RESEARCH REPORT AND SUBMISSION ON

JUSTICE MAYA FOR THE POSITION OF DEPUTY CHIEF JUSTICE

INTRODUCTION

1. The Democratic Governance and Rights Unit (DGRU) is an applied research unit based in the Department of Public Law at the University of Cape Town. The DGRU conducts applied research with a particular focus on the judiciary and has been monitoring the appointment of judges since 2009. We have regularly prepared research reports and submissions on candidates and the appointment process since 2009. Through our Judges Matter project, we aim to provide insight and transparency into the process by which judges are appointed in South Africa.

2. Following the JSC's interviews of candidates for the position of Chief Justice in February 2022 and the subsequent announcement of the appointment of Chief Justice Zondo, the President has nominated Justice Maya for appointment to the now-vacant position of Deputy Chief Justice. Whilst many of the issues relating to Justice Maya's candidacy would have been discussed at her interview in February 2022, we take the opportunity to make a short submission ahead of the JSC's interview of the candidate

3. In this submission, we discuss the criteria we think should inform the JSC's interview of the candidate and provide a short profile of the candidate's background and judicial record.

A NOTE ON CRITERIA

4. Readers of the DGRU's submissions to the JSC over the years will be aware that we have long advocated for the adoption by the JSC of supplementary criteria to elaborate on the broad requirements found in sections 174(1) and (2) of the Constitution. We have argued that the adoption of such criteria are crucial to addressing many of the concerns that have been raised about the JSC's processes over the years, and would bolster the transparency of the appointments process, as well as giving a clear means of assessing the relevance of questions put to candidates.

5. During the JSC's last sitting, a statement was released by the JSC, announcing that the JSC was reaffirming its commitment to the guidelines on criteria "adopted in 1998 and updated in 2010." It was further stated the Rules Committee of the JSC had been tasked with reviewing the criteria and recommending "any amendments to expand and or supplement the criteria."[1]

6. We welcome the JSC's steps to articulate more detailed criteria to guide the selection of candidates for judicial office. We further commend the JSC for the regular references made to these criteria during the April 2022 interviews. We are of the firm view that the practice followed by several commissioners of expressly linking their questions to the expanded criteria will be greatly beneficial to the appointments process.

7. We also welcome the mandate given to the Rules Committee to continue to evaluate and develop the criteria. Whilst we welcome the re-adoption of the guidelines on criteria, there is in our view much work that can still be done to develop them further. The vacancy under consideration at this sitting of the JSC provides an illustration of one area of potential development – the guidelines on criteria do not deal specifically with any qualities or

[1] Judicial Service Commission Media Advisory, 4 April 2022. Available at https://www.judiciary.org.za/index.php/news/press-statements/2022?download=9214:media-advisory-judicial-service-commission.

attributes specific to judicial leadership positions. Furthermore, they do not deal with any differences which may be applicable for appointments to appellate or specialist courts. We would therefore encourage the Rules Committee to address the issue of further development of the guidelines on criteria as a matter of priority.

WHAT CRITERIA SHOULD BE APPLIED IN APPOINTING A DEPUTY CHIEF JUSTICE?

8. In our submission for the interview of candidates for the position of Chief Justice in February 2022, we argued that the potential Chief Justice should possess a wide range of attributes. They would have to be an influential leader on several levels, both as the head of the Constitutional Court and as the head of the entire judiciary.

9. The Constitution does not provide specific details on the role of the Deputy Chief Justice. We take the view that as "second in command" to the Chief Justice, many of the criteria which could be applied to assessing the suitability of a candidate for the position of Chief Justice can also be applied to the position of Deputy Chief Justice. We set out those criteria, drawing on our submission for the Chief Justice interviews in February 2022 and modified appropriately, below.

Intellectual leadership

10. The Deputy Chief Justice should also be an intellectual leader of the judiciary. They must be able to lead the Constitutional Court in the absence of the Chief Justice. They must have a strong jurisprudential background and track record, so that they can write high-quality judgments that will be an example for other judicial officers to follow. They must have stature as a lawyer and as a leader and command the respect of judges and lawyers. They must have the intellectual ability to be a jurisprudential thought leader and innovator, to address novel legal questions, and to articulate judgments that break new legal ground. The Deputy Chief Justice must also have the capacity for the hard work that the role requires.

11. The Deputy Chief Justice should have a vision for the judiciary and have a demonstrated ability to implement that vision in harmony with the vision of the Chief Justice. They must understand the Constitution and how their leadership can assist with judicial reform

Integrity and ethics

12. The Deputy Chief Justice must be a person of the highest integrity. They must have a keen understanding of judicial ethics, and they must have conducted themselves, both on and off the bench, in a manner that demonstrates they possess high ethical standards and a strong understanding of the issues underlying judicial ethics. Whilst a sitting judge would have been assessed as a fit and proper person by the JSC when they were appointed, it does not follow that they have inevitably conducted themselves in an ethical way while they have been a judge. How they have conducted themselves as a judge therefore ought to be evaluated. As a member of the Judicial Conduct Committee, the Deputy Chief Justice must be able to provide leadership in holding to account judges who fall short of the required ethical standards, particularly as the practice has often been for the Chief Justice to delegate the role of chairperson of the JCC to the Deputy Chief Justice.

Administrative skill

13. The Deputy Chief Justice must be a strong administrator, to provide leadership for both Constitutional Court and the judiciary as a whole. The past decade has seen a dramatic increase in the scale of the Chief Justice's administrative responsibilities. This makes it important that the Deputy Chief Justice be able to assist the Chief Justice in discharging these responsibilities. To this end, the Deputy Chief Justice must have significant administrative skills, with strong organisational abilities and a keen understanding of the needs and challenges of the judiciary.

Strong communication skills

14. The Deputy Chief Justice may be required to assist the Chief Justice in communicating the views of the judiciary on matters relating to the administration of justice to other branches of government, as well as to the general public and civil society. This is important for maintaining public confidence in the judiciary.

Independent mind

15. The Deputy Chief Justice must be independent–minded and have a demonstrated commitment to constitutional values and the human rights enshrined in the Constitution. They must show fairness as a leader, and they should have the vision and ability to continue the process of transforming the judiciary.

16. The Deputy Chief Justice should carry out formal commitments with skill and impartiality, and must protect the judiciary from being undermined. In their role as a member of the JCC, they must be authoritative, fearless, and even-handed in dealing with complaints against judges

Temperament

17. In an environment where the judiciary is subject to frequent criticism and attack, the Deputy Chief Justice must therefore be thick skinned and able to handle pressure and criticism in a way that protects the integrity of the judiciary. In an ever-changing environment where every utterance by public figures is amplified by social media, and in which the judiciary continues to come under fierce criticism, it is vital that the Deputy Chief Justice is able, together with other judicial leaders, to respond to quickly developing challenges confronting the judiciary. Indicators of a suitable temperament include courtesy, politeness, being respectful, open-mindedness, thoughtfulness, and decisiveness.

18. The Deputy Chief Justice should have humility and generosity. They should be able to contribute to creating an enabling and nurturing environment for judges. This includes playing a role in identifying and nurturing new judges, considering the needs of the judiciary. It is important that they encourage skills transfer.

Diversity

19. Although it is difficult to factor in diversity fully when one person is being considered for one position, it is nevertheless worth noting the Constitution does require that the racial and gender composition of the country is considered when any judicial appointment is being made. The fact that the candidate is a woman is of obvious significance given that South Africa has never had a female Chief Justice or Deputy Chief Justice. This should obviously not be the

only criterion used to establish a candidate's suitability and it should not cause other qualities to be ignored, but it is a factor that should be given serious weight.

20. The remainder of this submission provides a brief profile of the candidate's professional background and key judgments.

ACKNOWLEDGMENTS

21. This submission was made possible by the generous support of the Millennium Trust and the Open Society Foundation.

DGRU

26 MAY 2022

PRESIDENT MANDISA MAYA

BACKGROUND

Born: 20 March 1964.

BProc, University of Transkei (1986)

LLB, University of Natal, Durban (1988)

LLM, Duke University, U.S.A. (1990) (Fulbright scholarship)

Assistant Law Advisor, Department of Justice (1991 – 1993)

Lecturer, University of Transkei (1992, 1993, 1995)

Advocate, Transkei Society of Advocates (1994 – 1999)

Acting Judge, Cape Provincial Division, Transkei Division (1999 – 2000)

Judge of the High Court (2000 – 2004)

Acting Justice, Constitutional Court (2012)

Justice of Appeal, Supreme Court of Appeal (2005 – to date)

Deputy President, Supreme Court of Appeal (2015 - 2017)

Acting President, Supreme Court of Appeal (2016 – 2017)

President, Supreme Court of Appeal (2017 – to date)

Chairperson, South African Law Reform Commission (2013 - 2016)

Advisory board member, Walter Sisulu University Law Journal (2005 -)

International Association of Women Judges, South African chapter: founder member (2004 – to date); Deputy President (2008 – 2010); President (2018 – to date).

International Association of Women Judges : Regional Director, West and Southern Africa (2021).

Member, Black Lawyers' Association (1994 – 2000)

Member, NADEL (1995)

SELECTED JUDGMENTS

MEC, DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS V MAPHANGA 2021 (4) SA 131 (SCA)

Case heard 18 November 2019, Judgment delivered 18 November 2019

This was ana appeal against a decision by the High Court to refuse to grant the appellant relief against the respondent in terms of the Vexatious Proceedings Act and the common law.

Maya P (Wallis, Mbha and Dambuza JJA and Weiner AJA concurring) considered whether proceedings brought by the respondent against the appellant qualified as "legal proceedings" in terms of section 2(1)(b) of the Act. Maya P held that the dispute lodged with a bargaining council in terms of the Labour Relations Act did not qualify as legal proceedings in terms of the Vexatious Proceedings Act:

> "While they [bargaining councils] are independent and impartial tribunals for the purposes of s 34 and resolve labour disputes in a manner similar to courts, there is clear authority that they are not courts. The Constitutional Court in *Sidumo* held that the Commission for Conciliation, Mediation and Arbitration was an administrative tribunal, not a court. In *Myathaza* the same point was made about bargaining councils." [Paragraph 18]

Maya P then considered whether proceedings brought in the Labour Court and the High Court qualified as "persistent and without reasonable cause" in terms of the Act. Maya P held that the legislation had to be construed narrowly, "as it interferes with a protected right and restricts the right of access to courts, to avoid undue limitation of the right." [Paragraph 20]. Maya P found that there had not ben a multiplicity of litigation, and noted that the respondent had not been legally represented during the litigation. [Paragraph 21]. Maya P held further that it could not be said that the respondent had approached the courts without reasonable grounds. [Paragraphs 22 – 23]

Maya P then considered the appellant's argument that they were entitled to relief under the common law as codified in section 173 of the Constitution, which gave the courts the inherent power to protect and regulate their own process. Maya P held that in granting relief to stop vexatious or frivolous proceedings,

> "A court must … proceed very cautiously and only in a clear case make a general order prohibiting proceedings between the same parties on the same cause of action and in respect of the same subject-matter where there has been repeated and persistent litigation, and craft such order to meet only the immediate requirements of the particular case." [Paragraph 26].

The appeal was dismissed with costs.

AFRIFORUM NPC V CHAIRPERSON OF THE COUNCIL OF THE UNIVERSITY OF SOUTH AFRICA AND OTHERS (765/2018) [2020] ZASCA 79 (30 JUNE 2020)

Appellant had sought to review and set aside decisions relating to the adoption of a new language policy at UNISA, in terms of which English was adopted as the sole language of learning and tuition. Previously, English and Afrikaans had been the languages of learning and instruction. The High Court dismissed the challenge.

Maya P, for a unanimous court (Petse DP, Leach JA and Koen and Eksteen AJJA concurring) considered the challenge based on section 29(2) of the Constitution, which established a right to receive education in the language of choice where reasonably practicable. Maya P found that UNISA had

misunderstood its obligations under section 29(2) [paragraph 34] and had failed to discuss justifications of cost – cutting at the meeting where it was resolved to change the policy. [Paragraph 35] UNISA further failed to provide support for the claim that it was not commercially practicable to continue to provide tuition in Afrikaans. [Paragraphs 36 – 38]

Maya P held further that the statistics on which UNISA had relied to claim a decrease in demand for Afrikaans tuition, and which UNISA claimed formed the basis of the adoption of the new policy, had not been placed before key meetings which resolved to adopt the policy. Accordingly, Maya P found that:

> "It is incomprehensible why the SLC would see no need for the Senate and Council to have recourse to the hard numbers of the students who would be affected by its far-reaching decision, in determining whether it was reasonably practicable to retain Afrikaans as a LOLT. Its stance is entirely insupportable. The omission to place the statistics which founded the recommendation to remove Afrikaans as a LOLT before the Senate and Council breached s 29(2) and rendered the decision to adopt the new language policy unlawful." [Paragraph 41]

Maya P concluded that while there may have been a need for a revision of UNISA's language policy, the adoption of the new policy had not been conducted in a constitutionally compliant manner, in that that "the factual and normative 'reasonably practicable' requirement in s 29(2) of the Constitution" had not been satisfied. [Paragraph 47] The appeal succeeded and the policy was set aside.

The judgment is also significant for being written in isiXhosa and to our knowledge is the first judgment of a South African superior court to have been written in an indigenous African language.

MBUNGELA AND ANOTHER v MKABI AND OTHERS 2020 (1) SA 41 (SCA)

Case heard 30 September 2019, Judgment delivered 30 September 2019.

The first respondent had successfully brought an action in the High Court to declare that he had concluded a valid customary marriage with the deceased. At issue was whether there had been compliance with section 3(1)(b) of the Recognition of Customary Marriages Act, in circumstances where the deceased's family had not handed her over to the first respondent's family in terms of custom.

Maya P (Zondi, Molemela, Mokgohloa and Dlodlo JJA concurring) noted that:

> "[C]ustomary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms. The system, therefore, requires its content to be determined with reference to both the history and the present practice of the community concerned. …" [Paragraph 17]

Maya P found that the first appellant had described successful lobola negotiations, payment of a significant portion of the amount agreed as well as a live cow, and an exchange of gifts by both families as "a combination of the two families." Both families had sent delegations to each other's burial ceremonies, and the first appellant had referred to the couple as husband and wife during testimony. [Paragraph 23]. Maya P held further that:

> "[T]here is overwhelming evidence that the families … considered the couple as husband and wife for all intents and purposes. The evidence ineluctably leads to the conclusion that the bridal-transfer ritual was waived. This finding, in my opinion, does not offend the spirit, purport and objects of the Bill of Rights and recognises the living law truly observed by the parties and the actual demands of contemporary society." [Paragraph 26].

The appeal was dismissed.

SANDVLIET BOERDERY (PTY) LTD v MAMPIES AND ANOTHER 2019 (6) SA 409 (SCA)

Case heard 8 July 2019, Judgment delivered 8 July 2019

The case concerned the right of the respondents to bury a family member on land owned by the appellant, in terms of the Extension of Security of Tenure Act (ESTA).

Maya P (Zondi, Dambuza, Makgoka JJA and Rogers AJA concurring) examined whether the respondents met the requirements of a right to bury in terms of section 6(2)*(d*A*)* of ESTA. Maya P identified the main issue as being whether the respondents and the deceased at her death resided on the land where the deceased was to be buried. [Paragraph 19]. To answer that question, the key issue was whether the legislature had intended that occupiers in the position of the respondents could exercise a burial right under section 6(2)*(d*A*)* of ESTA against a landowner who had allowed burials and the establishment of an ancestral burial site on nearby land owned by the landowner and historically used by the respondents, but not the land where the respondents' homes were built. [Paragraph 23].

Maya P held that:

> "It seems to me inconceivable that the legislature would have intended to deprive this small category of vulnerable occupiers of a critical right, which was specifically enacted to formally attach the right to bury to an occupier's right to residence and thus fortify her right of security of tenure. It certainly does not strengthen the security of tenure of persons residing on farms, to leave them without the means to bury their dead in accordance with their religion and customs. A contextual interpretation of 'reside' that takes into account the peculiar circumstances of the present case and the purpose of ESTA must include the respondents' ancestral burial site ..." [Paragraph 24]

The appeal was dismissed.

HELEN SUZMAN FOUNDATION V JUDICIAL SERVICE COMMISSION AND OTHERS (145/2015) [2016] ZASCA 161; [2017] 1 ALL SA 58 (SCA); 2017 (1) SA 367 (SCA) (2 NOVEMBER 2016)

At issue was whether the closed deliberations of the JSC formed part of the record of its proceedings in terms of Uniform Rule 53(1)(b). The High Court had held that they did not. Maya DP (Majiedt, Mbha, Dambuza JJA and Fourie AJA concurring) dismissed the appeal.

Maya DP found difficultly with the appellant's argument that non-disclosure was inimical to the notions of open justice and public accountability and that protecting the confidentiality of the deliberations would undermine the public's trust in the JSC and its processes:

> "The nature of the JSC's constitutional mandate requires it to engage in a rigorous, intense judicial selection process. To that end, it must be accepted that during the course of the deliberations adverse remarks will be made, which although not necessarily actionable in law, may yet be hurtful to a candidate and cause reputational damage harmful to his or her professional career. This would apply with greater force to a sitting judge who applies for a higher position on the Bench with the potential of eroding public esteem in the judiciary upon which the ultimate power of the courts rests. The JSC and its members may also be exposed to possible actionable claims for delictual damages arising from utterances made during the deliberations which a candidate may consider defamatory. It should not be overlooked too that the legal practitioners in the JSC will, in future, appear before the appointed judge who may harbour ill feelings against them if they expressed adverse views against her or his appointment in the deliberations. This may potentially inhibit the practitioners and even the judges sitting on the JSC from freely and frankly expressing themselves on the suitability of the candidates." [Paragraph 28]

Maya DP accordingly held that protecting the confidentiality of the deliberations "clearly serve[ed] legitimate public interests", and that whilst the JSC could not assert a general right to privacy, "the privacy and dignity of judicial candidates, who are assured by the JSC Act and its regulations that the deliberations concerning their suitability will be confidential, must be protected in the judicial interviewing and selection process." Maya DP held further that non-disclosure "likely encourages applicants who might otherwise not make themselves available for judicial appointment for fear of embarrassment were the JSC members' frank opinions on their competence or otherwise be made open to the public." The efficiency of the judicial selection process would otherwise be compromised. Confidentiality further enhanced the judicial appointments process "by allowing the members to robustly and candidly state facts and exchange views in discussing the suitability or otherwise of the candidates based on their skills, characters, weaknesses and strengths." [Paragraph 29]

The decision was overturned by a majority of the Constitutional Court in **HELEN SUZMAN FOUNDATION v JUDICIAL SERVICE COMMISSION 2018 (4) SA 1 (CC).** (See summary at pages 6 - 7 of this report).

THE STATE V MUDAU (631/2013) [2014] ZASCA 190 (27 November 2014)

The issue in this case was whether the regional court had jurisdiction to impose sentences of life imprisonment in light of s 53A of the Criminal Law Amendment Act. Respondents had been convicted of rape, indecent assault and robbery with aggravating circumstances by the regional court, which sentenced them to life imprisonment, 12 months' imprisonment and 15 years imprisonment respectively. On appeal, the high court held that the sentences were incompetent as, at the time the regional court imposed them, it lacked jurisdiction and should have referred the case to the high court for sentencing.

Maya JA (Wallis JA and Dambuza AJA concurring) held that from the date of commencement of the Criminal Law (Sentencing) Amendment Act, jurisdiction was conferred on a regional court to impose sentences of life imprisonment for scheduled offences, "including rape of the nature for which the appellants were convicted." It had thus been within the regional magistrate's powers to have sentenced the respondent as he had done, and the high court had erred in finding that the magistrate's invocation of section 53A of the Act was improper and in setting the sentences aside. [Paragraph 4].

Maya JA held further that the high court should not have granted leave to appeal to the SCA against the convictions and sentences:

> "This court's appellate jurisdiction to hear criminal appeals is not an inherent jurisdiction. It has no jurisdiction to hear appeals against convictions and sentences of lower courts. And the high court is not authorised to grant leave to appeal directly to this court against convictions and sentences imposed by the regional court. Such convictions and sentences can only be appealed against in this court when an appeal against them has failed in the high court." [Paragraph 5]

Maya JA therefore held that the high court was required to deal with the appeal originally placed before it. The appeal was upheld, and the case referred back to the high court. [Paragraphs 5 - 6].

DEPARTMENT OF CORRECTIONAL SERVICES AND ANOTHER v POPCRU AND OTHERS 2013 (4) SA 176 (SCA)

This was an appeal against a judgment of the Labour Appeal Court, which had upheld the Labour Court's finding that the Department's dismissal of certain correctional services officers, for their refusal to cut their dreadlocks, to be unfair. The Labour Court found the dismissals to be automatically unfair on the ground of gender discrimination. The Labour Appeal Court found that, in addition, the grounds of religion and culture were impacted. The officers were all male, and all wore dreadlocks, for various reasons.

Maya JA (Nugent and Pillay JJA and Plasket and Mbha AJJA concurring) held that the appeal should be dismissed, finding that, but for their religious and cultural beliefs, the respondents would not have worn dreadlocks, and "but for that fact and their male gender, they would not have been dismissed." The disparate treatment constituted discrimination. Appellants' motives and objectives of the dress code were "entirely irrelevant for this finding." [Paragraphs 18 – 19]

Maya JA held that:

> "Without question, a policy that effectively punishes the practice of a religion and culture degrades and devalues the followers of that religion and culture in society; it is a palpable invasion of their dignity which says their religion or culture is not worthy of protection. The impact of the limitation is profound. That impact here was devastating because the respondents' refusal to yield to an instruction at odds with their sincerely held beliefs cost them their employment." [Paragraph 22]

Maya JA found that no evidence had been provided which showed that the respondents' hair, which had been worn for many years before being ordered to shave it, detracted from their performance, or made them vulnerable to manipulation or corruption. Therefore, it has not been shown that short hair, not worn in dreadlocks, was an inherent requirement of the respondents' jobs:

> "A policy is not justified if it restricts a practice of religious belief — and, by necessary extension, a cultural belief — that does not affect an employee's ability to perform his duties, nor jeopardise the safety of the public or other employees, nor cause undue hardship to the employer in a practical sense." [Paragraph 25]

MINISTER OF SAFTEY AND SECURITY V F 2011 (3) SA 487 (SCA)

This case concerned whether the state could be held vicariously liable for the rape of the respondent (F) by a Mr Van Wyk, a policeman who was off duty but on "standby duty" when he committed the rape. The majority of the SCA (Nugent JA, with Snyders JA and R Pillay AJA concurring) held that there was no vicarious liability. Maya JA (Bosielo JA concurring) dissented, holding that while the rape "had nothing whatsoever to do" with Van Wyk's performance of his duties as police officer, it was necessary to establish whether, despite Van Wyk's conduct being "totally self-serving, there nevertheless was a sufficiently close link between his acts for his own personal gratification and the State's business." [Paragraph 67] Maya JA held that it was pertinent that F had been aware that Van Wyk was a police officer when she accepted an offer to take her home, and that this knowledge has influenced F's decision to accept the offer of a lift. [Paragraphs 70 – 71]

> "... [B]y offering to rescue and take home in a police vehicle a lone, vulnerable child stranded on a dark, deserted riverside in the dead of night in those circumstances, Van Wyk subjectively placed himself on duty and acted in his capacity as a police officer. ... In my opinion he placed himself on duty as he was empowered to do by law. And once he did, he assumed the status and obligations of an on-duty police officer. For that reason, I would find the Minister vicariously liable." [Paragraph 73]

On appeal, the majority decision was reversed by the Constitutional Court (per Mogoeng J, Moseneke DCJ, Cameron, Khampepe, Nkabinde, Skweyiya and Van Der Westhuizen JJ concurring; Froneman J in a separate concurrence finding direct liability; Yacoob J, with Jafta J concurring, dissenting. F v Minister of Safety and Security and Others 2012 (1) SA 536 (CC).