



SUBMISSION FOR THE JSC INTERVIEWS APRIL 2023

3 March 2023



UNIVERSITY OF CAPE TOWN
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

DGRU SUBMISSION FOR THE JSC APRIL 2023 INTERVIEWS

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.
2. The mission of the DGRU is to advance social justice and constitutional democracy in Africa by:
 - a. conducting applied and comparative research;
 - b. supporting the development of an independent, accountable and progressive judiciary;
 - c. promoting gender equality and diversity in the judiciary and in the legal profession; providing free access to law; and
 - d. enabling scholarship, advocacy and online access to legal information.

The DGRU has established itself as one of Africa’s leading research centres in the area of judicial governance.

3. Judges Matter is a project of the DGRU with a dedicated focus on monitoring the South African judiciary. Through applied research and advocacy, Judges Matter monitors the appointment of judges, their discipline for misconduct, and how the judiciary is governed and administered. More information is available on www.judgesmatter.co.za
4. 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 our analysis of the key issues affecting the judiciary and research reports analysing candidates’ judicial track records. This submission does not include the profiles of the candidates, as was provided in many of our previous reports. However, profiles of the candidates will be uploaded onto our Judges Matter website: <https://www.judgesmatter.co.za/jsc-interviews/jsc-candidates-april-2023/>.

5. Our October 2022 submission commented on the importance of JSC developing more detailed criteria for selection and a questioning guideline for commissioners to assist in the interview process. We are encouraged by the JSC’s decision to revise and update these criteria and look forward to their final adoption.
6. This submission will focus on the need for the JSC to adopt and implement revised criteria and questioning guidelines for use in judicial appointment interviews. It will also address the following issues:
 - a. the continued failure to attract sufficient candidates for the Constitutional Court
 - b. women in judicial leadership,
 - c. and problems at the specialist courts – the Land Claims Court, Electoral Court and the Competition Appeal Court.

Revised criteria and guidelines for selecting candidates for judicial appointment

7. In April 2022, the JSC announced that it would re-adopt the 2010 supplementary criteria to use in the October 2022 interview round whilst it developed more detailed criteria and guidelines for judicial appointment. At its October 2022 sitting, the JSC published its revised and adopted criteria and guidelines for judicial appointment for public comment for implementation from the April 2023 round of interviews.¹
8. In our submission on criteria and guidelines for judicial appointments,² we commended the JSC for ensuring that more rigorous criteria are adopted. As we have long argued, clarity on criteria used for judicial appointment makes the process transparent and fair, and fosters greater trust and confidence in the process. It makes it easier to assess the relevance of the questions posed to the candidates and allows the chairperson to intervene when commissioners ask irrelevant questions that do not assist in assessing the candidates suitability for appointment. It also helps in better understanding the logic and matrix of factors considered in the recommendations to the President for appointment.

¹ Judicial Service Commission Media Advisory, 27 October 2022 at p.3, available at: <https://www.judiciary.org.za/index.php/news/press-statements/2022?download=10739:jsc-media-statement-jsc-criteria-and-guidelines-for-selecting-candidates-for-judicial-appointments>.

² DGRU and Judges Matter submission on judicial appointments in South Africa, 28 November 2022: <https://www.judgesmatter.co.za/opinions/media-statement-judges-matter-submits-comment-on-jscs-criteria-for-judicial-appointments/>

9. The value of having publicly available, detailed criteria is that it gives the public and prospective candidates a clear sense of what qualities the JSC looks for in a judge, and what factors would be considered in assessing the suitability of the shortlisted candidate.
10. The April 2023 Interviews will be an important opportunity for the JSC to recover public confidence in the judicial appointment process. This can only be done if the JSC adopts and implements the revised criteria.
11. We reiterate and emphasise some of the points we make in our submission on criteria:
 - a. The criteria expand on what constitutes ‘appropriately qualified’ by guiding the commissioners on asking relevant questions that deal with the candidates forensic and competency skills required for a judicial appointment. Although, as acknowledged in our submission, the framing of fit and proper in the revised criteria overlaps with legal experience, it is important that the commission goes beyond this and considers the candidates ‘integrity, scholarship, diligence, trustworthiness and a commitment to the Constitution’s values’.³
 - b. We are of the view that judicial leadership goes beyond legal skills and experience. We welcome the JSC decision to add this as a requirement in its revised criteria. As we argued in our Chief Justice and Deputy Chief Justice submission, this requires the candidate to be a strong administrator with strong communications skills to guide the division they are leading. The commission must consider their interpersonal skills and temperament. The commission must go further than this and ask the candidate’s vision for their vision and interrogate this in the interview process.
 - c. We commend the JSC in its revised criteria that shortlisted candidates for specialists’ court must have the relevant experience in the area based on the needs of that

³ Summary and explanation of the criteria and guidelines used by the Judicial Service Commission when considering candidates for judicial appointment, 27 October 2022, Available at https://www.judgesmatter.co.za/wp-content/uploads/2022/10/Criteria_and_Guidelines_For_Judicial_Appointment-2.pdf. Also see Vuyani Ndzishe and Mbekezeli Benjamin ‘The JSC’s new criteria and the prospects for the success of its reform agenda’ *The DailyMaverick* 30 October 2022 available at <https://www.dailymaverick.co.za/article/2022-10-30-the-jscs-new-criteria-and-the-prospects-for-the-success-of-its-reform-agenda/>.

specific court. As highlighted in our previous submissions, the 2010 criteria did not account for the skills and experience in a specialist area for a specialist court nor did it account requirements and experience required in appeal courts, as general criteria cannot appreciate the level of experience and competence required in these specialists and appeal courts.⁴

12. For all these reasons, we would urge the JSC to adopt the revised criteria and implement them from the April 2023 sitting, while continuously monitoring their effectiveness and revise where necessary.

Code of Conduct for commissioners

13. While the adoption of a clear criteria document is an important step to inspire public confidence in the judicial appointment process, this step is unlikely to achieve its aims without an enforcement mechanism. We therefore propose that, in addition to criteria and the questioning guidelines, the JSC adopt a code of conduct for commissioners.
14. Such a Code would list all the qualities expected from commissioners, including the kind of behaviour expected from commissioners during the public interview. It would not only remind commissioners of their solemn duty to uphold the Constitution and carry the important functions of the JSC with dignity, but it would signify a public declaration of each commissioner's commitment to their duty.
15. The Code would also provide an enforcement mechanism for the criteria and question guidelines, in that it would allow the chairperson to report an errant commissioner to their relevant nominating body for further action. Such a Code would also give additional assurance to the public that the JSC takes its work seriously.

Failure to shortlist candidates for the Constitutional Court and other vacancies

16. For the April 2023 sitting, the JSC will not be interviewing any candidates for the Constitutional Court. This is due to the JSC's failure to attract the minimum of 4 candidates to interview. This is the second successive time this happens, after another failure to get 4 candidates in October

⁴ Democratic Governance and Rights Unit 'Submission for the JSC Interviews October 2022', available at https://www.judgesmatter.co.za/wp-content/uploads/2022/09/DGRU-submission-October-2022_Final.pdf.

2022. Most worryingly, this failure means the Constitutional Court will now have gone 2 full years without filling the vacancy (and 4 years without the full complement of 11 permanent justices on its bench). Importantly, this happens at a time when the Concourt is facing its heaviest workload of all time.

17. Although the situation at the Constitutional Court is worrying on its own, taken together with other vacancies on the April 2023 short list, it reveals a serious crisis in attracting suitable candidates for judicial appointment. In April, the JSC will interview 23 candidates for 18 vacancies at 10 courts, including the Constitutional Court. Compared to previous rounds, this is the lowest candidate yield in a decade. In fact, for many courts there are either no candidates shortlisted, or there is only one or two candidates for a single vacancy. It is not hard to predict that there will be several vacancies that remain even after the JSC concludes the session.
18. For this reason, we would urge the JSC to use the April 2023 sitting to reflect and introspect on the ways in which the commission is causing a crisis in public confidence, and deterring suitable candidates from putting themselves forward for judicial appointment. There have been several instances in the last two years where the JSC brought itself into disrepute, attracting criticism for how it conducts its affairs and for the humiliating way it sometimes treats candidates.
19. We are encouraged by Chief Justice Zondo's statement on Judiciary Day (24 February 2023) that the JSC intends to interrogate the reasons behind the failure to attract sufficient candidates for judicial appointment, and to adopt strategies to arrest the crisis. In this and our previous submissions, we suggest numerous ways for the JSC to undertake thoroughgoing reform, including:
 - a. Adopting clear criteria for judicial appointment,
 - b. Adopting question guidelines for interviews, and
 - c. Drawing a Code of Conduct for Commissioners
20. The April 2023 JSC sitting is an opportunity for the commission to implement these changes to instil public confidence again in the work of the commission and hopefully attract more suitable qualified candidates in the October 2023 round of interviews later in the year.

Women in Judicial Leadership

21. We have long lauded the JSC for its strides it has made in the gender transformation of the judiciary. Indeed, as at 2023, over 40% of South Africa's judiciary is comprised of women. However, not much has been achieved in appointing women to top judicial leadership positions, specifically heads of court.
22. While we believe diverse representivity is important for the legitimacy of the judiciary, there is another reason why we believe it is important to include more women in judicial leadership. The Heads of Court forum is an important consultative structure that also takes significant policy decisions on behalf of the judiciary, including on the judicial wellness programme, any policy on sexual harassment, acting judges and other topics. The quality and rigour of such policy decisions is likely to be poorer if it excludes the voices of half of the members of the judiciary.
23. There are currently 19 judges who occupy judicial leadership positions (i.e. the head of court and their deputy). One woman currently holds a permanent head of court position, which is KwaZulu-Natal Judge President Thoba Portia Poyo-Dlwati. Although Judge Yasmin Meer has ably led the Land Claims Court for well over a decade, she has done so in an acting capacity.
24. Seven other women serve as deputy heads of court, which are Deputy Chief Justice Maya,, Free State Deputy Judge President Mbhele, Limpopo Deputy Judge President Semenya, Mpumalanga Deputy Judge President Mphahlele, Northern Cape Deputy Judge President Phatshoane, North West Deputy Judge President Djaje, and Western Cape Deputy Judge President Goliath. Counting all these women still leaves more than half of all leadership positions held by men.
25. At the April 2023 sitting, there were 2 leadership positions available: the Judge President of Mpumalanga, and the Deputy Judge President of the Labour Court. As would have been expected, Judge Mphahlele is shortlisted for the position. However, for the DJP of the Labour Court, no candidate was shortlisted. This is surprising, considering that there 7 women to 5 men judges, with a woman being the most senior judge in the Cape Town, Durban and Gqeberha nodes of the court. We note that Justice Mahube Molemela will be interviewed for

the President of the Supreme Court of Appeal, and we commend the president for nominating her for the role.

26. The phenomenon of women judges not putting themselves forward for judicial appointment speaks directly to the work that the JSC must do in attracting suitable candidates for appointment, including taking proactive steps to encourage women to put themselves forward. After all, section 174(2) of the Constitution instructs the JSC to consider the broad racial and gender composition of South Africa when recommending candidates for judicial appointment. It's notable that South Africa is a majority black and majority woman country.

Appointments to the Specialist Courts

27. There are serious problems with appointments with appointments to the specialist courts which we believe the JSC should pay special attention to.
28. For the April 2023 JSC sitting, the Competition Appeal Court was scheduled to fill 5 vacancies, which would make it the largest single round of appointments in the court's history. However, this was not to be, as the court was not able to attract a sufficient number of candidates.
29. Similarly, 2023 was going to be an attempt for the Electoral Court to fill a judge-vacancy that arose following the retirement of the previous incumbent. The JSC April 2023 sitting would also be the Electoral Court's third attempt to fill its full complement of judges. Again, this was not to be, as the court was not able to attract a sufficient number of candidates.
30. The Labour Court has not had a deputy judge president since the 2017 elevation of Judge Tlaletsi to Judge President of the Northern Cape High Court. A previous attempt at appointing DJP was abandoned in 2019. Therefore, the JSC April 2023 sitting would be another attempt to fill the vacancy. However, this was not to be, as the court was not able to attract a sufficient number of candidates.
31. It took several attempts from 2021 and 2022 for the Land Claims Court to appoint permanent judges at the court. In both the April 2022 and October 2022 rounds, the Land Claims Court could only attract one candidate per round.

32. We raise these in this submission as we believe it is important for the JSC to seriously apply its mind to finding solutions as according to the Judiciary Annual Report 2021/22, the specialist courts are some of the worst performing superior courts. Although the reasons for this go beyond appointment of judges, the Land Claims Court had the lowest finalisation rates of all courts (49%). And while small in terms of number of judges and caseload, the Competition Appeal Court performed below target and only achieved a 50% finalisation rate.

CONCLUSION

33. While issues of judicial appointment criteria, vacancies at the Constitutional Court, and problems at specialist courts appear distinct, a common thread that runs through all of them is the need for the JSC to improve its processes in order to attract quality candidates. The JSC should particularly be concerned that sitting judges (from whom appointments to specialist and appellate courts are drawn) are simply not making themselves available.
34. We trust that the JSC will consider these submissions in its deliberations.

ACKNOWLEDGMENTS

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

DGRU
MARCH 2023