



SUBMISSION FOR THE JSC INTERVIEWS
OCTOBER 2022



UNIVERSITY OF CAPE TOWN
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

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. DGRU’s vision is of a socially just Africa, where equality and constitutional democracy are upheld by progressive and accountable legal systems, enforced by independent and transformative judiciaries, anchored by a strong rule of law. The mission of the DGRU is to advance social justice and constitutional democracy in Africa by conducting applied and comparative research; supporting the development of an independent, accountable and progressive judiciary; promoting gender equality and diversity in the judiciary and in the legal profession; providing free access to law; and enabling scholarship, advocacy and online access to legal information. The DGRU has established itself as one of South Africa’s leading research centres in the area of judicial governance.
2. The DGRU identifies judicial governance as a special focus because of its central role in adjudicating and mediating uncertainties in constitutional governance. The DGRU has an interest in ensuring that the judicial branch of government is strengthened, is independent, and has integrity. Our focus on the judiciary has expanded beyond South Africa. We are recognised as a resource partner of the Southern African Chief Justices’ Forum and are involved with the UNODC’s Global Judicial Integrity Network. We believe that these interactions have allowed us to develop a broader perspective on the appointment of judges, which we attempt to share with the JSC and other interested stakeholders.
3. The DGRU has regularly made submissions to the JSC since we first began monitoring the judicial appointments process in 2009. Most of these submissions have included detailed research reports analysing candidates’ judicial track records. Unfortunately, funding constraints on this area of our work mean that we are not able to produce such a report for this round of interviews. However, shorter biographies of the candidates will be uploaded to the website of our Judges Matter project prior to the interviews. These profiles will be available at <https://www.judgesmatter.co.za/jsc-interviews/jsc-candidates-october-2022/>.
4. Our previous submissions have also commented on the JSC interview process and made comments and suggestions, particularly on issues of the criteria applied and the process followed in the interviews. This submission will focus on these questions. Whilst some of the aspects covered in the submission will closely follow the points made in previous submissions, we think it is an appropriate time to re-iterate these points, especially considering the JSC’s ongoing work to develop more detailed selection criteria (as discussed in more detail below).
5. This submission will address the following issues: the development of additional criteria; the failure to interview candidates for the Constitutional Court; and gender transformation.

CRITERIA

6. A regular theme of our submissions has been the need for the JSC to develop more detailed criteria by which to evaluate and select candidates for judicial appointment. We acknowledge that sections 174(1) and (2) of the Constitution provide core criteria for judicial appointment, namely that candidates be appropriately qualified and fit and proper, and that racial and gender demographics be taken into account when judges are appointed. However, we have

consistently argued that these criteria on their own provide a necessary but not a sufficient basis for selecting judicial officers, and that the JSC needs to publicly articulate the additional criteria it would be taking into account when evaluating candidates.

7. Following the April 2022 interviews, the JSC announced that following a day of discussion on the commission's mandate, it re-adopted the supplementary criteria initially developed in 2010, and that the JSC's rules committee had been tasked with reviewing the criteria in order to recommend "any amendments to expand and or supplement the criteria."¹
8. We understand that the JSC's rules committee has drafted a further version of the supplementary criteria, which are being considered by the full JSC. We would hope that the October 2022 sitting will provide an opportunity for these criteria to be further discussed, and perhaps even implemented.
9. We welcome this development and are particularly encouraged by the fact that further work is being undertaken to develop criteria beyond the re-adoption of the 2010 criteria. Although the 2010 criteria are a positive step in providing greater transparency and putting more "flesh" on the criteria found in the Constitution, we think that there are still several respects in which the supplementary criteria can be developed further.
10. The October 2022 interviews bring to the fore some of the issues we have identified as requiring further development of the criteria. As we highlighted in our April 2022 submission to the JSC, the 2010 criteria do not distinguish between appointments to different levels of courts (i.e. appeal courts, high courts, specialist courts), nor do they identify any specific criteria for judicial leadership. The vacancies for which candidates will be interviewed in October 2022 include five positions on the Supreme Court of Appeal, and five judicial leadership positions. We think it is critically important that the JSC develop and apply criteria that address the requirements of these positions, as well as general criteria that would be applicable to all judicial appointments.

FAILURE TO INTERVIEW CANDIDATES FOR CONSTITUTIONAL COURT VACANCY

11. It is of concern that the JSC was not able to shortlist enough candidates to interview for the vacancy on the Constitutional Court. This vacancy became open with the retirement of Justices Jafta and Khampepe in October 2021. With no candidates being interviewed in the October 2022 sitting, the position will therefore stand vacant for well over a year, at minimum, before it can be filled. This is the latest example of a troubling trend of long delays in filling Constitutional Court vacancies.²
12. It is also not the first time that the JSC has not been able to shortlist the minimum number of candidates required for Constitutional Court vacancies. There have been instances in the past where vacancies have had to be re-advertised before enough candidates were shortlisted for the interviews to proceed. There have also been numerous instances where the JSC has only

¹ Judicial Service Commission Media Advisory 4 April 2022, available at <file:///C:/Users/user.3448ED44E9B4/Downloads/Media%20Advisory%20-%20Judicial%20Service%20Commission.pdf>.

² See <https://www.judgesmatter.co.za/opinions/the-process-of-filling-judicial-vacancies-why-the-delay/>

been able to shortlist the minimum of four candidates. Even this is an undesirable situation, as it runs the risk of the vacancy not being filled should one of the candidates withdraw – as evidenced by the withdrawal of the late Mr Justice Bosielo from the Constitutional Court interviews in October 2016.

13. This is obviously a concerning situation. One would expect that there would be a surfeit of candidates competing for a vacancy on the country's highest court. The fact that the JSC was unable to shortlist enough candidates to be able to interview candidates for a position on the country's highest court is a matter of grave concern, and invites serious introspection on the reasons why this situation has transpired.
14. To be clear, we do not suggest that the JSC should shortlist candidates without conducting a careful and thorough assessment of whether they are appointable to the highest court. If candidates are demonstrably not capable of being appointed to the court, the JSC should not shortlist them merely for the sake of "making up the numbers."
15. Nevertheless, we think it is important to interrogate the reasons for the lack of candidates in this round. We do not have any information about the candidates who were nominated, and the basis on which nominated candidates were not shortlisted. As an aside, we think that this illustrates that the shortlisting process is an aspect of the JSC's practice where far greater transparency is required.
16. Recent interviews for the Constitutional Court have been dogged by controversy. The April 2021 interviews had to be re-run following a legal challenge which impugned the fairness and appropriateness of many of the questions put to candidates. The February 2022 interviews of candidates for the position of Chief Justice were also strongly criticised for unequal and unfair questioning. And although improvements in the April 2022 interviews were noted, there was again controversy when an apparent front-running candidate was not included on the list sent to the President for potential appointment.
17. It is surely not too far-fetched to suggest that these events may have caused suitable candidates to avoid putting themselves forward. If so, this is an extremely concerning state of affairs. It would suggest that the reform process the JSC is currently undertaking in respect of criteria needs to extend to other areas of the JSC's processes, in order to ensure that the JSC conducts interviews – and indeed all aspects of the selection process- in a fair and transparent manner.
18. Issues which we suggest should be dealt with in such a process include the development of a code of conduct for commissioners, and the development of a protocol to evaluate the scope of permissible questioning. These issues would be informed by the work done on developing criteria, but the process needs to go further than identifying criteria alone, and develop a comprehensive guide for the JSC's practice in conducting interviews.

GENDER TRANSFORMATION

19. Great strides have been made in the gender transformation of the judiciary. As of February 2022, 113 out of the country's 254 permanent judges were women. Compared to the situation at the start of 2013, when only 70 of the then-241 permanent judges were women, it is clear

that significant progress has been made in meeting the constitutional imperative to take gender balance into account when making judicial appointments. The appointment of Justice Maya as Deputy Chief Justice was also a highly significant moment, being the first time a woman had been appointed to one of the “top two” positions in the South African judiciary.

20. Yet much still needs to be done in respect of gender transformation at the level of judicial leadership. With the recent retirement of Judge President Leeuw, and Justice Maya’s move from President of the SCA to Deputy Chief Justice, we calculate that there are currently no women heads of court. There are six women deputy heads of court (DCJ Maya, and DJPs Goliath, Mbhele, Mphahlele, Phatshoane and Semenya).
21. This is a factor which will no doubt feature prominently in the October 2022 interviews. In this sitting, there are four vacancies for heads of court positions, as well as one Deputy Judge President position. There are three women candidates contesting two of the heads of court positions, while the only candidate for the Deputy Judge President position is a woman.
22. We do not mean to advocate for specific individual candidates. But we do think that, in addition to considering whether candidates meet the criteria for judicial leadership positions, the overall lack of women in judicial leadership positions does need to be given serious consideration by the JSC. If women candidates are passed over for the leadership position, we would suggest that the successful male candidate would have to have exceptional qualities to distinguish them.
23. The issue of gender transformation will also need to be taken into account in respect of the remaining Constitutional Court vacancy when it is eventually filled. Only one of the last four appointments made to the Constitutional Court has been a woman (namely Justice Maya’s appointment as Deputy Chief Justice). Although the position should obviously not be predetermined (if it were, it might be another factor in a lack of candidates putting themselves forward), there would obviously be a strong push for women candidates to be shortlisted.

ACKNOWLEDGMENTS

24. This submission was made possible by the generous support of the Millennium Trust.

DGRU

29 AUGUST 2022