



Briefing Paper 543

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## Assessing the Judicial Service Commission

### 1. Introduction

During the period of State Capture, roughly coinciding with the Zuma administration's term of office, it was regularly asserted that the judiciary was 'the last bastion' preventing the complete collapse of the rule of law and a descent into kleptocracy and a failed state. There were other such bastions, including our vigorous media and our active civil society sector, but the role played by the courts in upholding the Constitution, and thereby largely preventing that collapse, is clear.

That we have a strong and independent judiciary while so many other institutions of democracy have been weakened and captured is, to a considerable extent, due to the way judges are selected and appointed. Since its inception in 1994 the Judicial Service Commission (JSC) has facilitated this process; nominees are interviewed in public and recommendations are made to the President, who is constitutionally mandated to make the final appointments. The JSC is, on paper at least, a fairly representative body – the legislature, the executive and the judiciary itself all have a presence, as do the various arms of the legal profession.

Lately, though, the JSC has come in for increasing criticism. It has failed to move with any sense of urgency on certain disciplinary matters, especially the long-running saga of Judge John Hlophe's attempts to influence the Constitutional Court in Mr Zuma's favour as far back as 2008. Its interviews have on occasion been tendentious, with candidates being attacked for perceived political stances or histories, rather than evaluated for what they might offer as judges. The quality of the chairing of some of its sessions has been poor. And there is more and more evidence

that certain members of the Commission are using it to pursue openly political ends.

This Briefing Paper looks at the JSC from various angles: its constitutional and statutory basis; its growing politicisation; its composition and leadership; its positive achievements; and the reforms that are needed to make it fit for its purpose for another three decades.

### 2. The Constitutional and Statutory Basis of the JSC

The JSC was established by section 178 of the Constitution, which sets out its composition and the manner of appointment of its members, and gives it a broad mandate – it "may advise the national government on any matter relating to the judiciary or the administration of justice..." Read with section 174, however, it is clear that one of the JSC's key roles – and the one probably most familiar to the public – is that which it plays in the selection and appointment of judges.

Sub-sections 174(3)&(4) set out in detail the particular functions of the JSC in the appointment of the Chief Justice and Deputy Chief Justice, the President and Deputy President of the Supreme Court of Appeal (SCA), and the other judges of the Constitutional Court. Sub-section 174(6) provides that the President "must appoint the judges of all other courts on the advice of" the JSC.

Most of the details governing the JSC's work are to be found in the Judicial Service Commission Act 9 of 1994. Apart from various mundane administrative matters, the Act contains important provisions relating to: oversight of judicial conduct and accountability; a Judicial

Conduct Committee and its procedures; the conditions under which active and retired judges may receive other remuneration; a judicial code of conduct; the disclosure of registrable interests; procedures for lodging and dealing with complaints against judges; and the establishment, composition, objects and procedures of Judicial Conduct Tribunals.

Underlying all these provisions is the constitutional imperative of judicial independence. The JSC's role in the appointment of judges helps to ensure openness and transparency (all candidate interviews are held in public, and usually televised or streamed), and militates against undue political influence in the process. The names of candidates are published beforehand, allowing interested parties to indicate support or opposition, or just to highlight specific issues.

Likewise, the sometimes protracted complaint, disciplinary and impeachment procedures are designed to shield judges from being dismissed, or subjected to investigation, on spurious grounds. It is only after an exhaustive process that the JSC can recommend to Parliament that a judge be removed from office, and even then, a two-thirds vote of the National Assembly is required to give effect to the removal.

Certainly, the nature of the disciplinary process makes it easy for an impugned judge, especially one who is prepared to act in bad faith, to draw things out for years. But this is the price we pay for ensuring that good judges cannot easily be got rid of, or influenced to rule in particular ways for fear of losing their positions.

Anyone who has observed the political circus surrounding the appointment of justices to the United States Supreme Court, especially over the last two or three decades, will appreciate the advantages of our system. It is also noteworthy that in 2006 the United Kingdom adopted a roughly similar approach to ours, in which an independent Judicial Appointments Commission is responsible for selecting, and recommending the appointment of, judges. Before that, judicial appointments were made directly by the Lord Chancellor, equivalent to our Minister of Justice.

### **3. The Commissioners**

Clearly, a body such as the JSC will carry out its duties with the necessary degree of independence

and integrity only if its members are up to the task, and if they approach their work in the correct spirit. The balance between political and non-political JSC commissioners, and indeed the conflation of the two, is presently causing concern. To understand this, the composition of the JSC needs to be examined.

#### ***3.1. Politicians and lawyers***

Most of the time, the JSC consists of 25 members – this is when it is dealing with appointments of 'ordinary' judges to the various divisions of the High Court. Then, the Judge President of the division concerned, and the Premier of the province in which it is located, are Commissioners. For all its other appointment business (to the Constitutional Court and the SCA, for example) these two members fall away, leaving 23.

Among these there is supposed to be a rough balance between political and non-political appointees. Thus, the Chief Justice and the President of the SCA, one divisional Judge President, two practising advocates, two practising attorneys, and one teacher of law (all five of the latter designated by their peers) constitute the non-political, or legal-professional, membership of the JSC. On the political side, there are the Minister of Justice, six members of the National Assembly (three from opposition parties) and four members of the National Council of Provinces. In addition, four commissioners are appointed directly by the President. Ideally, these should be non-political members, broadening the representivity of the JSC and enhancing the Commission's independence from political influence.

#### ***3.2. Acting in good faith***

The Constitution sets very broad criteria for the assessment of potential judges. They must be "appropriately qualified" and "fit and proper" persons; and the need for the judiciary as a whole to reflect SA's racial and gender make-up must be considered when judges are appointed. It might be thought that it would be a fairly straightforward matter to apply these criteria. The legal experts on the panel could assess candidates' qualifications and experience, question them on their track records, and deal with issues around their professional competence. The political representatives – always remembering that they are there on behalf of the citizenry as a whole – would focus on judicial philosophies, the candidates' grasp of key constitutional values, and

on the question of racial and gender representivity.

What is not needed from commissioners is the airing of personal grievances or narrow ideological beliefs, or the scoring of political points. Neither is it necessary to harry, embarrass or insult candidates. Unfortunately, all these things have been happening increasingly of late. Perhaps the worst example was during the most recent hearings, when candidates for the post of Chief Justice were interviewed in February. A number of commissioners, from both the political and the legal-professional components, clearly set out to discredit the candidacies of Judges Raymond Zondo and Dunstan Mlambo, and to promote that of Judge Mandisa Maya. To mention only two examples, Dali Mpofu SC went so far as to confront Judge Mlambo with baseless rumours of sexual impropriety. Julius Malema, who sits on the JSC as one of the National Assembly representatives, attacked Judge Zondo for meeting with Jacob Zuma in 2008, before the latter became President, to discuss concerns about Mr Malema's threats at that time to "kill for Zuma".

The problem here is simply that, if commissioners do not undertake their duties in good faith, and instead use their positions on the JSC to advance personal or political agendas, then the whole enterprise is put at risk. Already, there are indications that former judicial candidates who have been subjected to bullying and innuendo by some commissioners have declined further nominations. And accusations, no matter how unfounded they may be, tend to leave a taint when they are aired so publicly.

The six members of the National Assembly and the four from the National Council of Provinces are not there to serve the interests of their parties – they represent the legislature as a whole. While it may be too much to ask that they should share a similar approach to the assessment of judicial candidates, it is surely not unreasonable to ask that they do not use the JSC as a platform for political grandstanding, as one or two of them tend to do.

### **3.3. Leading the Commission**

Section 178 of the Constitution provides that the Chief Justice "presides" at meetings of the JSC. If he or she cannot, the Deputy Chief Justice or the President of the SCA, or the Deputy President of the SCA, does so. It is presumed that senior judges make effective chairs of commissions, but this is

not necessarily so. And, lately, a few instances of poor leadership have added to the sense of unease surrounding the JSC's performance.

In mid-2021 the Commission interviewed candidates for vacancies on the Constitutional Court. A number of them were subjected to irrelevant and politically-loaded questioning, which the chairperson, Chief Justice Mogoeng Mogoeng did nothing to prevent. Afterwards, the Council for the Advancement of the SA Constitution (CASAC), had these hearings reviewed and set aside. A media report itemises some of the problematic aspects of the hearings:

*Mogoeng did nothing to stop multiple JSC commissioners, including EFF leader Julius Malema, from questioning Judge Dhaya Pillay about rulings she had given against former president Jacob Zuma, as well as her long-standing friendship with Minister Pravin Gordhan.*

*Casac further accuses the chief justice of allowing "inaccurate and irrelevant questions" for Judge David Unterhalter, about Israel's relationship with Palestine and the "so-called two-state solution" – despite Mogoeng himself having been censured by a JSC conduct committee for expressing his support for Israel. Mogoeng also did nothing when Malema accused Pillay of being "a political activist" and "no judge", for quoting an ANC conference speech in a ruling in which she found Zuma had defamed former tourism minister Derek Hanekom by referring to him as a "known enemy agent" in response to a tweet posted by Malema himself.*

*While Pillay countered Malema's accusations by pointing out that the Hanekom ruling had not been successfully appealed, she received no support from Mogoeng or any of the other JSC commissioners. Instead, she was subjected to questions from JSC commissioner Archibold Nyambi about why she had refused to accept Zuma's "sick note" after he failed to attend his scheduled corruption trial court appearance and issued a suspended warrant of arrest for him.<sup>1</sup>*

The report goes on to note that Chief Justice Mogoeng "made matters worse" by himself insinuating that Minister Pravin Gordhan had "shown an interest [in Judge Pillay's] upward mobility". Mogoeng CJ subsequently conceded that Mr Gordhan had in fact said nothing at all inappropriate; but by then, it seems, the damage had been done to Judge Pillay's candidacy.

During the Chief Justice hearings this February, SCA Deputy President Xola Petse chaired the JSC, and signally failed to rein in irrelevant and belligerent questioning by Mr Malema and Mr Mpofo in particular. After initially allowing Mr Mpofo to go on at length with his unsubstantiated allegations of sexual impropriety against Judge Mlambo, Judge Petse did eventually rule them out of order and direct that they be struck from the record – but again, much reputational damage had already been done.

It is not only the reputations of individual candidates that suffer when the JSC is poorly led, and when the presiding judge allows all sorts of partisan and argumentative questions. The JSC's own reputation, and thus that of the judiciary as a whole, is at risk. This can be clearly seen in the growing politicisation of the Commission and its hearings.

#### **4. Politicisation**

In recent years the sense has been growing that the JSC, in both its main roles of judicial selection and judicial disciplining, has become a site of political contestation. More and more, sittings of the Commission give rise to comment and speculation about how certain candidates will be treated by certain commissioners.

One way in which this plays out is in judges being grilled about how some of their previous decisions have affected leading politicians. Mr Nyambi's question about former President Zuma's 'sick note', mentioned in the excerpt above, is one example, but there are numerous others. Last year, Julius Malema questioned Judge Elias Matojane about his decision to award damages to Trevor Manuel in a suit between Mr Manuel and the EFF. Other commissioners have asserted, without offering the slightest evidence, that certain courts – in which former President Zuma and the current Public Protector have regularly lost cases on the basis of their being weak and without merit – are biased in favour of the Ramaphosa administration. None of these questions (or attacks) illuminate anything useful about the respective judges' philosophies or abilities; instead, they seek to place the judges in an unfavourable light and to discredit their independence.

Another example occurred at the Chief Justice hearings, when Thandazani Madonsela SC, having ascertained that Judge Mlambo had not played a

militant role in the struggle against apartheid, asked him how he could uphold "a Constitution you never fought for". Candidates should be evaluated on their capacity and willingness to serve the Constitution, not on whether they played an 'acceptable' part in past struggles or not; if the latter was the criterion, no candidate for the US Supreme Court could possibly qualify, since the fight for that Constitution ended 250 years ago.

The politicisation of the JSC has been exacerbated over the last few years by the anomalous situation that one of its most prominent legal-professional members has been Dali Mpofo SC; in fact, Mr Mpofo served as the Commission's spokesperson as well. But until 2019 Mr Mpofo was also the national chairperson of the Economic Freedom Fighters, and he retains an influential role in the party. Quite how the General Council of the Bar, which sends two advocates to represent the profession on the JSC, thought that it was fitting to designate an active politician to be one of them is hard to fathom. During the Chief Justice hearings Mr Mpofo and Mr Malema made no attempt to disguise their shared intention to discredit Judges Zondo and Mlambo, and to boost the candidacy of Judge Maya.

But despite the politicisation of the JSC, and despite the unacceptable behaviour of some commissioners, abetted on occasion by poor leadership, the picture is by no means uniformly bleak. There is still much to commend in the work of the JSC.

#### **5. The Positives**

##### **5.1. Transparency**

Prior to 1994, judges in South Africa were appointed by the Minister of Justice, who might or might not have consulted with a small circle of advisors, and who would usually have received informal nominations from the judges president of the various High Court divisions. In the UK, until the advent of the Judicial Appointments Commission, it was said only half-jokingly that the Lord Chancellor simply 'tapped you on the shoulder' to indicate that elevation to the bench. In many other parts of the world, judges are not only directly appointed by governments, but are specifically chosen according to their political acceptability.

Against this background, the JSC has performed an invaluable service in promoting transparency in

the selection of judges. As already mentioned, its hearings are open to the public (though not its deliberations) and, despite the concerns discussed above, the commissioners often ask penetrating and revealing questions. There are currently about 260 active judges in our superior courts, each of whom has been through the JSC interview process. Very few of them have turned out to be unsuitable whereas, thanks in part to the transparency of the process, a number of candidates who would probably not have made good judges have been excluded.

### **5.2. Accountability**

The line between holding judges accountable and interfering with their independence is a fine one. The JSC has not often had to deal with substantial complaints against judges, and it is fair to say that in some such instances it has been disgracefully slow to act. Nevertheless, the provisions of section 177 of the Constitution, enlarged upon in the JSC Act 9 of 1994, constitute a careful and well-balanced set of processes for investigating complaints, disciplining judges where necessary, and recommending their impeachment as a last resort. The necessary checks and balances, as well as appeal procedures, are there to ensure that judges can be held to account, while at the same time safeguarding their independence.

### **5.3. Participation**

The names of candidates for the bench are published before interviews take place. Professional bodies, civil society organisations, and members of the public all have the opportunity to comment on candidates, and it is not unusual for such comments to be taken up in the formal interviews. The organisation *Judges Matter* often compiles dossiers on candidates, especially for the most senior positions, and makes these available to commissioners. As with parliamentary committee hearings, the physical presence (barring temporary COVID restrictions) of the media and civil society representatives at the JSC's hearings heightens the sense of public participation, and may help to focus the minds of commissioners on their task.

### **5.4. Preserving independence**

It is no small achievement that, over the 28 years since 1994, the independence of our judiciary has been preserved. It is certainly not the case that there have been no attempts to undermine this independence. Politicians of various parties have

made all sorts of accusations, and occasional threats, claiming that the courts have one agenda or another; that they are 'counter-revolutionary'; or that they 'stand in the way' of social progress. The fact that none of these attacks seems to have found any serious degree of traction in society, and the fact that no judges have been seen to be cowed by them, says a lot about judicial independence; and for this, the JSC can take considerable credit.

## **6. Reform**

Most of those who have observed the work of the JSC closely seem to think that it is generally fit for purpose.<sup>2</sup> It is the conduct of individual commissioners, more than any serious structural issues, that has led to recent concerns about politicisation of the commission, and worries that it is being used to pursue ideological ends. To enhance the JSC's performance, and to help protect it from political misuse, a few ideas have been put forward:

*A code of conduct for commissioners* would go some way to discouraging the kind of politically-motivated questioning we have seen recently. It would also, hopefully, help to improve levels of respect and decorum between commissioners and candidates, and between commissioners themselves. The sight of Julius Malema and Justice Minister Ronald Lamola shouting at each other during the Chief Justice hearings, for example, did nothing to enhance the standing of the Commission. A group of civil society organisations has recently called for such a code to be developed.<sup>3</sup>

*A more detailed set of criteria* for judicial appointments is desirable. It is felt by some that the constitutional criteria of "appropriately qualified" and "fit and proper" need to be fleshed out. It is also argued that a set of criteria will help to ensure that candidates are questioned in a more uniform manner. It is noted, for example, that Judge Maya faced almost no tough questioning at the Chief Justice interviews, whereas Judges Zondo and Mlambo were severely grilled, as mentioned earlier. Irrelevant, partisan, discriminatory, spurious and bigoted questions – all of which have been put to candidates of late – would also be more easily ruled out of order.

*More representation of civil society* on the JSC might also be beneficial. There is no reason why essentially only two sectors, the legal and the

political, should serve on the Commission. South Africa has a very active civil society sector, with many organisations having deep experience of constitutional and juridical matters. The human rights sector, the trade unions, and organised business, for example, would bring valuable perspectives to the JSC's processes.<sup>4</sup> The make-up of the JSC is constitutionally mandated, and is thus difficult to change, but the President has wide discretion when it comes to the four members he or she appoints directly under section 178(1)(j). Up to now, successive presidents have generally appointed legal professionals to these positions, but there is nothing to prevent the appointment of people from any walk of life.

## 7. Conclusion

Four recent developments engender optimism that the JSC can overcome its recent 'wobbles' and re-secure its reputation. *Firstly*, the politically-inspired attempt to railroad President Ramaphosa into appointing Judge Maya as Chief Justice (or, at least, to prevent him from appointing either Judge Mlambo or Judge Zondo) failed. This may give pause to those who still wish to make the Commission a site of political contestation.

*Secondly*, the appointment of Judge Zondo as Chief Justice means that he will chair the JSC. Those commissioners who try to intimidate candidates of whom they do not approve, who insist on introducing irrelevant matters, or who try to use

the Commission as a political platform, will find Judge Zondo a far tougher chairperson than some of his immediate predecessors in this position have been. There ought thus to be far less misuse of the JSC and its processes.

*Thirdly*, Dali Mpofu SC has been replaced as one of the representatives of the advocates' profession, and it appears that his successor will not be wearing a party-political hat underneath her legal one.

*Fourthly*, President Ramaphosa has removed Thandazani Madonsela SC as one of his appointees, seemingly in response to Mr Madonsela's controversial questioning of Judge Mlambo and his general association with the line of attack pursued by Mr Mpofu and Mr Malema.

These personnel changes are not in themselves enough to address all the issues currently affecting the JSC's performance, but they will certainly go some way to doing so. The Commission is not in need of a major turn-around. Its constitutional and legal basis is sound, and many individual commissioners undertake their duties with integrity and sincerity. It does need to insulate itself more securely against politicking and partisanship, and perhaps to adopt and enforce a code of conduct for its members. With these changes, and with its new leadership, we may have some confidence that the JSC will continue to serve the judiciary, and the people, for the foreseeable future.

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<sup>1</sup> <https://www.news24.com/news24/southafrica/news/unlawful-irrational-and-unfair-mogoeng-jsc-under-fire-over-politicised-concourt-interviews-20210604>

<sup>2</sup> The CPLO and the Hanns Seidel Foundation held a webinar in February this year at which three long-time observers of the JSC gave their views on the institution, its problems and its achievements. An edited version of the webinar can be watched at <https://www.youtube.com/watch?v=P3YC8N1JscI>

<sup>3</sup> See <https://www.polity.org.za/article/civil-society-wants-jsc-interviews-halted-until-code-of-conduct-published-2022-03-03>

<sup>4</sup> It is interesting to note, in this regard, that the United Kingdom's Judicial Appointments Commission contains a number of 'lay members' who are not lawyers. The chair of the JAC is a Professor of Surgery. Even more notably, the JAC has no active party politicians in its ranks. <https://judicialappointments.gov.uk/the-board-of-commissioners/>



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