



Democracy Digest

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Choosing Our Judges

On paper, South Africa has a very good system for appointing people to the judiciary – the judges of the High Court, Supreme Court of Appeal, and Constitutional Court. Nominees for positions on these courts undergo a public interview process before the Judicial Service Commission (JSC), which then sends a shortlist of suitable candidates to the President, who makes the formal appointments.

The JSC consists of a mix of legal and political role-players: it is chaired by the Chief Justice, and various other judges, lawyers, and legal academics serve on it with the Minister of Justice and ten Members of Parliament. The exact composition of the JSC can be found at <https://www.judiciary.org.za/index.php/judicial-service-commission/members-of-the-jsc>

Recently, however, the performance of the JSC has come under question, and fears have been expressed that its approach to selecting judges has become politicised. The legal columnist 'Professor Balthazar' was one of those who criticised the JSC's hearings for Constitutional Court positions in April this year. For one thing, some of the candidates were subjected to improper and irrelevant questioning; for another, one of the most highly-regarded candidates, David Unterhalter SC, was passed over, seemingly on the basis of his being a white male.

<https://www.dailymaverick.co.za/opinionista/2021-04-18-judicial-service-commission-hearings-were-a-disturbing-show-of-intimidation-impropriety-and-indecency/>

<https://www.dailymaverick.co.za/opinionista/2021-08-16-judicial-service-commission-has-failed-its-constitutional-mandate-and-it-knows-it/>

The Council for the Advancement of the SA Constitution (CASAC) went further, and successfully applied to the High Court to have this round of hearings set aside.

<https://www.timeslive.co.za/news/south-africa/2021-07-14-jsc-interviews-for-constitutional-court-were-a-sham-casac/>

When the hearings were conducted again during the first week of October, one of the nominees, Judge Dhaya Pillay, who had been particularly unfairly treated at the original hearings, withdrew her nomination. Most commentators felt that the re-run hearings were better, with fewer politically-motivated questions, but in the end the same shortlist of five names was sent to the President.

<https://mg.co.za/news/2021-10-05-jsc-interviews-for-concourt-round-two-better-process-same-outcome/>

The renewed failure to select Adv Unterhalter evoked further comment:

https://www.news24.com/news24/columnists/serjeant_at_the_bar/serjeant-at-the-bar-streaks-ahead-yet-judge-david-unterhalter-didnt-make-it-again-20211007

<https://www.timeslive.co.za/sunday-times-daily/opinion-and-analysis/2021-10-06-the-jsc-should-tell-us-whether-white-men-should-stop-applying/>

Not everyone saw Adv Unterhalter's exclusion as primarily a racial question (even though one member of the JSC, Dali Mpofu SC, regarded this as "the elephant in the room"); instead, it has been suggested that it reflects an 'anti-intellectual' trend in judicial appointments. The following piece argues this cogently:

<https://tinyurl.com/v5zmm9ys>

Broader questions have also been raised about the criteria the JSC employs in its selection process, and about what is seen as a lack of proper leadership at the apex of the judiciary.

<https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/>

<https://www.news24.com/news24/opinions/fridaybriefing/lawson-naidoo-and-dan-mafora-the-concourt-in-free-fall-the-leadership-vacuum-must-be-rectified-20210923>

But there is also a more positive view of the situation, at least as far as the Constitutional Court's judicial performance is concerned. The opinions of two of its recently retired members must carry considerable weight:

<https://www.news24.com/news24/analysis/edwin-cameron-and-johan-froneman-is-the-constitutional-court-slipping-no-on-the-contrary-20210930>

The other matter of 'judge choosing' currently attracting attention is the process underway to find a new Chief Justice, Judge Mogoeng Mogoeng's term of office having come to an end. The novel procedure instituted by President Ramaphosa is described here:

<https://www.cplo.org.za/response-choosing-the-new-chief-justice-by-mike-pothier/>

Numerous names were submitted, but only eight met the nomination criteria fully. Among them were the Judge President of the Western Cape, John Hlophe, and the Public Protector, Busisiwe Mkhwebane. Both these absurd nominations – Judge Hlophe has been found guilty of gross judicial misconduct for trying to influence the Constitutional Court in a matter involving Jacob Zuma, and faces a further misconduct hearing for allegedly assaulting a fellow judge; and Adv Mkhwebane's lack of legal acumen and judicial temperament has been highlighted in numerous court cases – must be seen as attempts to undermine both the selection process and, in the longer term, the standing of the judiciary.

<https://www.dailymaverick.co.za/opinionista/2021-10-05-disgrace-the-word-that-sums-up-the-chief-justice-nominations-of-john-hlophe-and-busisiwe-mkhwebane/>

<https://www.news24.com/news24/columnists/guestcolumn/opinion-craig-watt-pringle-by-backing-hlophe-for-chief-justice-bla-shows-contempt-for-jsc-parly-20211004>

Naturally, not everyone agreed with these views:

https://www.news24.com/news24/Columnists/GuestColumn/right-of-reply-we-are-not-in-contempt-of-the-jsc-or-parly-bla-responds-to-craig-watt-pringle-20211007?utm_source=24.com&utm_medium=email&utm_campaign=_3781_36143821_20211008_&utm_content=tfrs_v4s16_subs_nfy_20211008_C

Finally, the all-round significance of the role of the Chief Justice, and the importance of openness and transparency in the way he or she is chosen, are explored in these two articles:

<https://www.news24.com/citypress/voices/appointing-the-next-chief-justice-a-matter-of-grave-importance-20211010>

<https://tinyurl.com/yywnmyhc>

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