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Judical Appointments in South Africa

Alison Tilley,* Zikhona Ndlebe**

ABSTRACT

South Africa is widely regarded as a model of a constitutional democracy on the African continent. This is partly because of the progressive Constitution adopted in 1996 and the fact that the country has consistently managed to conduct democratic, free and fair elections since the end of apartheid in the early 1990s. The sustainability of South Africa's constitutional democracy rests on the ability of the judiciary to ensure compliance with the constitution. The competence and credibility of the judiciary hinge on the appointment of judges who are able to reflect the diversity of the country, act without fear or favor, and develop a jurisprudence which creates and deepens constitutionalism. Judicial independence is a key component of the credibility of the judiciary. The inconsistent application of norms and standards when selecting and appointing judges tends to undermine the credibility of the appointments process.

The process of judicial selection and appointment in South Africa begins with the Judicial Service Commission (JSC) advertising the existing judicial vacancies. After that, the JSC shortlists candidates who are then interviewed. Following these interviews, the JSC shortlists candidates for possible appointment by the President. A review of the transcripts of interviews conducted by the JSC from April 2014 to October 2019 shows patterns of discrepancies in the types of questions which candidates vying for the same judicial position are required to answer. This Article explains the process followed by the JSC, and then identifies and analyzes the discrepancies in the process employed by the JSC. The Article then demonstrates the negative impact which the discrepancies have had on both the quality of the judicial selection process and the quality of candidates shortlisted for appointment. Furthermore, this Article makes recommendations on how South Africa can draw from international norms and standards as well as good practices from comparative jurisdictions, to enhance consistency and fairness in its judicial selection and appointments processes.

KEYWORDS

Judicial Selection in South Africa, Judicial Service Commission, Lilongwe Principles and Guidelines

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I. Introduction

Judges Matter is a project of the Democratic Governance and Rights Unit, which is situated in the Public Law Department of the University of Cape Town. The Judges Matter project was established in 2009 with the objective of monitoring the appointment, governance and discipline of judicial officers, and ensuring transparency and public accountability of the judiciary in South Africa by scrutinising the judicial selection process undertaken by the JSC in South Africa. Judges Matter has monitored the judicial appointment process since 2009 by attending and keeping records of the JSC interview sittings that take place in April and October of each year. In April 2014 Judges Matters started livestreaming the JSC interview sittings, in addition to publicising the transcripts of each interview.

Over the years of monitoring the judicial appointment process undertaken by the JSC, Judges Matter has found that there are deficiencies in the appointment process employed by the JSC when interviewing candidates for appointment as judges. In this Article we submit that the appointment process of Superior Court Judges is fraught with inconsistency and lack of attention to a standard set of criteria. While a number of elements of a set of criteria have been articulated by previous Chief Justices who chaired the Judicial Service Commission ("the JSC"), these criteria are not articulated in interviews for judicial appointment and the actual criteria being used are not public, if they exist at all.[1] The inconsistent application of norms and standards when selecting and appointing judges tends to undermine the credibility of the appointments process. As a result, Judges Matter, has been advocating for the JSC to have a clear set criterion that it employs when interviewing candidates for appointment as judges.

It should be noted that the South African judiciary is comprised of superior courts, lower courts and specialist courts. The superior courts consist of the Constitutional Court, which is the apex court, the Supreme Court of Appeal, which is the second highest court in South Africa, and the various High Courts. The lower courts consist of the Magistrates Court and Small Claims Courts. The specialist courts comprise of the Labour Appeal Court, which has the same status as the Supreme Court of Appeal. In addition, the specialist courts comprise the Labour Court, Land Claims Court, Electoral Courts and Tax Courts, which have similar status as the High Court in respective fields. This Article draws a sharp focus on

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[1] In 1998 the late Chief Justice Ismail Mohamed introduced additional guidelines for the selection and appointment of judges (referred to as the Mohamed guidelines). These guidelines were agreed to by the JSC sitting at the time of his Chairmanship. The Mohamed guidelines suggested that in elaboration of the first three criteria the following should be considered:

- The applicant had to be a person of integrity;
- A person with the necessary energy and motivation;
- A competent person, both technically as a lawyer, and with respect to the capacity and ability to give expression to the values in the constitution;
- An experienced person, both technically, with the capacity and ability to give expression to the values in the constitution;
- A person with appropriate potential, so that any lack of technical experience could be made up by intensive training; and
- Whether the applicant's appointment would be symbolic in sending a message to the community at large.

the appointment of judges in the Superior Courts, with the specific focus on the appointment of High Court judges. In the implementation of the methodology we reviewed the transcripts of interviews conducted by the JSC between October 2015 and October 2019, which covered all interviews for the period of October 2015 to October 2019. These transcripts form the records for a total of 123 interviews. 119 candidates were interviewed in these 123 interviews, with some candidates being interviewed more than once during the period of October 2015 to October 2019.

The notion that the JSC judicial appointment process is fraught with inconsistencies is supported by the findings and conclusions reached upon considering the transcripts of interviews during the period of October 2015 to October 2019. As a result, we make recommendations on how the JSC in South Africa can improve its judicial selection and appointment processes.

II. Historical Framework

In the past the appointment of judges was based on the principle of parliamentary supremacy rather than constitutional democracy, as in the present times. The President was vested with the sole authority to appoint judges and then only with the input from the senior judge of the court to which the new appointment was being made by the President. This resulted in a lot of controversy around the way judges were appointed. The basis of the controversy was the lack of transparency and opportunity for input from the legal profession and from the public in general. [2] The manner employed to appoint judges inevitably resulted in a widely white and male dominated judiciary

To break from this past practice of judicial appointment, a JSC was created as part of the interim constitutional settlement. The JSC in its present form was established in terms of section 178 of the Constitution.[3] Section 178 specifically makes provision for the constitution of the JSC. The JSC is constituted as follows:

- the Chief Justice, who presides at meetings of the Commission;
- the President of the Supreme Court of Appeal;
- one Judge President designated by the Judges President;
- the cabinet member responsible for the administration of justice, or an alternate designated by that cabinet member;
- two practicing advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
- two practicing attorneys nominated within the attorneys' profession to represent the profession as a whole, and appointed by the President;
- one teacher of law designated by teachers of law at South African Universities;
- six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the assembly;
- four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least four provinces;

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2 Chris Oxtoby, Securing Judicial Independence: The Role of Commissions in Selecting Judges in the Commonwealth, 153 (2017).

3 *Id*.

- four persons designated by the President as head of the national executive after consulting the leaders of all the parties in the National Assembly; and
- when considering matters relating to a specific High Court, the Judge President of that court and the Premier of the province concerned, or an alternate designated by each of them.

III. The Legal Framework for the Appointment of Judges

The legal framework for the appointment of judges is provided for in section 174 of the Constitution. This section makes provision as follows:

- Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must be a South African citizen.
- The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.
- The President as head of the national executive, after consulting the Judicial Service Commission and the leader of the parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice, and after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.
- The other judges of the Constitutional Court are appointed by the President, as head of the national executive after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:
    - The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made and submit the list to the President.
    - The President may make appointments from the list, and must advise the Judicial Service Commission with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
    - The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.
- At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.
- The President must appoint judges of all other courts on the advice of the Judicial Service Commission.
- Other judicial officers must be appointed in terms of an Act of Parliament, which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against these judicial officers take place without favour or prejudice.
- Before judicial officer begin to perform their duties, they must take an oath or affirm that they will uphold and protect the Constitution.[4]

[4] SA. Const. sec 174(1) – (8)

The criteria for the appointment of judges are ascertained directly from the provisions of section 174, specifically subsections (1) and (2). Two essential criteria appear from section 174(1), these being that a person must be 'appropriately qualified' and 'a fit and proper person' to be a judge.[5] These can be regarded as essential or necessary criteria in the sense that a person who is not appropriately qualified and is not a fit and proper person may not be appointed as a judicial officer. The meaning of the content of these criteria should be sourced from the Constitution itself, 'and more particularly by considering the nature of the judicial function and the powers that vest in judges.'[6] Most fundamentally are the provisions of section 165(2) of the Constitution which require that the judiciary be independent, must protect the Constitution and uphold rights, and must apply the law impartially and without favour or prejudice.

'The terms "appropriately qualified" raises various interpretive questions. Firstly, what is meant by "qualified"? Does it refer narrowly to the completion of a tertiary degree in law? A broader interpretation is probably the correct one, referring not only to an academic legal qualification, but also to have skill and experience that "makes a person suitable for (the) particular position or task (of judging)".'[7] It was expressed by the then President of the Supreme Court of Appeal, Mpati P that the requirement of "suitably qualified", is not defined, 'but cannot be interpreted as being a reference to academic qualifications only. Legal knowledge and experience must form part of that requirement.'[8]

'There is no "correct" way to categorize those qualities that relate to fitness and propriety for judicial office.'[9] However, five categories have been identified. Firstly, a fit and proper judicial officer must embody independent-mindedness[10]. Secondly, a fit and proper judicial officer must embody fairness and impartiality[11]. Thirdly, a fit and proper judicial officer must embody judicial integrity[12]. Fourth, a fit and proper judicial officer must embody judicial temperament[13]. Lastly, a fit and proper judicial officer must embody commitment to constitutional values[14].

The judicial selection process requires careful analysis. This analysis should take into account three notionally distinct though overlapping constitutional objectives or requirements: non-discrimination, diversity and the requirement of race and gender representivity.[15]It is the provisions of section 174(2) of the Constitution that place important responsibilities on judicial selectors in respect of non-discrimination, diversity and, perhaps most prominently in public debate, racial and gender representivity. When:

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5 Susannah Cowen, Judicial Selection in South Africa, 15 (2013).
6 SA. Const. sec 174(2).
7 Cowen, *supra* note 5, at 43.
8 These issues came under the spotlight at the Kliptown hearings when the JSC announced its shortlist of seven candidates for President Zuma's consideration after only one hour of deliberation in respect of 21 candidates. For some discussion of the issues, see _www.supremecourtofappeal/speeches/mpati.pdf.
9 Cowen, *supra* note 5, at 28.
10 *Id*. at 43.
11 *Id*. at 44.
12 *Id*. at 46.
13 *Id*. at 47.
14 *Id*. at 50.
15 *Id*. at 63.

> the apartheid state was brought to a halt, the leading questions…were: Which institutions would police the democratic projects? Who would guard the guardians? Who would ensure that the duties imposed by the freshly ground Constitution were fulfilled? There were two layers to the enquiry. The first pointed to the history and the legal culture of the courts. The second asked what the name, location and character of the new arbiter would be.[16]

The Constitution's protection of the right to equality, in section 9 mandates that there is no room for discrimination in the process of judicial selection, and, arguably, also enables selectors to seek to enhance the diversity of the judiciary. On the question of race and gender representivity, the Constitution is clear. It ordains specifically that when judicial officers are appointed 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered'[17].

There are no other legislated guidelines beside the above. However, in 1998 the late Chief Justice Ismail Mohamed introduced additional guidelines for the selection and appointment of judges (referred to as the Mohamed guidelines). These guidelines were agreed to by the JSC sitting at the time of his Chairmanship. The Mohamed guidelines suggested that in elaboration of the first three criteria the following should be considered:

- The applicant had to be a person of integrity;
- a person with the necessary energy and motivation;
- a competent person, both technically as a lawyer, and with respect to the capacity and ability to give expression to the values in the constitution;
- an experienced person, both technically, with the capacity and ability to give expression to the values in the Constitution;
- a person with appropriate potential, so that any lack of technical experience could be made up by intensive training; and
- whether the applicant's appointment would be symbolic in sending a message to the community at large.

'According to Advocate Milton Seligson, SC, an important requirement developed by the Commission is that an applicant must have acted as a judge in that court, and delivered a satisfactory level of performance, measured both qualitatively with reference to judgments delivered, and the comments of the permanent judges who have worked with the candidate, and in terms of the level of diligence displayed in producing judgments, and not having delayed unduly in handing down reserved judgments. [18]

The Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers ("the Lilongwe Principles and Guidelines") also make provision for the appointment of judges in Africa. The Lilongwe Principles and Guidelines

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16 Dikgang Moseneke, All Rise: A Judicial Memoir 60 (2020).

17 Cowen, *supra* note 5, at 15.

18 Milton Seligson SC 2-11-2009(unpublished paper); *see* Tabeth Masengu & Alison Tilley, *Is the Appointment of Acting Judges Transparent?*, de Rebus, (Nov. 30, 2021, 21:23 PM), https://www.derebus.org.za/is-the-appointment-of-acting-judges-transparent/.

were adopted at the Southern African Chief Justices' Forum Conference and Annual General Meeting in Lilongwe, which is the capital city of Malawi in Africa. 'At its 2015 Annual Conference, the Southern African Chief Justices' Forum (SACJF) adopted a resolution to establish an ad hoc team of Judicial Service Commissions from the region to work towards developing regional principles and guidelines on selection and appointment of judges in Africa to be presented to the SACJF for discussion and adoption at its 2017 Annual Conference.'[19] As a result of the resolution adopted in 2015, in 2018 the Lilongwe Principles were finally adopted.

The Lilongwe Principles and Guidelines provide an excellent overview of the minimum procedural requisites of an effective appointment process, but also of the standard of merit that is minimally necessary. The Lilongwe Principles and Guidelines set out as follows: i) The principle of transparency should permeate every stage of the selection and appointment process. ii) The selection and appointment authority should be independent and impartial. iii) The process for the selection and appointment of judicial officers shall be fair. iv) Judicial appointees should exceed minimum standards of competency, diligence and ethics. v) Appointments of candidates should be made according to merit. vi) The appointment process should ensure stakeholder engagement at all relevant stages of the process. vii) Objective criteria for the selection of judicial officers should be pre-set by the selection and appointment authority, publicly advertised, and should not be altered during that process. viii) The judicial bench should reflect the diversity of society in all respects, and selection and appointment authorities may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench. ix) Candidates shall be sourced according to a consistent and transparent process. x) The shortlisting of candidates shall be credible, fair and transparent. xi) Candidates shortlisted for interview shall be vetted and stakeholders invited to comment on the candidate's suitability for appointment prior to interview. xii) Interviews should be held for the selection of candidates for appointment to judicial office. xiii) The final selection (decision) to recommend for appointment shall be fair, objective and based on weighing the suitability of the candidate for appointment against the criteria set for that appointment. xiv) Formal appointment shall be made constitutionally and lawfully. xv) Provision shall be made for judicial officers to assume office timeously once appointed.[20]

The Lilongwe Principles and Guidelines expand on the criteria that should be employed when candidates for judicial appointment are considered for recommendation to the bench. The Lilongwe Principles and Guidelines note that '[o[bjective criteria for the selection of judicial officers should be pre-set by the selection and appointment authority, publicly advertised, and should not be altered during that selection process.'[21] 'In order to be appointable, judicial officers should, at a minimum: (a) hold a recognised law degree; (b) hold an appropriate level of post-qualification experience; (c) be a fit and proper person; (d) be competent to perform

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19 Democratic Governance and Rights Unit, *Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers*, (Nov. 30, 2021, 22:46 PM), http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/Lilongwe%20Principles%20and%20Guidelines%20on%20the%20Selection%20and%20Appointment%20of%20Judicial%20Officers.pdf.

20 *Id.*

21 *Id*.

the functions of a judicial officer; (e) possess good written and communication skills; (f) be able to diligently render a reasoned decision; (g) not have any criminal convictions, other than for minor offences; (h) not have any ongoing political affiliation after appointment.'[22]

IV. Description of the Actual Process of Appointing Judges

The process of judicial selection and appointment in South Africa begins with the JSC advertising the existing judicial vacancies. After that, the JSC shortlists candidates who are then interviewed. Following these interviews, the JSC nominates candidates to be shortlisted for possible appointment by the President. The President makes the appointment.[23]

In *Helen Suzman Foundation v Judicial Service Commission*[24] the judicial appointment process came under severe scrutiny. The dispute in this case concerned whether the JSC was obliged, under rule 53(1)(b) of the Uniform Rules of Court, to furnish the Helen Suzman Foundation (HSF) with the record of its private deliberations. In October 2012 the JSC publicly interviewed candidates for judicial appointment and decided to recommend that the President appoint certain candidates as permanent judges of the Western Cape High Court, and not to appoint others. The decision by the JSC to recommend certain candidates for appointment was subsequent to private deliberations held by the JSC after the candidates had been publicly interviewed. The HSF lodged a review application with the High Court, seeking to have the decision by the JSC to recommend certain candidates for permanent appointment as judges reviewed and set aside on the grounds that the recommendation was unlawful and irrational. The HSF brought the application in the public interest.

The JSC subsequently filed a record of its proceedings as required in terms of rule 53(1)(b) of the rules of court in review proceedings. The record included reasons prepared by Chief Justice Mogoeng Mogoeng following the deliberations but did not include the deliberations themselves. The HSF discovered that the JSC routinely recorded its private deliberations prior to making recommendations for permanent appointment. The HSF therefore launched an interlocutory application in the High Court for an order compelling the JSC to provide the recording as part of the full rule 53(1)(b) record. The application was denied at the High Court and subsequently at the Supreme Court of Appeal (SCA). The HSF therefore approached the Constitutional Court for leave to appeal the decision of the SCA. [25]

The HSF contended that rule 53(1)(b) exists to facilitate effective review proceedings and that review applicants are entitled to the record as they should not be placed in a position where they launch their review applications in the dark. The request for the record of the deliberations by the JSC accords with the right to

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22 *Id.*

23 Judges Matter, *The Appointment Process of Judges and Magistrates*, Judges Matter, (Nov. 30, 2021, 23:13 PM), https://www.judgesmatter.co.za/opinions/the-appointment-process-of-judges-and-magistrates/.

24 Helen Suzman Foundation v Judicial Service Commission, 7 BCLR, 763 (CC; 2018).

25 *Id.*

access to court or fair trial as per the provisions of section 34 of the Constitution. The HSF argued that the deliberations by the JSC were the most relevant evidence of what considerations were factored into the decision-making process and were thus liable to be disclosed.[26] The Constitutional Court agreed with the arguments advances by the HSF and made an order compelling the JSC to deliver the full recording of the proceedings sought to be reviewed by the HSF.[27]

In the case between Council for the Advancement of the South African Constitution v Judicial Service Commission[28] a review application was, once again, brought against the decision of the JSC to recommend certain candidates for appointment as judges. However, the case did not reach a stage where a judgment was handed down as the parties settled outside of court and the settlement agreement was made an order of court. Council for the Advancement of the South African Constitution (CASAC) sought that the JSC's decision be reviewed, declared invalid and set aside. CASAC also sought that the JSC's conduct in the April 2021 interviews be declared unlawful.[29] The April 2021 interviews by the JSC were widely publicised and drew on tremendous publicity and controversy, for the same reasons that CASAC also saw it fitting to launch the review application.

CASAC advanced an argument that the way the JSC conducted the April 2021 interviews was unlawful. In illustrating the unlawfulness CASAC noted that the purpose of the interviews conducted by the JSC is to give the JSC an opportunity to determine whether a candidate meets the requirements stipulated in section 174 of the Constitution. Those requirements being that, to be a superior court judge a candidate must be "appropriately qualified" and "fit and proper". CASAC advanced that the JSC interviews are not a platform for party politics. They are not there for the JSC to investigate and evaluate complaints against judges. The interviews are not there to give Commissioners a chance to quibble with judgments they lost as litigants. The interviews do not exist to enable individual Commissioners to ventilate grudges against judges. However, during the April 2021 interviews, the opposite occurred, which resulted in controversy over how the JSC interviews should be conducted.[30] The JSC conceded to the concerns raised by CASAC in its review application and entered into a settlement agreement with CASAC, which was made an order of court. As a result, the recommended shortlist of candidates submitted by the JSC to the President in April 2021 was set aside and fresh interviews for the Constitutional Court candidates were conducted in October 2021. The re-run of the Constitutional Court interviews in October 2021 was less hostile and was to a certain extent fair.

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26 *Id.*

27 *Id.*

28 Council for the Advancement of the South African Constitution v Judicial Service Commission, Case Number: 2021/26886 (the court papers filed are not yet available in the public domain. However, they are available as hard copies in the court file and there is no judgment as the parties settled outside of court).

29 Lawson Naidoo, *CASAS Challenges JSC interviews for Constitutional Court*, PoliticsWeb, (Dec. 01,2021, 06:06 AM), https://www.politicsweb.co.za/documents/casac-challenges-jsc-interviews-for-constitutional.

30 Trinity News Commentary, *CASAC takes JSC to court for its 'unconstitutional' interviews of ConCourt justice nominees*, Trinity News Commentary, (Dec. 01, 2021 06:15 AM), https://trinitynewscommentary.com/just-in-casac-takes-jsc-to-court-for-its-unconstitutional-interviews-of-concourt-justice-nominees/.

V. Methodology

As noted in the preceding paragraphs, there are documents which provide guidance in the appointment of judges. The Constitution is the primary document that provides guidance in the appointment of judges. The Lilongwe Principles and Guidelines also provides guidance in the appointment of judges. However, it has been observed that the JSC only considers the provisions of the Constitution when undertaking the process of appointing permanent judges. The JSC does not apply the guiding principles found in the Lilongwe Principles and Guidelines. It has also been observed that the JSC does ask questions regularly which go particularly to some of the elements of the principles found in the Lilongwe Principles and Guidelines. The elements of the Lilongwe Principles and Guidelines are merit and objective criteria. They test merit in two ways, one being experience as an acting judge, and the second being general questions about the jurisprudential approach of the candidate and their knowledge of the law. The question around acting experience is consistently asked, but the questions about experience and approach are not consistently asked, but relatively frequently. The candidates are frequently questioned around diversity, which is the second element of the principles, and diversity as a requirement for appointment is regularly discussed. We therefore tested the fairness of the process against four criteria: acting experience, transformation (diversity), questions that go to the law (technical questions), and questions of a jurisprudential nature (jurisprudential questions).

For each interview, we recorded whether or not any questions from each of four different categories were asked to the candidates. These four categories were:

1) Questions establishing the extent of any acting experience on the part of the candidate.
2) Questions pertaining to the transformation of the judiciary.
3) Questions of a technical character. (Means a question of law that relates to a particular subject.)
4) Questions of a jurisprudential character. (Meaning a question relating to particular theory of law)

We furthermore recorded the following metadata on each of the transcripts reviewed:

1) The title and name of the applicant.
2) The date of the interview.
3) The gender and race of the applicant, with race being recorded as either of Black or White; and Black is a generic term which refers to Africans, Coloureds and Indians as per section 1 of the Broad Based-Black Economic Empowerment Act, 2003.
4) The length of the interview in minutes.
5) Whether or not the applicant was ultimately recommended for appointment.

We did not capture the length of the interview for 25 of these interviews as only a minute of the proceeding was captured and there was no video recording, as it was before Judges Matter started recording interviews. With a handful of exceptions, we were otherwise able to capture all other fields on all of the interviews. In the analysis below, for those records where there were missing values for an attribute being graphed, those records were omitted from the analysis.

VI. Description of the Judges Matter Project and How the Data Is Captured

The project was initially conceptualised in order to address the problem of judicial nominations and the hearings for these by the JSC have been increasingly controversial. As the practice of the JSC evolved a number of shortcomings were identified by the project team:

1. Potential candidates refusing to come forward, as they do not wish to subject themselves to what is seen is a partisan and unrespectful process;
2. Questioning of candidates being very uneven, and the focus of questions changes from session to session, with little discussion of the record of the candidate;
3. The criteria for appointment being unclear, and there has been little consistent engagement by the JSC on the question of criteria;
4. One line of questioning indicates that a more deferential attitude to executive action would be prized;
5. There is insufficient discussion about the constitutional values of the candidates and their records on the hard questions;
6. The debate around racial transformation has eclipsed the debate around the change demanded of judges in relation to constitutional values.

The project theorised that the process and the lack of clarity on what makes a good judge, created a toxic mix which is not conducive to good appointments. Good appointments make for good judges; good judges make for good judgments; and good judgments take forward the rights and governance framework in the constitution, develop and strengthen the rule of law, and contribute to social justice.

The project then hosted a number of colloquia, focusing on housing, gender-based violence, African customary law in relation to governance, and freedom of expression. The project monitored judicial appointments at the JSC, and in April 2017 started live streaming the appointments process, as well as providing information on the candidates. The videos of the interviews were then put online, and transcripts of the interviews were made available. This content was then shared on social media.

Our hypothesis was that this would show there are patterns of discrepancies in the types of questions which candidates vying for the same judicial position are required to answer. While it is obviously desirable that candidates are asked these questions consistently, it is true that there is no statutory requirement that the JSC do so. However, we have drawn comfort from the process for appointing judicial officers in the lower courts, in which these issues are canvassed more consistently.

VII. Results of Analysis

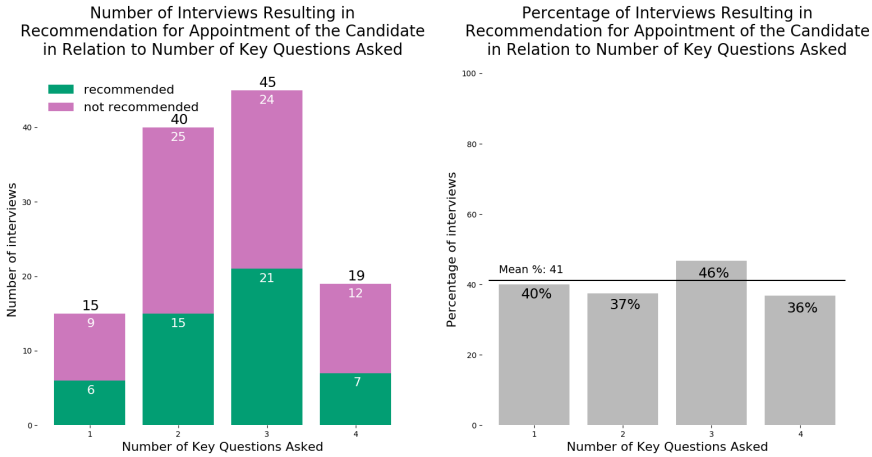
Part 1: The Relationship Between Number of Key Questions Asked and Recommendation for Appointment

Figure 1 graphs the relationship between key questions asked of interviewed candidates, and whether or not those interviews resulted in a recommendation for appointment. In 50 of the interviews in this round of interviews, the candidates

were asked 2 questions, and these interviews resulted in a higher proportion of recommendation for appointment than those in which 0, 1, 3 or 4 key questions were asked. In only 19 interviews were all 4 key questions asked.

We submit that this demonstrates a level of difference between candidates interviews which is significant. We have suggested previously that the interviews have not dealt with criteria in any systematic way. We submit that for the sake of fairness there should be evenness in the questioning, both in terms of time and in terms of content of the questions. Given the criteria that have previously been articulated and the questions in fact asked of candidates, it is our analysis that four categories of questions are or should be asked: and that at a bare minimum four questions covering these areas should be asked about the candidates: one question about what the candidates jurisprudential approach is, one technical question about the law should be asked, one question be asked about acting appointments, and one question asked about the transformation of the judiciary. However, what we can see here is that only 19 out of the 119 candidates were asked questions which cover all four areas. 15 candidates were only asked one question of the four that we identified. Being asked 3 of the 4 questions shows the highest relationship with being appointed.

Graph Showing the Relationship Between Number of Key Questions Asked and Recommendation for Appointment

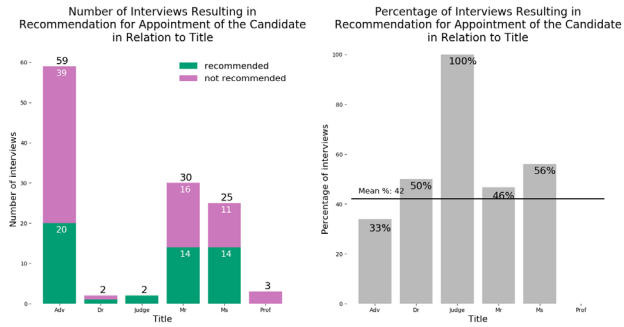


Part 2: Relationship Between Candidate's Title and Their Recommendation for Appointment.

Figure 2 graphs the relationship between candidate's title and the appointment. Candidates are recorded as being titled 'Advocate', 'Judge', or 'Mrs' and 'Mr'. 'Advocate' signifies a lawyer who is admitted to the bar, and who generally does a lot of trial work. 'Mr' and 'Mrs' as titles include magistrates, who sit as judicial officers on the lower courts and attorneys. Although candidates are predominantly advocates, with 59 candidates being advocates, in fact only 33% of candidates who are advocates are appointed. Both magistrates and attorneys would be addressed by

the terms 'Mr' and 'Mrs', and there 55 candidates described that way. 46% of male candidates described as Mr are appointed, and 56% of female candidates called Mrs are appointed. This shows that the long-held view that advocates are favoured in appointment to the bench is in fact not strictly speaking correct. While they make up a lot of the candidates, they are less likely to be appointed than magistrates and attorneys.

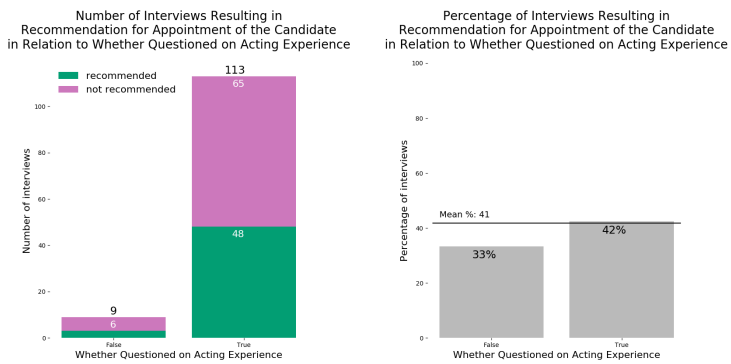
Graph Showing the Relationship Between Candidate Title and Recommendation for Appointment



Part 3: The Relationship Between a Candidate Being Questioned on Acting Experience and Recommendation for Appointment

Figure 3 shows the observed relationship between whether a candidate with acting experience was being interviewed, and whether the interview resulted in an appointment. We have suggested that while the legislation governing the appointment of judges does not say that acting experience is a requirement for appointment, it is apparent in interviews that candidates are frequently asked if they have acting experience or not. A large majority of the interviews were of candidates who had acting experience. Those with acting experience performed better. Of 122 interviews, 113 were asked questions about having had acting experience. We would suggest that this indicates that acting experience is a *de facto* criterion. Only 3 candidates of the 122 interviewed were appointed but were not asked in the interview about their acting experience.

Graph Showing the Relationship Between Whether Questioned on Acting Experience and Recommendation for Appointment



Part 4: The Relationship Between a Candidate Being Questioned on Transformation and Recommendation for Appointment

Figure 4 shows the observed relationship between whether a candidate was asked a transformation question, and whether the interview resulted in a recommendation for appointment.

What is meant by transformation? Transformation has been expressly recognised as a foundational value by the Constitutional Court and is found in the text of the preamble to the Constitution.

Ngcobo, J. stated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others.*[31]

> South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed `to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms'. This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The preamble to the Constitution `recognises the injustices of our past' and makes a commitment to establishing `a society based on democratic values, social justice and fundamental rights'. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.[32]

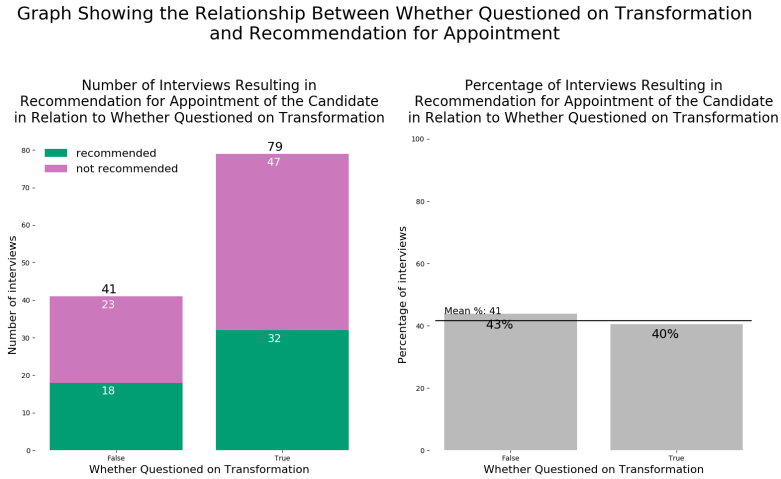
Understanding transformation in the context of the judiciary and judicial governance is a key part of understanding how judges are appointed. It is clearly not just about numbers, although numbers have a critical role to play in measuring whether an environment is conducive to transformation. Therefore, we regard at least one question on transformation as being essential to the appointment of a candidate.

We have recorded in the interviews where candidates have been asked a question about transformation. We have accepted any question which has the word transformation in it, whether the question relates to race or gender transformation, or more broadly transformation in terms of the jurisprudence. 79 candidates were asked about transformation as against 41 who were not. This shows that two thirds of candidates were asked a question about transformation, which suggests it is an important question for the JSC. There is no material difference however between those who get asked a question about transformation and those who are not asked a question about transformation in terms of being appointed.

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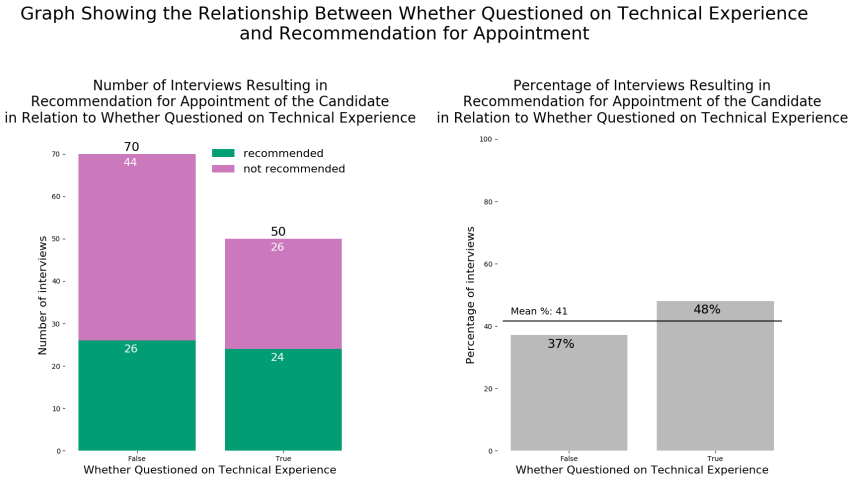
31 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others, 7 BCLR, 687 (CC; 2004).

32 *Id*. at 712.



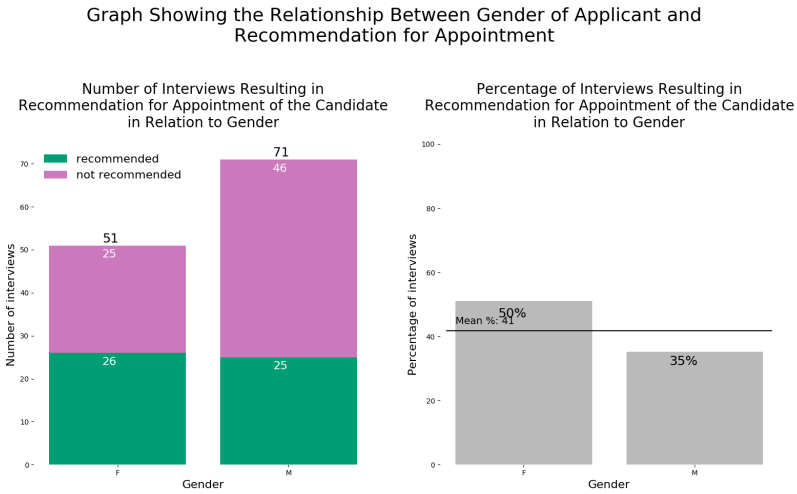
Part 5: The Relationship Between a Candidate Being Questioned on a Technical Issue and Recommendation for Appointment

Figure 5 shows the relationship between whether candidates to whom questions of a technical nature were posed and recommendation for appointment. 70 out of 120 candidates or 58% were asked a technical question. This is surprisingly high, given that the technical competence of candidates tends to be assumed, and there is no systematic approach to this question. It would be our observation that candidates tend to not be asked technical questions until their experience in an area of law is doubted, at which point some questions will be asked. There is no evenness in whether candidates are or not asked technical questions.



Part 6: The Relationship Between the Gender of a Candidate and Recommendation for Appointment

Figure 6 shows the relationship between the gender of a candidate and recommendation for appointment. 71 men as against 51 women were appointed in the period. Thus 58% of candidates are men. While we would expect in terms of demographic breakdown that an even number of men and women would be appointed, in terms of the transformation criteria, we might expect that more women would be appointed than men in order to remedy the historic backlog in the appointment of women. We do see that more women are appointed as a percentage of the number of women who are interviewed than of men who are interviewed. However, overall more men were appointed in the period than women.



Part 7: The Relationship Between the Race of a Candidate and Recommendation for Appointment

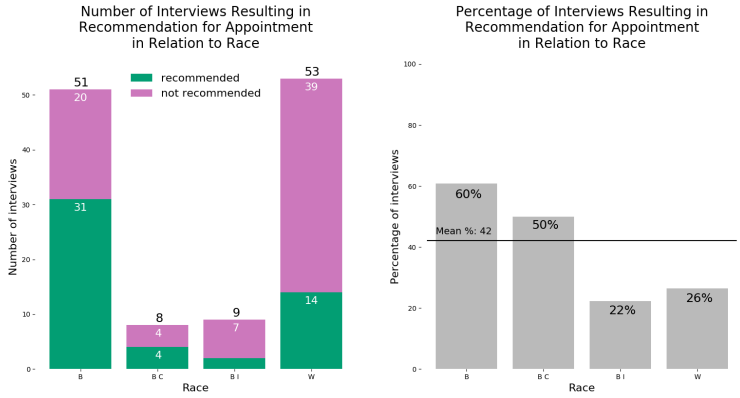
Figure 7 shows the relationship between race of a candidate and recommendation for appointment. Of 121 candidates who were interviewed, 53 were white people and 68 were black people. We continue to see white people interviewed in numbers that are disproportionately large in terms of the general demographics of the country. 43% of those interviewed were white people while white people make up 8% of the population. The legal profession is made up of more white people than black people, especially in the advocates profession, which is where the majority of the interviewees come from.

However, 14 white candidates were appointed, as opposed to 37 black candidates. That is 11% of candidates. Given that 56% of attorneys are white, and 31% of magistrates are white[33], the fact that 8% of appointments are white shows a

[33] Office of the Chief Justice of South Africa, *Annual Report* 2018/19, The South African Judiciary, (Dec. 01, 2021, 10:18 AM), file:///C:/Users/01468363/AppData/Local/

vigorous application of section 174, which requires that the need for the judiciary to reflect broadly the racial and gender composition of South Africa be considered when judicial officers are appointed.

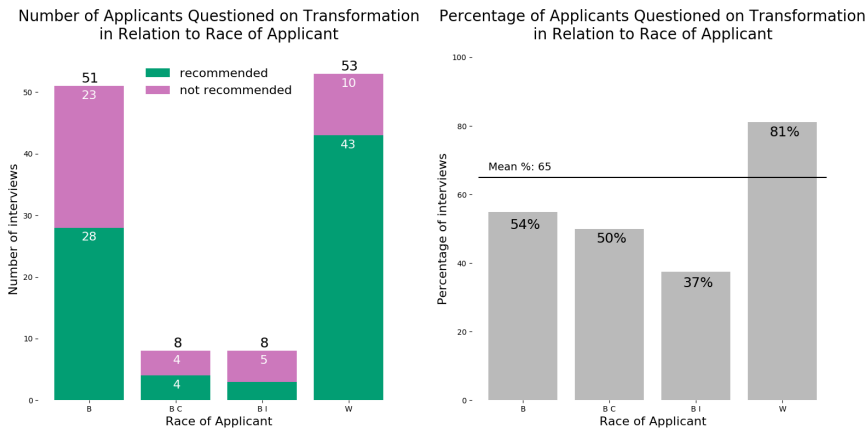
Graph Showing the Relationship Between Race of Applicant and Recommendation for Appointment



Part 8: The Relationship Between the Race of a Candidate and Whether Questioned on Transformation

Figure 8 shows the relationship between the race of a candidate and whether the candidate is questioned on transformation.

Graph Showing the Relationship Between Race of Applicant and Whether Questioned on transformation



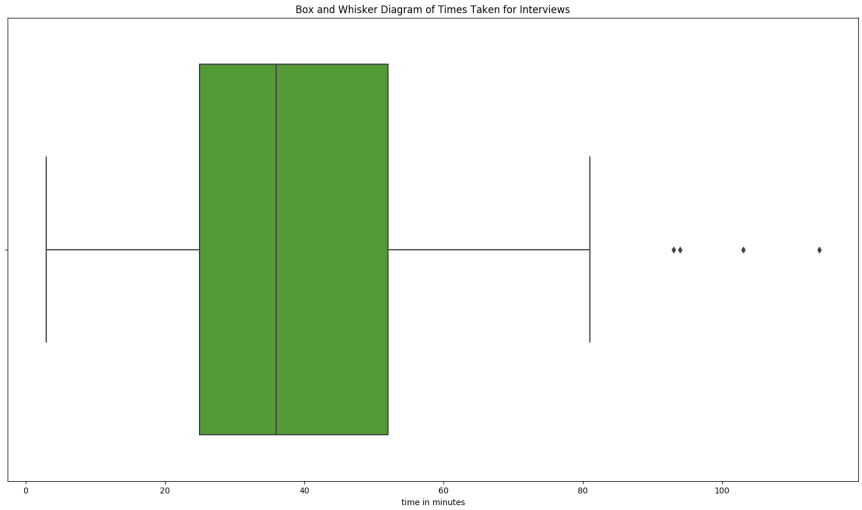
Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/OCJ%20Annual%20Report%202018-19%20(1).pdf.

Part 9: How Are Interviewers Allocating Time?

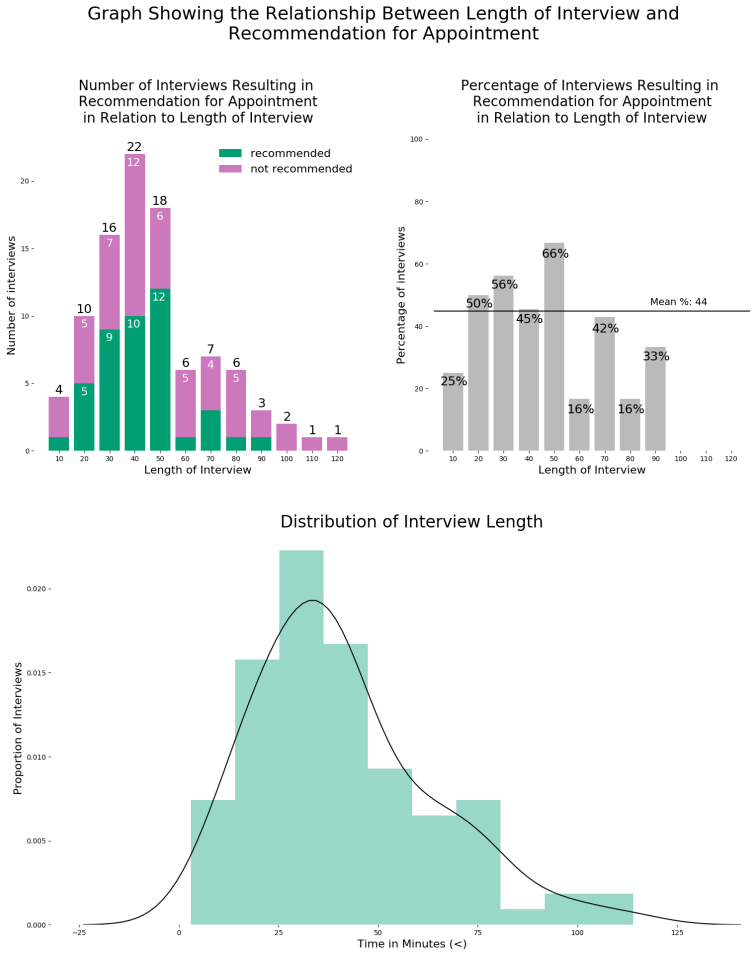
Mean Absolute Deviation: 17.4 minutes

count	97.000000
mean	41.164948
std	22.469739
min	3.000000
25%	25.000000
50%	36.000000
75%	52.000000
max	114.000000

Kurtosis: 3.5580803683270497
(Normal = 3)



Non-Parametric Distribution of Time Taken.
Parametric:
The interview length for candidates differs significantly. Candidates who are interviewed for 40 minutes stand a better chance of being recommended for appointment. Once an interview goes on for longer than 60 minutes the chances of that candidate being appointed drop significantly. The shortest interview was 3 minutes and the longest 114 minutes. The candidate interviewed for 3 minutes was appointed.



Average Time of Interview by Date:

Date	
Apr-16	32.611111
Apr-17	23.000000
Apr-18	37.100000
Oct-16	56.428571
Oct-17	33.250000

Number of Interviews each day:

Date	
Apr-16	18
Apr-17	5
Apr-18	10
Oct-16	28
Oct-17	4

VIII. Conclusion

The process of appointing judges in South Africa commences with advertisement of vacant positions and there is call for nominations to be made. A shortlisting process takes place and thereafter an interview process follows. As evident in the case of *Helen Suzman Foundation v Judicial Service Commission,*[34] and in the case of *Council for the Advancement of the South African Constitution v the Judicial Service Commission & Nine Others*[35] controversy has resulted from the manner the JSC conducts the interviews of judges. The criteria as set out in section 174 of the Constitution do not ensure a fair process followed by the JSC when interviewing candidates because the JSC does not limit its questions to section 174 of the Constitution. The JSC is an organ of state, and its conduct is subject to the Constitution. When discharging its duties, the JSC must do so in a lawful and rational manner. When discharging its duties during the interviews of judges, in addition to section 174, the JSC needs a set criterion that it measures its conduct against, failing which the JSC will continue to find itself the subject of litigation.

IX. Recommendations

Considering the above, it is necessary that recommendations be made on how the JSC in South Africa can improve its judicial selection and appointment processes.

First the JSC should draw from international norms and standards as well as good practices from comparative jurisdictions, to enhance consistency and fairness in its judicial selection and appointments processes. Second, the questioning of candidates needs to be significantly more even. Third, the length of time of interviews needs to standardised and the chair should be mindful of the restriction in allowing questions that stray from the areas that relate to suitability for appointment as a judge.

The question of standardised questions is a difficult one. Candidates are very different and have different backgrounds. Some are attorneys, some are advocates and some are magistrates. They have very varied lengths of time in practice, and different areas of practice. A very senior advocate or magistrate with a lot of experience and available judgements, is a very different proposition from a junior practitioner who only has 10 or 12 years in practice. However, there must be some evenness in questions. This could be dealt with by having a member of the commission lead with some questions which are similar across candidates, but which are not merely biographic data. The first 10 or 20 minutes of interviews are frequently given up to the chair of the JSC, the Chief Justice, asking the candidate to recite the facts that are clear from the CV, to allow the candidate to settle down. This is a well-known technique in dealing with witnesses in the box but seems unnecessary for an aspirant high court judge.

Fourth, we have observed that the candidates are almost always asked about their acting stints in the court they are applying for, and their transformation

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[34] Helen Suzman Foundation v Judicial Service Commission, 7 BCLR, 763 (CC; 2018).

[35] Council for the Advancement of the South African Constitution v Judicial Service Commission, Case Number: 2021/26886/.

credentials. We have proposed that the candidate should be asked in addition about their knowledge of the law, and their jurisprudential philosophy. This would mean four questions that are asked of each candidate, two of which are often asked, and two of which are sometimes asked.

As already stated above, it would assist the JSC to articulate the criteria for appointment of judges. The skills, qualities and experience of a candidate are generally the subject of an interview by the JSC, and there must be agreement between the interviewers as to what the ideal candidate would look like. These criteria have been articulated in different ways over time, but the JSC does not appear to refresh its process with a reminder as to what those criteria are during interviews.

One of the key criteria for the appointment of judges is their understanding of the constitution and constitutional values, and of transformation. There are many different ways of asking a candidate what their attitude is to transformation, and the question is sometimes put in the most blunt form, in asking candidates what their view is of the numbers of black people and women in the profession. The candidates are also often asked what their role has been in transformation. Given the solitary nature of practice, where the client is the one who gives instructions, it is often difficult to see how an individual practitioner can be held accountable for broader transformation, which is in fact the brief of the JSC. It would be more relevant to ask the candidate what their attitude is in relation to transformational values in the constitution, and how that is reflected in their judgments. Language is sometimes used as a proxy for transformation. Asking a candidate for judicial office whether they can speak an indigenous language is common. Of course, the language of the courts is English, and there is no relevance to the question of running a court. Candidates have answered variously, with some replying no, many indicating they have tried to learn, and some professing fluency. This is not necessarily the subject of a uniform response. This is often the subject of castigation, without it being clear why this is in fact a matter for this, nor why commissioners feel they should pursue this line of questioning. It may be more useful to deal with a perceived opposition to transformation directly, than to use a proxy.

The question as to whether the candidate should be asked questions of law is a tricky one. Lawyers have areas of expertise, and a seasoned criminal lawyer cannot be expected to know the intricacies of IP law. However, questions of law are sometimes used to expose whether or not a candidate knows the basics. Questions about the requirements for an urgent interdict, what the Plascon Evans Rule is, and what makes a dismissal unfair, are some of the questions that have been asked. Candidates have been unable to answer these questions. If these questions are valuable, and they do seem to be, all candidates should have the opportunity to show whether they are able to answer some of the most basic principles of law.