



Response

8th February 2022

Choosing the New Chief Justice, Part II

In a *Response* published last September with the title '[Choosing the New Chief Justice](#)', we wrote that President Cyril Ramaphosa's decision to allow public participation in the selection process was "a significant and welcome development". Since the Constitution gives the President the power to make the appointment without such participation, it was "a voluntary concession of state power of the kind that governments seldom make"; and "another significant brick being laid in our gradual constitutional renovation".

Last week the process reached its penultimate stage, with Judicial Service Commission (JSC) conducting hearings for the four candidates referred to it by Mr Ramaphosa after the promised public nomination and short-listing stages. Sadly and frustratingly, rather than following the President's constructive example, the JSC chose the opposite path. Its divisive and destructive approach did both the process and the country a shameful disservice.

Four key points emerge from the hearings:

Firstly, enhanced opportunities for consultation and participation are well and good, but to be effective the participants and consultees must act in good faith. Far too many members of the JSC, on the contrary, clearly had no interest in genuinely probing the strengths and qualities, the judicial philosophies and outlooks, and the administrative and leadership skills of the candidates. Neither did they make any attempt to represent the constituencies in whose name they serve on the JSC. The commissioners nominated to the JSC by Parliament, for example, are supposed to represent the institution as a whole (and, indirectly, us the citizens); not their own narrow political views or the partisan interests of their parties. The same is true of the commissioners who represent the advocates' and attorneys' professions. Julius Malema and Dali Mpofu SC were the two worst offenders in this regard, but by no means the only ones.

Secondly, it was a national embarrassment to see eminent judges being treated with such disrespect and impudence. The low point was the scurrilous ambushing of Judge Dunstan Mlambo by Mr Mpofu, who confronted the judge with utterly unsubstantiated rumours of sexual harassment. But this was not the only example. Much of Mr Malema's questioning of Judges Mlambo and Zondo was clearly designed to paint them as dishonest political operators, while one of the other commissioners made the absurd comment that Judge Mlambo could not be expected to defend the Constitution since, apparently, his record in the liberation struggle indicated that he had "not fought for it".

The behaviour of these commissioners served only to sully the reputations of some of our most highly regarded judges, and thereby to bring the judiciary as a whole into disrepute. (At least in the eyes of gullible members of the public. People who know anything about the law and its administration will know very well whose reputations were diminished last week.)

Thirdly, these hearings confirmed that the JSC urgently needs to be reformed. There are far too many politicians on it, quite a number of whom seem to think that the Commission is just another forum for the waging of political battles. Some of the professional representatives, on this showing at least, also appeared to think that their job was to back up the political attacks launched by Mr Malema in particular. Room should be made for representatives of civil society, especially for people from the union movement, from the human rights sector and from organised business; all these sectors have a deep interest in the appointment of good judges. The JSC also needs more effective chairing. Ideally, a panel of retired judges could be retained to chair the Commission's meetings – this would eliminate situations of potential conflict, since the usual chairpersons (the Chief Justice or the Acting CJ, or the President or Acting President of the Supreme Court of Appeal) will often have a direct interest in which candidates succeed in their interviews.

Fourthly, and to end on the one positive note, we are very fortunate to have had four such well-qualified candidates for the post. Any one of them would make a good Chief Justice and, in this respect at least, the bullying and shenanigans that we saw last week were not able to deprive the country of the best candidates and install a poor one. But that might not be the case next time. Unless the JSC is reformed and brought back to its original, non-partisan purpose, we may well see it being used to weaken, rather than strengthen, the judiciary.

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