates had been interviewed, including the 2021 additions, these were nominated: Judge Kathree-Setiloane Judge Kollapen Judge Mathopo Judge Vally
	Electoral Court (two vacancies)	None	None
	Gauteng Division of the High Court for secondment to the Land Claims Court (two vacancies)	None – the two shortlisted candidates withdrew their candidacies	None
	KwaZulu-Natal Division of the High Court for secondment to the Land Claims Court	Mr MT Ncube Judge CM Sardiwalla	Mr Ncube
	KwaZulu Natal Division of the High Court (two vacancies)	Mr BSM Bedderson Mr P Govindasamy Ms SM Marks Ms LR Mogwera Adv IL Topping SC	Adv Bedderson Mr Nkosi Adv Sibiya
	Mpumalanga Division of the High Court (Deputy Judge President)	Judge AM Kgoele Judge SS Mphahlele	Judge Mphahlele

	Mpumalanga Division of the High Court (three vacancies)	Mr HF Brauckmann Mr MBG Langa Adv TM Mankge Adv NE Ndlovakane Mr TV Ratshibvumo Adv JH Roelofse Ms LD Vuyeka	Mr Ratshibvumo Adv Mankge Ms Vuyeka
	North West Division of the High Court (two vacancies)	Adv NG Laubscher (withdrew)	None
12-23 April 2021 ³⁷⁸	Constitutional Court (two vacancies)	Adv AC Dodson SC Judge F Kathree-Setiloane Judge N Kollapen Judge AP Ledwaba (withdrew) Judge RS Mathopo Judge YS Meer (withdrew) Judge MB Molemela Judge D Pillay Judge DN Unterhalter SC Judge B Vally	Judge Kathree-Setiloane Judge Kollapen Judge Mathopo Judge Molemela Judge Vally

³⁷⁸ Judges Matter (April 2021). Interview Schedule April 2021. Available at <https://www.judgesmatter.co.za/wp-content/uploads/2021/04/JSC-Interview-Schedule-April-2021.pdf> (accessed July 2022). The candidates interviewed in this round included those that were due to be interviewed in the round of interviews postponed from 2020.

No appointment was made to fill the Constitutional Court vacancy from this round of interviews as the JSC's conduct had been taken on review.

	Supreme Court of Appeal (five vacancies)	Judge Z Carelse Judge JW Eksteen Judge TR Gorven Judge W Hughes Judge PA Koen Judge AP Ledwaba Judge NP Mabindla-Boqwana Judge KE Matojane Judge SP Mothle Judge OL Rogers Judge S Weiner	Judge Mabindla-Boqwana Judge Carelse Judge Gorven Judge Hughes Judge Mothle
	Eastern Cape Division of the High Court in Mthatha (one vacancy)	Adv N Dukada SC (withdrew during interview)	None
	Free State Division of the High Court (Deputy Judge President) (one vacancy)	Judge JP Daffue Judge NM Mbhele Judge S Naidoo	Judge Mbhele
	Gauteng Division of the High Court (Deputy Judge President) (one vacancy)	Judge RT Sutherland	Judge Sutherland

	Gauteng Division of the High Court (six vacancies)	Adv AA Crutchfield SC Mr D Dario Adv DP de Villiers SC Judge NP Mali Adv PG Malindi SC Mr PH Malungana Mr NM Manoim Mr MPN Mbongwe Mr AP Millar Adv CI Moosa Mr VT Mtati (withdrew) Ms MM Munzhelele Adv PD Phahlane Adv BC Wanless SC	Judge Mali Adv Malindi SC Mr Manoim Mr Mbongwe Adv Phahlane Ms Munzhelele
	KwaZulu-Natal Division of the High Court, Durban (one vacancy)	Adv BSM Bedderson Mr BS Laing Adv RG Mossop SC Mr ME Nkosi Adv C Sibiyi	Adv Bedderson Mr Nkosi Adv Sibiyi
	Labour Court (one vacancy)	Adv JL Basson Mr VRSN Nkosi Adv MTM Phahane Adv FJ van der Merwe	Adv Phahane
	Limpopo Division of the High Court (Deputy Judge President) (one vacancy)	Judge TP Mudau Judge MG Phatudi Judge MV Semanya	Judge Semanya

	North West Division of the High Court (two vacancies)	Mr AH Petersen Adv FMM Snyman SC	Mr Petersen Adv Snyman SC
	Northern Cape Division of the High Court (Deputy Judge President) (one vacancy)	Judge MV Phatshoane	Judge Phatshoane
	Northern Cape Division of the High Court (two vacancies)	Adv LG Lever SC Adv APS Nxumalo Ms JA Snyders	Adv Lever SC Adv Nxumalo
	Western Cape Division of the High Court (two vacancies)	Mr M Francis Adv BC Hack Mr S Hockey Adv P Magona-Dano Adv N Mangcu-Lockwood Adv FSG Sievers SC (withdrew) Mr DM Thulare	Adv Mangcu-Lockwood Mr Francis
4-8 October 2021 ³⁷⁹ (transcripts unavailable via Judges Matter website, but there is a complete	Constitutional Court (two vacancies)	Adv AC Dodson SC Judge F Kathree-Setiloane Judge N Kollapen Judge RS Mathopo Judge MB Molemela Judge DN Unterhalter Judge B Vally	Judge Kathree-Setiloane Judge Kollapen Judge Mathopo Judge Molemela Judge Vally

³⁷⁹ Judges Matter (October 2021). Interview Schedule October 2021. Available at <https://www.judgesmatter.co.za/wp-content/uploads/2021/10/JSC-Interview-Schedule-Oct-2021-Updated.pdf> (accessed July 2022). The round of interviews for the Constitutional Court vacancies was a rerun of the previous round in April – as the latter had been set aside by court order.

resource of the videos from this interview round available under ' October 2021 JSC Interview Videos ')	Competition Appeal Court (Judge President) (one vacancy)	Judge BJ Mnguni (deceased)	None
	Competition Appeal Court (two vacancies)	Judge DC Fisher Judge NM Manoim	Judge Manoim
	Electoral Court (judge members) (two vacancies)	Judge JL Mhlambi Judge LT Modiba	Judge Modiba
	Electoral Court (non-judge members) (two vacancies)	Prof NP Ntlama-Makhanya Ms ZMA Tiry Ms S Pather Prof MR Phooko	Prof Ntlama-Makhanya Prof Phooko
	Eastern Cape Division of the High Court (Mthatha) (one vacancy)	Adv NK Dukada SC Mr MS Dunywa Mr MV Nqumse Ms L Rusi Mr BI Somacala	Ms Rusi
	Eastern Cape Division of the High Court (Grahamstown) (three vacancies)	Adv M Beneke SC Prof A Govindjee Mr SK Gough Mr JGA Laing Ms S Mfenyana Adv TV Norman SC Adv NJ Mullins SC Adv OH Ronaansen SC	Prof Govindjee MR Laing Adv Norman SC
	Free State Division of the High Court (one vacancy)	None	None

	Gauteng Division of the High Court (ten vacancies)	Ms NN Bam Adv AC Crutchfield SC Adv DP de Villiers SC Mr JE Dlamini Mr D Dosio Adv HK Kooverjie SC Adv S Kuny SC Adv J Holland-Muter SC Mr MP Khumalo Adv KG Mogale Mr SP Millar Adv CA Moosa Adv JS Nyathi Adv JJ Strijdom SC Adv JJC Swanepoel Adv BC Wanless SC Ms LB Vuma	Ms Bam Adv Crutchfield SC Mr Dlamini Mr Dosio Adv Kooverjie SC Adv Kuny SC Mr Khumalo Mr Millar Adv Moosa Adv Nyathi
	Gauteng Division of the High Court for secondment to the Land Claims Court (two vacancies)	Adv S Cowen SC	Adv Cowen SC
	Limpopo Division of the High Court (one vacancy)	Ms A Lamminga Adv M Naude-Odendaal Adv TC Tshidada	None

	Mpumalanga Division of the High Court (Mbombela and Middelburg) (two vacancies)	Adv HF Braukmann Adv D Greyling-Coetzer Mr MBG Langa Ms A Lamminga Mr NS Masango Mr PD Nkuna Adv JH Roelofse	Mr Langa Adv Roelofse ³⁸⁰
	Western Cape Division of the High Court (two vacancies)	Ms PD Andrews Dr JD Lekhuleni Mr DM Thulare Ms CN Nziweni Adv M Salie SC	Dr Lekhuleni Mr Thulare
1-5 February 2022 ³⁸¹	Constitutional Court (Chief Justice) (one vacancy)	Justice M Madlanga Justice MML Maya Judge D Mlambo Justice RMM Zondo	The JSC recommended Justice Maya ³⁸²

³⁸⁰ This recommendation is currently under review. See Majavu (2022) "Society of advocates seeks court action to have JSC review recommendation." *City Press* available at <https://www.news24.com/citypress/news/society-of-advocates-seeks-court-action-to-have-jsc-review-judge-recommendation-20220629> (accessed October 2022).

³⁸¹ JSC Schedule for interviews of candidates nominated for the position of Chief Justice (February 2022). Available at <https://www.judiciary.org.za/index.php/judicial-service-commission/interviews-for-chief-justice/interview-schedule> (accessed July 2022).

³⁸² SANews (2022) "JSC recommends Maya as new Chief Justice." Available at <https://www.sanews.gov.za/south-africa/jsc-recommends-maya-new-chief-justice> (accessed July 2022).

4-8 April 2022 ³⁸³	Constitutional Court (two vacancies)	Adv AC Dodson SC Judge F Kathree-Setiloane Judge KE Matojane (withdrew) Judge MB Molemela Judge OL Rogers Judge DN Unterhalter	Adv Dodson SC Judge Kathree-Setiloane Judge Molemela Judge Rogers
	Competition Appeal Court (three vacancies)	None	None
	Eastern Cape Division of the High Court (Gqeberha) (two vacancies)	Prof R Kruger Ms S Mfenyana Mr V Naidu Ms VP Noncembu Mr MV Nqumse Adv DO Potgieter SC	Ms Noncembu Adv Potgieter SC
	Free State Division of the High Court (one vacancy)	Adv JJF Hefer SC Ms CL Page Adv I van Rhyn	Adv van Rhyn
	Gauteng Division of the High Court for secondment to the Land Court (one vacancy)	Ms L Flatela (withdrew)	None
	KwaZulu-Natal Division of the High Court (Judge President) (one vacancy)	Judge MI Madondo	None

³⁸³ Judges Matter (April 2022). Interview Schedule April 2022. Available at https://www.judgesmatter.co.za/wp-content/uploads/2022/03/April-2022_Interview-Schedule.pdf (accessed July 2022).

	KwaZulu-Natal Division of the High Court (Pietermaritzburg) (three vacancies)	Adv EM Bezuidenhout SC Adv HS Gani SC Ms NM Hiralall Mr BS Laing Prof MJ Mathenjwa Adv RG Mossop SC Mr LB Phoswa	Adv Mossop SC
	Limpopo Division of the High Court (two vacancies)	Adv JH Muter SC Adv LGP Ledwaba Adv M Naude-Odendaal Mr VRSN Nkosi Adv TC Tshidada	Adv Naude-Odendaal Adv Tshidada
	North West Division of the High Court (Judge President) (one vacancy)	Judge RD Hendricks	Judge Hendricks
20 June 2022	Constitutional Court (Deputy Chief Justice) (one vacancy)	Justice MML Maya	Justice Maya

Annexure C – Annual Reports submitted to Parliament by the JSC for the period October 2009-April 2022 in terms of section 6 of the JSC Act, 1994

<u>Financial year</u>	<u>Title of Report</u>	<u>Accessible online</u>
2009-2010		
2010-2011		
2011-2012		
2012-2013		
2013-2014		
2014-2015		
2015-2016		
2016-2017		
2017-2018	Judicial Service Commission Annual Report 2017/18	https://www.judiciary.org.za/index.php/judicial-service-commission/jsc-annual-reports?download=10095:jsc-annual-report-2017-18
2018-2019	Judicial Service Commission Annual Report 2018/19	https://www.judiciary.org.za/index.php/judicial-service-commission/jsc-annual-reports?download=10096:jsc-annual-report-2018-19
2019-2020	Judicial Service Commission Annual Report 2019/20	https://www.judiciary.org.za/index.php/judicial-service-commission/jsc-annual-reports?download=10097:jsc-annual-report-2019-20
2020-2021	Judicial Service Commission Annual Report 2020/21	https://www.judiciary.org.za/index.php/judicial-service-commission/jsc-annual-reports?download=10098:jsc-annual-report-2020-21
2021-2022		

No other Annual Reports are available on either the Judiciary government website³⁸⁴ or the Department of Justice government website.³⁸⁵

³⁸⁴ www.judiciary.gov.za.

³⁸⁵ www.justice.gov.za (contains Annual Reports for periods 2004, 2006 and 2007).

Judges Matter recorded the following on their website in September 2018:

... as far as we can tell, the last such report submitted to Parliament by the JSC was in 2007 and no report has been submitted to Parliament since then. The last three reports were in 2004, 2006 and 2007. The Parliamentary Portfolio Committee on Justice and Correctional Services has made similar observations in its 16 May 2018 Report where it noted that: "The Committee also queried if the Judicial Services [sic] Commission had tabled a report of its activities in Parliament (as required by the enabling legislation) and recommended that the report be tabled as a matter of urgency." This inquiry and recommendation was made during the portfolio committee's debate on the 2018 budget allocation to the Office of the Chief Justice (OCJ).³⁸⁶

³⁸⁶ Judges Matter (2018) "Ten years of no accountability to Parliament by JSC." Available at <https://www.judgesmatter.co.za/opinions/ten-years-of-no-accountability-to-parliament-by-jsc/> (accessed July 2022).

Annexure D – Litigation in which the JSC has been a party for the period April 2009-April 2022

In relation to the JSC’s appointment process

- *Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)* [\[2012\] ZASCA 115](#) (on appeal from *Cape Bar Council v Judicial Service Commission (Centre for Constitutional Rights as amicus curiae)* [\[2011\] ZAWCHC 388](#))
- *Helen Suzman Foundation v Judicial Service Commission* [\[2018\] ZACC 8](#) (on appeal from *Helen Suzman Foundation v Judicial Service Commission* [\[2016\] ZASCA 161](#); on appeal from *Helen Suzman Foundation v Judicial Service Commission* [\[2014\] ZAWCHC 136](#))

In relation to the JSC’s disciplinary process

- *eTV (Pty) Ltd and Others v Judicial Service Commission and Others* [\[2009\] ZAGPJHC 12](#) (made an order, the JSC’s compliance with which was subsequently challenged in *Mail & Guardian v Judicial Service Commission* [\[2009\] ZAGPJHC 29](#))
- *Hlophe v Judicial Service Commission and Others* [\[2009\] ZAGPJHC 19](#)
- *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Others* [\[2012\] ZACC 4](#), provides the reasons for the matter postponed in *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Others* [\[2011\] ZACC 29](#); wherein the matters were joined on appeal from:
 - *Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province* [\[2011\] ZASCA 53](#) (on further appeal from *Premier of the Western Cape Province v Acting Chairperson: Judicial*

Service Commission and Others [\[2010\] ZAWCHC 80](#) wherein the WCHC granted leave to appeal in *Premier of the Western Cape Province v Acting Chairperson: Judicial Service Commission and Others* [\[2010\] ZAWCHC 136](#)

- *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* [\[2011\] ZASCA 59](#) (on further appeal from *Freedom Under Law v The Acting Chairperson: Judicial Service Commission and Others* Case No 63513/09 North Gauteng High Court, 10 December 2010, unreported)

- *Motata v Minister of Justice and Constitutional Development and Others* [\[2012\] ZAGPPHC 196](#) (after which Judge Motata sought to review the constitutionality of the JSC Amendment Act in *Motata v Minister of Justice and Correctional Services and Another* [\[2016\] ZAGPPHC 1063](#))

- *Ka Mtuze v Judicial Services Commission and Others* [\[2013\] ZAGPPHC 231](#)

- *Poswa v President of the Republic of South Africa and Others* [\[2014\] ZAGPJHC 218](#)

- *Nkabinde and Another v Judicial Service Commission and Others* [\[2016\] ZACC 25](#) (is an application for rescission of the Constitutional Court's order in May 2016 which dismissed an application for leave to appeal the judgment of *Nkabinde and Another v Judicial Service Commission and Others* [\[2016\] ZASCA 12](#), which was a further appeal from *Nkabinde and Another v Judicial Service Commission President of the Judicial Conduct Tribunal and Others* [\[2014\] ZAGPJHC 217](#))

- *Hlophe v Judicial Service Commission and Others* [\[2022\] ZAGPJHC 276](#) (followed from the application for joinder in *Hlophe v Freedom Under Law In re: Freedom Under Law v Hlophe; Moseneke and Others v Hlophe In re: Hlophe v Judicial Services Commission and Others* [\[2021\] ZAGPJHC 743](#))

Other matters

- *Exxaro Coal (Mpumalanga) (Pty) Ltd and Another v Minister of Water Affairs and Another* [\[2012\] ZAGPPHC 354](#) (in which the JSC is cited as the Second Respondent, but no relief is sought against it).

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**Annexure E – Complaints brought against judges and considered by the Judicial Conduct Committee as reported in the
JSC and Judiciary Annual Reports for the period under review**

For the period 1 April 2020-31 March 2021³⁸⁷

COURT	Number of complaints received	Number of complaints resolved	Number of complaints pending
Constitutional Court	6	10	6
Supreme Court of Appeal	6	2	4
Gauteng Division of the High Court (Pretoria and Johannesburg)	55	29	26
KwaZulu-Natal Division of the High Court (Pietermaritzburg and Durban)	8	4	4
Free State Division of the High Court	6	1	5
Western Cape Division of the High Court	13	4	9
North West Division of the High Court	3	0	3
Limpopo Division of the High Court (Polokwane and Thohoyandou)	15	6	9

³⁸⁷ Judicial Service Commission Annual Report 2020 – 2021.

Labour Court and Labour Appeal Court (Johannesburg, Port Elizabeth, Durban and Cape Town)	22	13	9
Eastern Cape Local Divisions (Bhisho, Grahamstown, Mthatha and Port Elizabeth)	6	5	1
TOTAL	162	81	81

For the period 1 April 2019-31 March 2020³⁸⁸

COURT	Number of complaints received	Number of complaints resolved	Number of complaints pending
Constitutional Court	1	0	1
Supreme Court of Appeal	1	1	0
Gauteng Division of the High Court (Pretoria and Johannesburg)	41	31	10
KwaZulu-Natal Division of the High Court (Pietermaritzburg and Durban)	4	4	0
Free State Division of the High Court	2	2	0
Western Cape Division of the High Court	10	8	2
North West Division of the High Court	3	3	0
Limpopo Division of the High Court (Polokwane and Thohoyandou)	13	7	6
Labour Court and Labour Appeal Court (Johannesburg, Port Elizabeth, Durban and Cape Town)	19	10	9

³⁸⁸ Judicial Service Commission Annual Report 2019-2020

Eastern Cape Local Divisions (Bhisho, Grahamston, Mthatha and Port Elizabeth)	5	4	1
TOTAL	99	70	29

For the period 1 April 2018-31 March 2019³⁸⁹

COURT	Number of complaints received	Number of complaints resolved	Number of complaints pending
Constitutional Court	1	1	0
Supreme Court of Appeal	0	0	0
Gauteng Division of the High Court (Pretoria and Johannesburg)	32	24	8
KwaZulu-Natal Division of the High Court (Pietermaritzburg and Durban)	8	5	3
Free State Division of the High Court	3	2	1
Western Cape Division of the High Court	4	4	0
North West Division of the High Court	3	2	1
Limpopo Division of the High Court (Polokwane and Thohoyandou)	9	5	4
Labour Court and Labour Appeal Court (Johannesburg, Port Elizabeth, Durban and Cape Town)	14	12	2
Eastern Cape Local Divisions (Bhisho, Grahamston, Mthatha and Port Elizabeth)	3	2	1

³⁸⁹ Judicial Service Commission Annual Report 2018-2019.

TOTAL	77	57	20
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For the period 1 April 2017-31 March 2018³⁹⁰

COURT	Number of complaints received	Number of complaints resolved	Number of complaints pending
Constitutional Court	4	3	1
Supreme Court of Appeal	2	2	0
Gauteng Division of the High Court (Pretoria and Johannesburg)	23 (Pretoria) 9 (Johannesburg)	18 (Pretoria) 8 (Johannesburg)	5 (Pretoria) 1 (Johannesburg)
KwaZulu-Natal Division of the High Court (Pietermaritzburg and Durban)	9	7	2
Free State Division of the High Court	2	2	0
Western Cape Division of the High Court	7	5	2
North West Division of the High Court	6 (Mmabatho) 0 (Kimberley)	6 (Mmabatho) 0 (Kimberley)	60 (Mmabatho) 0 (Kimberley)
Limpopo Division of the High Court (Polokwane and Thohoyandou)	5	2	3
Labour Court and Labour Appeal Court (Johannesburg, Port Elizabeth, Durban and Cape Town)	11	6	5

³⁹⁰ Judicial Service Commission Annual Report 2017-2018.

Eastern Cape Local Divisions (Bhisho, Grahamstown, Mthatha and Port Elizabeth)	4	4	0
Miscellaneous	8	8	0
TOTAL	90	71	19

**Annexure F - Disciplinary matters in which the JSC has convened a Judicial
Conduct Tribunal**

[*In re: Judge NJ Motata JCT 2018*](#)

*In re: Judges M Mavundla, N Poswa, P Preller and G Webster JCT 2019 ('Reserved
Judgments JCT')*

[*Justices of the Constitutional Court \(Complainants\) v JM Hlophe \(Respondent\) JCT
2021*](#)

[*#Unite Behind \(Complainant\) v Judge TAN Makhubele \(Respondent\) \(ongoing\).*](#)

[*Judge D Davis and Others \(Complainants\) v Judge MK Parker \(Respondent\); Cape
Bar Council \(Complainants\) v Judge MK Parker \(Respondent\) \(forthcoming\).*](#)