



SUBMISSION FOR THE JSC INTERVIEWS APRIL 2024

29 February 2024



UNIVERSITY OF CAPE TOWN
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

DGRU SUBMISSION FOR THE JSC APRIL 2024 INTERVIEWS

Table of Contents

A. Introduction.....	3
B. The positive impact of new criteria and recommendations for improvement	4
<i>Supplements to existing criteria</i>	6
C. Code of Conduct for commissioners	8
D. Failure to advertise vacancies and readvertisement of SCA vacancies.....	9
E. The JSC’s strategic “Human Resources” function.....	9
F. How the JSC deals with judicial misconduct complaints.....	10
G. Conclusion.....	12
H. Acknowledgements.....	12

DGRU SUBMISSION FOR THE JSC APRIL 2024 INTERVIEWS

A. 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 DGRU has established itself as one of Africa’s leading research centres in the area of judicial governance. The mission of the DGRU is to advance social justice and constitutional democracy across 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.
3. **Judges Matter** is a project of the DGRU with a dedicated focus on monitoring judiciary in South Africa. 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 Judicial Service Commission since we first began monitoring the judicial appointments process in 2009 (see [here](#)). Most of these submissions have also included our analysis of the key issues affecting the judiciary. They also include research reports analysing candidates’ judicial track records. However, in order to reduce the size and improve accessibility, this submission does not include the profiles of the candidates as was done previously. However, profiles of the candidates will be uploaded onto our Judges Matter website: <https://www.judgesmatter.co.za/jsc-interviews/jsc-candidates-april-2024/>

5. All our submissions since 2015 have focused on the importance of the JSC developing more detailed criteria for the selection of judges, plus a questioning guideline to assist commissioners in the interview process. We commend the JSC's April 2023 decision to adopt revised criteria and question guidelines for judicial appointments, which we believe improve the process of appointing judges in South Africa. It will strengthen judicial independence in the process.
6. In this submission will comment on the improvements observed since the JSC adopted revised criteria in April 2023, including the areas that still need to be strengthened in these new criteria.

The submission will also address the following issues:

- a. The need to develop a code of conduct for commissioners
- b. the failure to advertise vacancies on the Supreme Court of Appeal
- c. the need for the JSC to recognise its strategic 'HR function'
- d. women in judicial leadership
- e. problems with the JSC dealing with judicial misconduct.

B. The positive impact of new criteria and recommendations for improvement

7. Following a year-long revision led by the JSC's Rules Committee, the JSC's new criteria¹ adopted in April 2023 clarified the requirements that the JSC considers when recommending candidates for judicial appointment. The criteria provide what can easily be described as a mission statement for the JSC when undertaking its duties in terms of section 174 of the Constitution. Furthermore, the criteria provide important guidelines for what issues commissioners may legitimately take up with candidates during the interview and, significantly, those issue they may not. The criteria also provide significant powers to the Chairperson to overrule questions that are inappropriat

¹ Criteria and Guidelines used by the JSC for Judicial Appointment <https://www.judiciary.org.za/index.php/judicial-service-commission/criteria-for-judicial-appointment>

8. We welcome the new criteria. We encourage their regular revision to improve their effectiveness in strengthening judicial appointments. We were pleased to observe the criteria being actively applied by commissioners at both the April and October 2023 interview sessions. Each interview started with the chairperson reiterating the JSC's intention to be rigorous yet respectful of the candidate's dignity. This was important. The line of questioning also followed closely on the issues identified in the criteria, including a candidates' professional track record, the expertise in particular fields of the law, and their readiness for appointment in reference to their acting experience. We were also pleased to see the Chief Justice ask an almost standard set of legal questions of all candidates, which improves the general fairness of the interview. Again, we commend the JSC for how it conducted the interviews and wish that this standard of rigour be maintained going forward.

9. We were however concerned by the glaring inconsistency that prevailed during the interviews for the SCA. While it is to be expected that candidates will be assessed at different levels to test their strength for elevation to one of our apex appellate courts, we were alarmed by the aggressive and hostile tone taken against some candidates by the Deputy President of the SCA, which jarringly contrasted with the more polite tone he took with other candidates. This tone was not restrained by the chairperson, and created the unfortunate impression that there were some favoured candidates and others who were not favoured. We would recommend that the chairperson pay closer attention to the line of questioning and intervene where unfairness is likely to result.

10. In our November 2022 submission² to the draft criteria, we emphasised that criteria need to be applied – in varying degrees – through all the stages of the judicial appointment process. This must be from shortlisting, to the interviews and even during deliberations. This is in order to maintain consistently high standards throughout. We repeated this point ahead of the JSC's October 2023 sitting.

11. However, events subsequent to the October 2023 interview suggest that the deliberations become a free-for-all that is not constrained by any reference to the criteria or issues canvassed in the interview. A reading of the transcript supplied by

² DGRU and Judges Matter, 'Submission on Criteria for Judicial Appointments in South Africa' (28 November 2022) para 14 – 18 <https://www.judgesmatter.co.za/opinions/judges-matter-dgru-submission-on-criteria-and-guidelines-for-judicial-appointment-in-south-africa/>

the JSC in its litigation³ with Freedom Under Law suggests that commissioners feel at latitude to raise whatever issue as disqualifying to any candidate, even when the issue is not related to criteria or was never raised during the interview. This defeats the very purpose of having written criteria and undermines the fairness and integrity of the appointment process. We therefore would strongly urge the JSC to apply the criteria throughout the appointment process, including at the stage of deliberations and final recommendation.

Supplements to existing criteria

12. In our November 2022 submission on the draft criteria, and again in the April⁴ and October⁵ 2023 submissions, we suggested the JSC include additional questions on ethics and integrity of candidates. These questions test whether the candidate is fit and proper for judicial office. Similar questions are already asked in the questionnaire and interviews for magistrates.⁶ We repeat this proposal that the JSC supplement the existing questionnaire and criteria with some of these questions
13. We do not propose these additional questions to embarrass the candidates. We simply recognise the limitations of the current questionnaire, which asks relatively vague and general questions. The questionnaire asks whether there are 'any circumstances' that might cause embarrassment, or 'any relevant matter' to be brought to the attention of the JSC. This does not go far enough.
14. As we have seen in past interviews, some candidates are failing to disclose serious issues relating to integrity. This poses a grave risk to the integrity of the judicial appointment process. If such candidates are appointed, it might also cause serious reputational harm to the judiciary. Indeed, on a few occasions the JSC has had to request candidates to withdraw their candidature until their integrity issues are resolved.⁷ Including detailed

³ *Freedom Under Law v Judicial Service Commission and Others* (ZAGPPJHC Case No. 129593/2023), <https://www.freedomunderlaw.org/2023/12/07/freedom-under-law-v-jsc-and-others/>

⁴ DGRU and Judges Matter, 'Submission for JSC Interviews April 2023' (3 March 2023) https://www.judgesmatter.co.za/wp-content/uploads/2023/04/DGRU_submission_JSC_Apr-2023.pdf

⁵ DGRU and Judges Matter, 'Submission for JSC Interviews October 2023' (1 September 2023) https://www.judgesmatter.co.za/wp-content/uploads/2023/09/Final_DGRU_submission_JSC_Oct-2023.pdf

⁶ Magistrates Commission of SA, *Questionnaire for Judicial Appointment* <https://www.lssa.org.za/wp-content/uploads/2023/03/Form-1-Advert-1-of-2023.pdf>

⁷ See, for example, the interview of VRSN Nkosi (April 2022): <https://www.youtube.com/watch?v=Mmxt1N2UmxM>

questions on this issue in the questionnaire helps prevent some of these risks.

15. The first set of additional questions we propose cover issues of integrity and ethics. They ask whether the candidate has ever been involved in disciplinary proceedings or whether there are any such disciplinary proceedings pending against them. Then they ask whether the candidate has ever appeared in criminal court as an accused. If they have appeared, whether they have ever been convicted, or have a criminal record entered against their name. Alternatively, whether there are any criminal proceedings – including investigations – pending against them.⁸
16. The second set of additional questions we propose cover financial propriety. These questions ask whether the candidate has ever had a civil judgment entered against them.⁹ This includes whether they have maintenance orders, debt review orders, sequestration orders or other similar order against them. Alternatively, if the candidate has any civil lawsuits pending against them. These questions recognise the financial and economic reality legal professionals face, which may cause embarrassment if appointed to judicial office.
17. These questions could be included in the questionnaire that candidates submit as part of their application for appointment as judges. The candidate should be given an opportunity to elaborate on each question by explaining the circumstances of each entry, well ahead of the interview.
18. To protect the candidate's reputation, the JSC's Shortlisting Committee should collate a list of the candidates' responses on the integrity questions. In anticipation of the interview, the Shortlisting Committee must circulate the list to commissioners for them to indicate if they would raise any questions about the candidates' responses during the interview. The Chief Justice as chairperson should give commissioners clear guidance on the limitations of the questioning, and that it should not cause embarrassment or undermine the candidate's reputation during the interview, which is broadcast on

⁸ For example, the case of a Free State High Court judge currently facing criminal trial for allegations that arose several years prior to their permanent appointment as a judge, while practising as an attorney. See, for example News24 'Free State judge to appear in court in R25 million Road Accident Fund fraud case' (20 February 2023) <https://www.news24.com/news24/southafrica/news/free-state-judge-to-appear-in-court-in-r25-million-road-accident-fund-fraud-case-20230220>

⁹ See, for example, *Mpumalanga Bar v Judicial Service Commission and Others* (Case No: 55663/2021), a judicial review application currently pending in the Gauteng High Court where one of the key issues raised is a civil judgment entered against a candidate that had already been recommended for judicial appointment by the JSC.

television and online.

C. Code of Conduct for commissioners

19. 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.
20. Such a Code would list all the qualities expected from commissioners. It would generally include the kind of behaviour expected from commissioners during the public interview. It would remind commissioners of their solemn duty to uphold the Constitution and carry the important functions of the JSC with dignity. It would also be a public declaration of each commissioner's commitment to their duty.
21. The Code would also provide an enforcement mechanism for the criteria and question guidelines. It would allow the JSC 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, and sanctions those who do not.

D. Failure to advertise vacancies and readvertisement of SCA vacancies

22. In 2023, we raised a concern regarding the non-advertisement of the Constitutional Court vacancy, and the withdrawal of a vacancy on the SCA, with no explanation given for either decision. We found it hard to imagine a reasonable reading of the Constitution that permits a head of court to unilaterally and artificially maintain a vacancy at a superior court for any reason, let alone a reason of convenience. And certainly not at the highest courts in the land.
23. For the April 2024 sitting, the JSC advertised only 2 vacancies which were not filled in the October 2023 sitting. However, on 28 February 2024, the JSC advertised a further vacancy, without explaining what brought about this vacancy or why it was omitted in the initial advert. It may very well be possible that this vacancy is advertised in light of Justice Zondi's nomination as Deputy President of the SCA, but without an explanation,

it is hard for the public to conclude that this is the case. We therefore call for more transparency in how this set of circumstances came about. Without an explanation, it creates the unfortunate impression that vacancies are withdrawn based on the candidates received, and readvertised when preferred candidates appear on the applicants list.

24. For the April 2024 sitting, the JSC will interview a total of 15 candidates for only 4 vacancies across different courts. This sitting may be the least productive and most expensive in several years, considering that the JSC will sit for a full week in Sandton. This is a concern to us, considering that there are several vacancies across various superior courts which have not been advertised.
25. Section 237 of the Constitution requires that all constitutional obligations to be performed without delay. The Judicial Service Commission has a constitutional obligation to advise the President on the appointment of judges to existing vacancies in the superior courts. It troubles us that vacancies are left open for extended periods of time without their prompt advertising and filling. As we stated in our October 2023 submission, we urge the JSC to seriously consider developing guidelines on when and how vacancies must be declared and advertised.

E. The JSC's strategic 'Human Resources' function

26. As the body responsible for the appointment function, the JSC plays a crucial role in determining the shape, size and competence of South Africa's judiciary. In this regard, the JSC needs to be strategic in the judicial appointments it recommends at each round of interviews. Put simply, the JSC needs to take seriously its 'human resources' function. We made a similar argument in our October 2023 submission and reiterate now.
27. We understand the JSC's practice to be that, at the start of the deliberations stage at each interview session, the head of that specific court provides commissioners with their view of how the candidates fared. They then comment on which candidates are suitable for appointment based on the needs of that specific court.¹⁸ However, we believe that this is far too little and far too late.
28. In our view, commissioners must be armed with information much earlier – at the Sifting Stage of the judicial appointments. That means the Sifting Committee must approach

the shortlisting with the needs of the court firmly at the front of mind. The Committee must firstly review the candidates technical skills and experiences, then assess the individual candidate's suitability based on the needs of the court at that particular time. They should then assess this against the other candidates in that pool.

29. The Committee must try its utmost to match the needs of the court with the skills of the candidates. Other considerations may include demographics, age and expected tenure on the bench. Later, when the process moves to the interview stage, the Commission must also question the candidates' qualities, and test them against the needs of the court, the broader judiciary and South African society in general, in line with section 174(2) of the Constitution.
30. In fulfilling this strategic HR role, both the Sifting Committee and the full Commission must receive comprehensive reports on the needs of specific courts and the judiciary in general. These reports must detail the caseloads and nature of cases the specific courts deal with, the skills needed to handle these cases, and the skills currently available at the specific court. For example, while virtually all high court divisions deal with RAF and rape matters, the Mpumalanga High Court deals with wildlife crimes while the Pretoria High Court deals with complex commercial and administrative law cases due to it being the seat of government. The JSC must also receive reserved judgments and case backlog reports.
31. The ages of all the judges stationed at a specific court at a particular time is also a metric that the JSC must monitor closely. Older, more senior judges are generally more productive and can boost a court's productivity. However, older judges are also vulnerable to illness and too many of them retiring at once can completely wipe out a court's productivity and institutional memory, leaving junior judges without the guidance and mentorship necessary for optimal function. For example, in the 5 years between 2018 and 2023 the SCA has 'lost', through retirement and promotions, over 200 collective years of appellate judicial experience. While this might not always be bad, the risks associated must be mitigated through well-considered appointments.
32. The JSC must constantly keep in mind considerations like the pipeline of skilled judges to appoint to leadership positions; to specialist courts; and to appellate courts like the CAC, SCA and the Constitutional Court. The Commission must also consider the pipeline

of women judges available, in order to maintain the levels of representivity required by section 174(2) of the Constitution. Even at the sifting stage the JSC must be acutely aware of these tensions and try to balance them in each successive round of interviews.

33. Where will the JSC source this information? This information must primarily come from the heads of courts. However, they may also retrieve it from the OCJ's Statistics Unit and Judicial Support Unit. Even external bodies like the Department of Justice (which monitors rationalisation of the court's jurisdiction, as well as the SA Police Service (for crime trends) and StatsSA (for demographic and economic trends).
34. Ultimately, the JSC must have at its disposal a full grasp of all the information before it arrives at a decision to select one candidate over another. It must also be able to competently predict the pool(s) from where it would appoint all of these judges in future. The JSC must seriously grapple with its 'HR' function.

F. How the JSC deals with judicial misconduct complaints

35. While issues of judicial misconduct do not strictly relate to the JSC's judicial appointment function, we raise them in this submission because these issues are often dealt with a JSC sittings in April and October each year.
36. In our October 2023 submission we highlighted the administrative omissions that resulted in the Small JSC's inability to take crucial decisions on a longstanding misconduct complaint. In this submission, we draw attention to a further incident where the Small JSC only concluded on the course of action of a tribunal after several attempts.
37. In September 2023 the Judicial Conduct Committee established a *prima facie* grounds of gross judicial misconduct against Judge Selby Mbenenge, and recommended the establishment of a Judicial Conduct Tribunal to further probe the allegations. The JSC only considered this recommendation after the JSC sitting in November 2023, by requesting submissions from the parties on the establishment of the tribunal, despite a clear recommendation of the JCC. The JSC finally recommended the establishment of a tribunal in December, and requested further submissions on the desirability of suspension, which the JSC ruled was undesirable in February 2024. In each of these events, the JSC departed from past practice, which involved the JSC taking a single

decision on the establishment of a tribunal coupled with the suspension of a judge. In our view, this course of action requires a public explanation from the JSC. In this regard, we have addressed correspondence to the JSC through the Chief Justice, which we are still awaiting a response.

38. We reiterate our call for the JSC to act swiftly on these matters. We also call on the JSC to invest more resources in ensuring the Judicial Conduct Committee and the Judicial Conduct Appeal Committee are properly capacitated to avoid the extremely long delays in how complaints and appeals are adjudicated.
39. We raise these concerns in the hope that the JSC will self-correct and invest the necessary resources and attention to fulfil its disciplinary mandate. This will also be fulfilling the JSC's mandate to assist and protect the courts and ensure their independence, impartiality, dignity, accessibility, and effectiveness in terms of section 165(3) of the Constitution.

G. Conclusion

40. Once again, we commend the JSC for the important progress in relation to adoption and implementation of criteria. We also applaud the appointment of several women to judicial leadership positions. We nevertheless urge the JSC to proceed with adopting a code of conduct for commissioners; to supplement the questions in the questionnaire; to provide transparency in relation to the non-advertisement of superior court vacancies; and to seriously consider the JSC's strategic 'HR function' in relation to judicial appointments. We also urge the JSC to capacitate the Small JSC, and also the Judicial Conduct and Judicial Conduct Appeal Committees. All of this will sustain and entrench the important successes that have been gained so far.

H. Acknowledgments

41. This submission was made possible by the diligent team of researchers led by Mbekezeli Benjamin, and the generous support of the Millennium Trust, both of which we gratefully acknowledge.

DGRU and Judges Matter
February 2024