

# How to appoint a strong judiciary

**ACTION FOUR**



**PRIORITIES**  
FOR SA'S NEW GOVERNMENT



**AGENDA**  
**2024**

## About CDE

The Centre for Development and Enterprise, an independent policy research and advocacy organisation, is South Africa's leading development think tank. Since its establishment in 1995, CDE has been consulting widely, gathering evidence and generating innovative policy recommendations on issues critical to economic growth and democratic consolidation. By examining South African and international experience, CDE formulates practical policy proposals outlining ways in which South Africa can tackle major social and economic challenges. CDE has a special focus on the role of business and markets in development.

CDE disseminates its research and proposals to a national audience of policy makers, opinion formers and the wider public through printed and digital publications, which receive wide media coverage. Our track record of successful engagement enables CDE to bring together experts (local and international), senior government officials (national and local), business leaders, politicians and civil society organisations to debate critical challenges facing the country and the policy implications of research findings.

## The AGENDA 2024 series

**Series editor: Ann Bernstein**

Reports in the AGENDA 2024 Series are based on CDE's many policy initiatives, commissioned research and think pieces, as well as consultations and workshops with experts and stakeholders.

This special project has been guided by the CDE Board, a select group of senior business leaders, a strategy group of analysts supplemented by other senior advisors.

This document and the other reports that will follow in the AGENDA 2024 series are available from CDE and can be downloaded from [www.cde.org.za](http://www.cde.org.za).

**ACTION FOUR: How to appoint a strong judiciary** has been written by the CDE team under the leadership of executive director, Ann Bernstein, and research director, Stefan Schirmer. CDE acknowledges with gratitude the assistance and support of a wide range of senior legal experts.

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## **AGENDA 2024: Priorities for South Africa's new government**

AGENDA 2024 is based on CDE's extensive policy work and recent collaboration with experts, business leaders, former public servants, and others across our society. The project sets out to answer what is by far the most important question facing South Africa: **what can a new government do to get the country back on track after 15 years of stagnation and decline?**

We cannot afford to keep making the same mistakes while hoping for a different outcome. We need a new vision of how to govern South Africa and a carefully crafted strategy to make it happen. Confronted with a generational challenge to get tens of millions of people out of poverty, the new government must take bold action.

AGENDA 2024 makes the case for a policy agenda that is substantially different from what we have seen over the past 15 years. It consists of a series of carefully selected and crafted actions to signal a new approach to reform. We have to prioritise fixing the basics and sending strong signals that a new determination and focus will characterise the seventh democratic government. The right priorities are essential and the first step of reform is to appoint excellent people into senior government positions.

Our priority areas for action are:

- Fix the state
- Drive growth and development by freeing up markets and competition
- Build a new approach to mass inclusion
- Tackle the fiscal crisis
- Strengthen the rule of law

This report is the fourth in CDE's AGENDA 2024 series, **ACTION FOUR: How to appoint a strong judiciary.**

See also:

- **ACTION ONE: Reorganise the Presidency and the Cabinet**
- **ACTION TWO: Appoint the right people in mission critical public sector jobs**
- **ACTION THREE: Fix the fiscal crisis**

# ACTION FOUR: How to appoint a strong judiciary

## Introduction

This document is the fourth in CDE's new series of reports, **AGENDA 2024: Priorities for South Africa's new government**. For the country to realise its potential, we need to focus on critical actions to catalyse wider change. Strengthening the judiciary may seem to some like a less pressing concern than direct measures to reduce unemployment or boost growth. We disagree.

**“South Africa's democracy is anchored by its Constitution and the rule of law. Judges are the guardians of both”**

Strengthening the rule of law and an independent judiciary is a vital area, which underpins many of CDE's other catalytic priorities. By addressing issues threatening the selection, effectiveness and independence of the country's judges we will be strengthening the rule of law, which in turn underpins the country's ability to deal with crime and corruption, as well as efforts to fix the state. Bolstering the rule of law will, furthermore, create the underlying conditions required to raise investment, growth and employment levels, all of which are critical elements of inclusive growth. As former judge of the Supreme Court of Appeal Azhar Cachalia put it:

South Africa's democracy is anchored by its Constitution and the rule of law. Judges are the guardians of both. They derive their authority from their competence and their integrity. Without either, they have none.<sup>1</sup>

The Judicial Service Commission (JSC) has two functions: It appoints judges and investigates complaints against them for misconduct. It thus has a crucial role in maintaining the independence and excellence of the judiciary, and protecting it from political capture. “It follows that those appointed to the JSC to perform these functions must themselves be ‘fit for purpose’”.<sup>2</sup>

## The vital importance of an effective judiciary

An effective judiciary is not a 'nice to have'. It is critically important for the country's future. It underpins the hope of getting the growth and inclusion we desperately need.

A World Bank study using country-level data has shown conclusively that countries with more effective judiciaries, have higher levels of economic growth and business formation. This is caused by “better enforcement of contracts and more secure property rights ... and healthier business environments”. The report shows empirically that:

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The judicial system can incentivise entrepreneurship, have a positive effect on firms' outcomes and growth, and even affect the output of other industries that heavily rely on contracting. A more effective judiciary may also contribute to reducing violence, by creating a deterrent effect on criminal acts and increasing citizens' trust in the quality of institutions.<sup>3</sup>

These issues are central to the existence of the rule of law, a condition in which everyone, including the poor, has *access* to the law, and everyone, including the powerful, is *subject* to the law. When the rule of law holds, the legal system provides protection from the arbitrary use of power, and it becomes possible to hold the corrupt to account. When firmly established, the rule of law also provides a framework for a stable, peaceful, open society in which future-oriented action can take place. Without such a framework, as Mexican scholar Luis Rubio has lamented about his own country:

All development and ... investment plans – public as well as private – are designed for the short term; pacts and agreements among parties are personal rather than institutional; decisions on matters of permits and appointments are guided by preferences for friends; and there is a propensity for reinventing the world every time a new government takes over and to negate the value of everything that existed before.<sup>4</sup>

There can be no rule of law without an effective and independent judiciary to enforce the law. Rules without proper and impartial enforcement do not endure.

Furthermore, in democratic South Africa, the dominance of one party has severely blunted Parliament's constitutionally mandated role to check the misuse of executive power. This has left the courts as the principal institution through which litigants have sought to ensure that the executive and the legislature are bound by the requirements of legality and constitutionality. For the most part, the courts have discharged this duty with conspicuous vitality.

**“The judiciary should include a significant complement of judges who are highly regarded within the legal profession”**

### The challenge

The judiciary as an institution has maintained its independence. It rules frequently against the executive and against legislation that infringes the Bill of Rights. By and large, judicial orders are obeyed. The judiciary has developed a robust public law. Judges see themselves as independent, and the courts rule upon cases with impartiality. There is little evidence of judicial corruption or political bias. These are attributes of a healthy judiciary.

Nevertheless, although the judiciary has demonstrated independence, there are a number of risks that must be recognised.

*First, the quality of judicial appointments has declined.* The institutional importance of this cannot be over-emphasised. Law is often complex. Cases are fought by way of public contestation. The rules of engagement call for judges who are fair, firm, efficient, cogent in their reasoning, and able to deliver written judgments without undue delay. Judges who do not meet these criteria (and who lack the required competence and

application) should not be appointed to the bench. However, all too often, the JSC – the Constitutional body tasked with selecting fit and proper persons for appointment – has not chosen wisely.<sup>5</sup>

However one measures achievement – and there is certainly scope to broaden what this means – the judiciary should attract to its ranks lawyers who have excelled in their practice of the law. Whether drawn from advocates, attorneys or academic lawyers, the judiciary should include a significant complement of judges who are highly regarded within the legal profession.<sup>6</sup>

**“There is no reason why we cannot have a fully competent and transformed judiciary”**

One particular problem has been the unpredictable, inconsistent and often unpleasant treatment nominees can face during JSC proceedings. Retired Supreme Court of Appeal Judge Azhar Cachalia described personally choosing not to return for further interviews after being subjected to “the appalling behaviour of some commissioners” at the JSC as far back as 2009. In the April 2021 JSC interviews a number of judges, including Judge Dhaya Pillay, were targeted with personal attacks. Although the threat of court action forced the JSC to re-run the interviews, Pillay chose not to return.<sup>7</sup>

Amongst others, retired justice of the Constitutional Court, Edwin Cameron, has criticised the JSC in this respect. Judge Cameron spoke in July 2024 about some lawyers and advocates being “skilled liars, dissemblers, manipulators and propagandists,” who have “used the Judicial Service Commission to wreck the advancement of conscientious and capable candidates for judicial preferment”.<sup>8</sup>

Azhar Cachalia was even more trenchant in his general criticism of the JSC. He said:

I and many others have sought to arrest the decline of the JSC by raising our voices. That it has increasingly abused its power and been captured by political interests has been laid bare. It was not only the politicians on the JSC who were responsible for this. Some judges have acquiesced in this development.<sup>9</sup>

Sir Jeffrey Jowell, Emeritus Professor of public law at University College London, went further in August 2021 when he said that:

There are many great South African lawyers who are known all over the world for their abilities who have not been appointed as judges. One has seen this time and time again, where lawyers who would grace the highest courts in any democratic country have been rejected by the South African JSC. This raises questions about whether they are being held back on account of their independence or due to other irrelevant factors. Either way, that is concerning.<sup>10</sup>

*Second, the courts are not properly resourced and managed.* Like many public institutions they are short of many of the basics: court buildings are not properly maintained; access to proper IT and legal databases are degraded; support staff often lack critical skills or are poorly managed; and systems of court administration work imperfectly.<sup>11</sup>

**“Key sections of civil society and business are too complacent about the state of the judiciary”**

*Third, the judiciary needs to be well led if the courts are to function properly and if justice is to be administered fairly. Judicial leadership requires a combination of attributes: adherence to and defence of the Constitutional remit of the judiciary; leadership in the substantive development of the law; and administrative capability to manage and lead a complex institution.*

The Constitutional Court, the Supreme Court of Appeal, and the high courts all need to be led by people who are widely acknowledged and respected, both in the legal professions and more broadly in society, as individuals who are pre-eminently qualified and suitable to lead. The positions of the Chief Justice, Deputy Chief Justice and heads of court are critical. Some good choices have been made. But too often, here too, competence has yielded to other considerations.<sup>12</sup>

It is certainly the case that the judiciary has **rightly** had to change from an institution largely appointed from white male members of the bar. The need for the judiciary to reflect broadly the racial and gender composition of South Africa, as stipulated by the Constitution, has been no small challenge. It has been a complex process. However, there is no reason why we cannot have a fully competent and transformed judiciary. To get there, it is imperative that the judiciary attracts the best legal talent from the largest possible pool of candidates. That this is not the case is painfully obvious.

The JSC in its latest call for nominations did not receive the minimum of four candidates they are constitutionally required to interview for the vacancy on the Constitutional Court. Assessing this reality, Freedom Under Law’s Judith February and Chris Oxtoby conclude, “[It is] telling that potential, competent candidates simply do not wish to put their hats in the ring. The consequence of this is unending vacancies or, even worse, that the weakest, not strongest, jurists are appointed to the highest court”.<sup>13</sup>

The consequences are increasingly apparent. Business frequently avoids the courts, where it can, in favour of private arbitration.<sup>14</sup> Gifted practitioners retreat from public service in favour of lucrative private practice. The courts are over-burdened, under-resourced, and attract few candidates of excellence for permanent appointment.<sup>15</sup> Over time this degrades the legitimacy of the courts. It is not possible to have a thriving legal system predicated upon private excellence and public mediocrity.

Key sections of civil society and business are too complacent about the state of the judiciary. This is a grave error.<sup>16</sup>

The cure for these problems is not singular. But one part of the solution is to reform the process by which appointments to the judiciary are made.

## **The structure, power and functions of the JSC**

The Constitution vests the power to appoint judges in the JSC.

When appointments have to be made, the JSC publishes a notice giving details of the vacancies that exist and calls for nominations. It shortlists suitable candidates and invites them for interviews. Professional bodies and

members of the public have the opportunity to comment prior to the interviews or to make representations concerning the candidates to the Commission. The interviews are conducted in public, after which the JSC deliberates and makes its decisions in private. Its recommendations are communicated to the President, who then makes the appointments.

**“Candidates have frequently been targeted for hostile questions that have nothing to do with probing their legal expertise”**

The Constitution states that the JSC may advise the national government on any matter relating to the judiciary or the administration of justice. The JSC also plays a key role in the process of suspending and removing judges. Section 177 of the Constitution provides that a judge may be removed from office only if the JSC finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; *and* the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

The broader powers and functions of the JSC are assigned by the Judicial Service Commission Act of 1994. In sum, the Commission interviews candidates for judicial positions, recommends them for appointment, and deals with complaints against judges.

### **Composition of the Judicial Service Commission**

The composition of the JSC is set out in Section 178 of the Constitution.

- (1) There is a Judicial Service Commission consisting of—
- a. the Chief Justice, who presides at meetings of the Commission;
  - b. the President of the Supreme Court of Appeal;
  - c. one Judge President designated by the Judges President;
  - d. the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
  - e. two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
  - f. two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
  - g. one teacher of law designated by teachers of law at South African universities;
  - h. 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;
  - i. four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
  - j. 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
  - k. when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that Division and the Premier of the province concerned, or an alternate designated by each of them.



Complaints against judges who contravene the Code of Judicial Conduct or any law must first be reported to the Judicial Conduct Committee (JCC), a body comprised of the Chief Justice, Deputy Chief Justice and four other judges designated by the Chief Justice after consultation with the Minister of Justice. If the JCC believes that the complaint lodged against a particular judge is of a serious nature to warrant an impeachment of a judge, the JCC is empowered to recommend to the JSC for the complaint to be investigated and reported on by a Judicial Conduct Tribunal. It is the Chief Justice who has the power to appoint a Judicial Conduct Tribunal following recommendation by the JSC.

## How effective is the JSC

Unfortunately, the JSC has for years engaged in judicial selection which has weakened the judiciary. It has recommended the appointment of many judges who should not have been selected for appointment to the High Court, and others who should not have been appointed to the appeal courts. This has led to a marked decline in the quality of the judiciary and has made appointment to the bench an altogether less desirable aspiration among senior practitioners.

The current vacancy on the Constitutional Court has been open since 2021. The JSC has been forced to re-advertise vacancies in 2012, 2016, 2022, and in the latest call for nominations issued in May 2024.<sup>17</sup> The Constitution requires that at least four candidates be presented for the President to make an appointment to one vacancy, but only three nominations were received for the interviews scheduled to take place in October 2024. There have also been occasions (including the April 2024 interviews) where the JSC has interviewed the minimum number of candidates but has not been able to recommend all of them for appointment, resulting in vacancies remaining unfilled.

**“Parliament’s appointments to the JSC demonstrate what little care is taken to determine the suitability of these appointments”**

Furthermore, the JSC interview process is often fraught with inconsistencies that seriously call into question the credibility of proceedings.<sup>18</sup> In the past, there were no objective criteria or standards to guide the JSC’s decision-making on judicial appointments.<sup>19</sup> While the JSC recently adopted objective criteria to guide its decision-making on judicial appointments, they are not consistently applied. Candidates have frequently been targeted for hostile questions that have nothing to do with probing their legal expertise or judicial temperament, sometimes resulting in a spectacle of humiliation.

There is no guide to the process the JSC should follow, either during the interviews of candidates or in the closed-door discussions that follow.

Research published in 2022 by the advocacy group, *Judges Matter*, reveals that there is a significant inconsistency in how the JSC asks questions, and ultimately how these questions influence the decision to appoint a candidate as a judge. The length of interviews also often differs markedly from candidate to candidate. In sum, the “wild inconsistency in the questions asked, the discrepancy in the length and time allocated for each interview, and how these factors ultimately impact the decision for appointment, are issues that should concern us all about the judicial appointment process”.<sup>20</sup> The post-interview deliberations, when challenged, have seldom withstood judicial scrutiny, as they are often irrational and unfair<sup>21</sup> (see box <sup>22</sup>).

### **JSC procedures under review**

- In 2011 the Supreme Court of Appeal invalidated JSC's decision to drop the Hlophe misconduct investigation.
- In 2011 the Supreme Court of Appeal invalidated the JSC hearings and directed JSC reconsider applications after it left vacancies unfilled despite interviewing qualified candidates.
- In 2021 JSC settled and agreed to redo interviews when the Council for the Advancement of the South African Constitution brought a case to the High Court, asking for a review of April 2021 JSC interviews, which featured intense personal attacks on some judges.
- In 2023 Supreme Court of Appeal forced the JSC to reconsider their decision to reject the finding of gross misconduct against judge Nkola Motata.
- In 2023 JSC settled when challenged about the decisions of the October 2023 JSC sessions on the basis of irrational deliberations.

**CDE, 2024**

Senior practitioners do not put themselves up to be nominated for judicial appointment for another reason – the conditions of work at the courts. The courts are under-resourced. The result is not simply under-paid and over-worked judges without access to the libraries they require, but dirty, crumbling courtrooms without air-conditioning and, in the case of Johannesburg, a crime-infested neighbourhood.<sup>23</sup>

**“Fair rules and procedures, enforced via strong leadership, will do much to rebuild trust in the JSC”**

Whatever other reasons there may be for senior counsel to decide against a career on the bench, the prospect of running the gauntlet of the JSC and the conditions of work in the high courts are two factors that make that avoidance much more likely.

## **CDE Recommendations**

South Africa needs and deserves better. This situation should not be allowed to continue and the government of national unity (GNU), the appointment of a new Minister of Justice and Constitutional Development and a new Chief Justice provide an opportunity for reform. Catalytic changes would include the following recommendations.

### **The quality of the commissioners serving on the JSC needs to be improved**

The JSC cannot be allowed to descend again into a mechanism for calculations of political advantage, and mechanistic applications of the important principle of representativity. The quality of the appointments to the JSC matters and can be hugely influential. The quality of the appointments to the judiciary depends upon the quality of the appointments to the JSC.

The recent announcement of Parliament's appointments to the JSC demonstrates what little care is taken to determine the suitability of these appointments. The designation of Umkhonto weSizwe (MK) party Member of Parliament Dr John Hlophe has caused a furore, and could embroil the JSC, again, in review proceedings before the courts. Hlophe was found guilty of gross misconduct by the JSC itself and was removed from high judicial office through parliamentary impeachment, again on the recommendation of the JSC. So too, the appointment of members of the JSC who are accused in pending criminal proceedings depletes the authority and legitimacy of the institution.

**“The promise of a constitutional democracy with strong rule of law and an independent judiciary is undermined by an executive that underfunds the courts”**

The quality of decisions made by a body depends first and foremost on the qualities of the members of that body. Almost all appointments to the judiciary are made nominally by the President, but in effect by the JSC, a substantial number of whose members are appointed by the National Assembly and the National Council of Provinces (NCOP).<sup>24</sup>

We indicated earlier the composition of the JSC, the membership of which can be separated into four parts:

1. Three members of the judiciary, or four in the case of appointments to the High Court (the Chief Justice, the President of the Supreme Court of Appeal, one Judge President designated by his or her peers, and where an appointment is to be made to a High Court, the Judge President of that court).
2. Five members representing the legal profession and academe (two representing the advocates' profession, two representing the attorneys' profession, and a teacher of law, nominally appointed by the President).
3. Twelve persons who hold political office: the Cabinet member responsible for the administration of justice or his or her designate, six designated by the National Assembly from amongst its members, four designated by the NCOP from amongst its delegates, and the Premier of the province concerned or his or her delegate in the case of an appointment to the High Court.
4. Four persons designated by the President.

It will be apparent, then, that those who can be expected to have the most knowledge of what is required for judicial office, judges themselves, are vastly outnumbered (in almost all cases four members of the judiciary in a body comprising 24 members), in particular by persons designated by the National Assembly and the NCOP.

To the extent that the judiciary has been weakened that has for the most part been occasioned by decisions of those members. In our view the fault lies with the failure of those members, and the persons who designated them, properly to appreciate their functions and responsibilities.

It has become practice for political parties represented in the National Assembly and the NCOP to nominate persons for appointment from amongst their members, whom those bodies then appoint as a matter of course without independent evaluation.

**“The new government needs to act with speed to preserve and strengthen this vital third branch of government”**

In that respect the National Assembly and the NCOP have failed to appreciate their function. Their function is not to ‘rubber stamp’ nominations by political parties. The persons appointed to the JSC are appointees of those bodies and not appointees of political parties. The duty of the National Assembly and the NCOP is to evaluate independently, in the national interest and not the interest of political parties, whether nominees are suitably qualified to assess candidates for judicial appointment.

Once appointed, those persons designated by the National Assembly and the NCOP, in turn, hold office in the national interest, not the interest of the political parties to which they are affiliated. There is no place for their decisions to emanate from a political ‘caucus’, which has commonly been the case, nor for their decisions to emanate from party instructions.

Their duty is to evaluate candidates, each independently in the national interest, on the objective merits of the particular candidate.

#### **The JSC’s procedures require reform**

Bad process produces bad or indifferent decisions. The JSC has been beset by procedural shortcomings. The Commission has been taken on review repeatedly and compelled to concede its shortcomings – remarkable circumstances for a body that appoints judges.<sup>25</sup>

Some of the JSC’s procedural shortcomings have started to be addressed. The remedy is relatively straightforward: fairness, clear criteria and consistent application. Some of this is notionally in place. In April 2023 the JSC adopted formal criteria for the selection and appointment of judges. But these require consistent and active application, which has sometimes been absent. The failure to do so is in part the result of the chairing of the JSC. The new Chief Justice (or her delegate) must conduct the proceedings and the deliberations in strict conformity with the JSC’s own rules, criteria and principles, and exercise stringent control of the proceedings.

The proceedings of the JSC would also be strengthened by the adoption of a binding code of conduct for commissioners.<sup>26</sup> This would lay out the standards in terms of which commissioners discharge their duties and would go some way to ensuring a fair, courteous and even-handed process. It could potentially also describe sanctions for repeated breaches of the code.

#### **Firmer leadership of the JSC is needed to prevent wayward decision making**

This highlights a further aspect that requires correction. While the judges who serve on the JSC have no special status, they should assume leadership of the JSC and give clear guidance. So too should representatives of the professions. They are best placed to say what makes a good judge and what it is that the judiciary needs. Decisions ultimately come to a vote. But the reasons that underpin that vote must withstand rational scrutiny, and this is where the judges and lawyers serving as commissioners can and should play an influential role. That influence is altogether more likely to be effective if proper people are appointed to the JSC in the first place.

## ACTION FOUR: How to appoint a strong judiciary

As mentioned above, the JSC has repeatedly been successfully taken on review or effectively conceded its legal failings. While commissioners are responsible for their own behaviour, strong leadership by the Chief Justice is required to ensure that the JSC does its work as the Constitution requires. The JSC's failures to adhere to its own procedures, its inconsistent application of criteria for appointment, and its poor quality of decision-making is in part attributable to the insufficiently authoritative role played by the Chief Justice.

The Chief Justice chairs the JSC and therefore has significant power to shape how interviews and deliberations take place and to ensure conformity with the JSC's own rules, criteria and principles. The retired Chief Justice took some important steps towards improving the level of engagement by commissioners, such as running a preparatory workshop before a round of interviews. However, that a Constitutional body such as the JSC has been reviewed and forced to concede its errors under compulsion of law, and then only in cases of greatest abuse has demonstrated a failure of leadership.<sup>27</sup>

That the JSC has not measured up to its Constitutional duties is best illustrated by the fact that the JSC has periodically struggled to attract sufficient candidates to shortlist for vacant positions on the Constitutional Court. In a properly functioning system, there should be an abundance of talented candidates available for consideration by the JSC. Appointment to the Apex court should be the highest honour of a legal career. That it is not so considered is resounding testimony of the JSC's failure. Fair rules and procedures, enforced via strong leadership, will do much to reverse this and rebuild trust in the JSC.

### **The JSC needs to have better support and researchers who help to prepare commissioners for interviews and the deliberations**

There is a great deal of material to consider, and further scrutiny to be undertaken in order properly to assess candidates. It is doubtful that many commissioners are properly steeped in the evidence before them, the lines of questioning that would be useful, and how the criteria are to be applied to that evidence. Judges should not be appointed by people who are unable to assess the professional abilities of the candidates.

Judicial appointments are mostly until retirement (only Constitutional Court judges are appointed for set terms). Poor appointments have lasting effects. A person aged 40 years can be expected to remain in office for at least 20 years and in some cases more.

Many commissioners are ill-prepared and spend much less time carrying out their duties than is required. Some assistance may improve the quality of decision making.

The JSC also requires additional resources to expedite its disciplinary processes (along with an amendment to the JSC Act, to allow for a greater number of retired judges to act on a Judicial Conduct Tribunal). The tribunal may make a recommendation that a judge be removed from office through impeachment. However, it took almost 15 years to impeach errant judges like Nkola Motata and former Western Cape Judge President John Hlophe. The fact that they continued to be judges for so long deeply undermined the public's perception of the Judiciary.

### **The composition of the JSC should be revisited**

As we indicated earlier, the composition is asymmetrically skewed in favour of political representation. Those who can be expected to have intimate knowledge of the qualities required of a judge are vastly outnumbered by those appointed by virtue of political office. The latter have often engaged in grandstanding, driven narrow

partisan agendas, and failed to discharge their Constitutional obligations. Consideration should be given to altering the composition of the JSC, which will require Constitutional amendment, that restores the balance to the position that prevailed under the interim Constitution, in which four members of Parliament were sent to the JSC, rather than the current ten (six from the National Assembly and four from the NCOP). Although constitutional changes can take time, there are other constitutional proposals concerning the functioning of the Constitutional Court that are urgent and under consideration. This may afford a timely opportunity to change the composition of the JSC.

### **The judiciary needs to be properly resourced**

The promise of a Constitutional democracy with strong rule of law and an independent judiciary is undermined by an executive that underfunds the courts.

### **Final Thoughts**

SA's judiciary is rightly praised for its independence and many fine judges. However, there are important warning signs of trouble brewing now and into the future in terms of the quality of appointments. The new government needs to act with speed to preserve and strengthen this vital third branch of government.

These then are the immediate catalytic actions required to strengthen the country's judiciary – who applies to be judges, how judges are selected, and basic conditions of service for members of the judiciary - that need to be taken by the GNU.

1. *The members of the National Assembly and the NCOP must be required to apply their minds independently, in the national interest and not party interest, to the suitability of nominees for appointment to the JSC and must be held to account for doing so.*
2. *Members of the JSC must be required to apply their minds to the suitability of candidates for judicial appointment on objective grounds, independently in the national interest, uninfluenced by political affiliation, and must be held to account for doing so.*
3. *Candidates for judicial office must be evaluated objectively and only with reference to the Constitutional requirement that they be "appropriately qualified" and are "fit and proper" persons for appointment, though with consideration of the need for a judiciary broadly reflecting the racial and gender composition of the country.*
4. *The JSC must be properly led to adhere to appropriate and proper exercise of their duties and to ensure clear and public selection criteria are then rigorously applied in the evaluation of candidates for judicial appointment.*
5. The JSC should adopt a code of conduct to regulate the behaviour of its members during interviews with the aim of ensuring a fair, courteous and even-handed process.
6. The composition of the JSC should be adjusted to increase the influence of judges in the evaluation of candidates.
7. The JSC needs research support.
8. The judiciary needs to be properly resourced – not large buildings in Midrand – but safe, well maintained courts, excellent IT and other functional support to judges.

## Endnotes

- <sup>1</sup> Azhar Cachalia, 'Is the Judicial Commission "fit for purpose?" A reflection over 15 years', Lecture given at Rhodes University, 6 August 2024.
- <sup>2</sup> Ibid.
- <sup>3</sup> Manuel Ramos Maqueda and Daniel L. Chen, *The Role of Justice in Development*, World Bank, Policy Research Working Paper 9720, June 2021, p. 3.
- <sup>4</sup> Luis Rubio, *A Mexican Utopia: The Rule of Law is possible*, Wilson Center, 2015, p. 5.
- <sup>5</sup> For a survey of the JSC's interviews and appointments from 2009-2022, see *Freedom Under Law, Serving the Judiciary? A review of the activities of the South African Judicial Service Commission, 2009 to 2022*, November 2022, pp. 11-20.
- <sup>6</sup> One quantitative indicator of the unsatisfactory state of the judiciary, is that of the 27 judges appointed in the period from April 2023 to May 2024 (excluding Constitutional Court Judges and Judges President) at the time of writing, 22 had two or fewer reported cases in *Juta South African Law Reports* while acting as counsel. 14 had two or fewer reported cases as either judges or counsel. Only seven had ten or more reported cases as either judges or counsel.
- <sup>7</sup> Azhar Cachalia, 'Is the Judicial Commission "fit for purpose?" A reflection over 15 years', Lecture given at Rhodes University, 6 August 2024; *Judges Matter*, 50-day countdown: Chief Justice Raymond Zondo's legacy as Chief Justice, 12 July 2024. Accessed at <https://www.judgesmatter.co.za/opinions/chief-justice-raymond-zondos-legacy-as-chief-justice/>
- <sup>8</sup> Edwin Cameron, *We should act against lawyers who undermine the Constitution*, *GroundUp*, 22 July 2024.
- <sup>9</sup> Azhar Cachalia, 'Is the Judicial Commission "fit for purpose?" A reflection over 15 years', Lecture given at Rhodes University, 6 August 2024.
- <sup>10</sup> Jeffrey Jowell In Conversation with Ann Bernstein, CDE, August 2021.
- <sup>11</sup> *Judges Matter*, "Judicial governance in South Africa", November 2023, pp. 14-16.
- <sup>12</sup> For some details on this see, Azhar Cachalia, *Is the Judicial Commission "fit for purpose?" A reflection over 15 years*, Lecture given at Rhodes University, 6 August 2024.
- <sup>13</sup> Judith February and Chris Oxtoby, *JSC shortlist gives troubling glimpse of appointment process*, *News24*, 3 August 2024.
- <sup>14</sup> Des Williams, "Arbitration Guide: South Africa", *International Bar Association Arbitration Committee*, January 2018, p. 19: "Arbitration has become a real alternative to court proceedings in South Africa and is becoming increasingly popular, particularly as a method of commercial dispute resolution". This trend has also been noted by Azhar Cachalia, *Is the Judicial Commission "fit for purpose?" A reflection over 15 years*, Lecture given at Rhodes University, 6 August 2024.
- <sup>15</sup> Franny Rabkin, "Three non-judges asked to act at apex court", *Business Day*, 10 October 2023. The same phenomenon was noted as early as 2012; see Nashira Davids, "Candidates shy away from plum court jobs", *TimesLive*, 9 March 2012.
- <sup>16</sup> See Edwin Cameron, *We should act against lawyers who undermine the Constitution*, *GroundUp*, 22 July 2024.
- <sup>17</sup> Franny Rabkin, *Why the queue for Constitutional Court candidates is so short*, *Sunday Times*, 4 August 2024; Judith February and Chris Oxtoby, *JSC shortlist gives troubling glimpse of appointment process*, *News24*, 3 August 2024.
- <sup>18</sup> For a detailed report on this and other issues relating to the selection of judges see, Susannah Cowen. *Judicial Selection in South Africa, Democratic Governance and Rights Unit*, August 2013: "If we are to realise the democratic ideals embraced in the Constitution, including a strong and independent transformed judiciary, we must surely all now confront the challenge to transcend discourse at times steeped in discriminatory attitudes and seek a dialogue based on mutual respect and aimed at forging some consensus about the underlying principles at stake. The JSC itself is composed of representatives of the judiciary, the legal profession including attorneys, academic and advocates, political parties represented in parliament, members of the national and provincial executive and presidential appointees. Each sector has a responsibility to define its role and approach, as does the JSC collectively".
- <sup>19</sup> Chris Oxtoby, *Managing a Fraught Transition: the Practice of the South African JSC*, in Hugh Corder & Jan van Zyl Smit, eds, *Securing Judicial Independence, The Role of Commissions in Selecting Judges in the Commonwealth*, Bingham Centre, 2017, p. 161: "The lack of clear and detailed criteria, forming the subject of at least some degree of consensus among the members of the JSC as to the basis on which the Commission makes its recommendations, contributes to the procedural difficulties evident during interviews".
- <sup>20</sup> *Judges Matter*, "New research on the JSC appointments process shows cause for concern, but there is hope", 4 April 2022. Accessed at <https://www.judgesmatter.co.za/opinions/new-research-on-the-jsc-appointments-process-shows-cause-for-concern-but-there-is-hope/>
- <sup>21</sup> *Freedom Under Law v The Acting Chairperson: Judicial Service Commission 2011 JDR 0305 (SCA)*; *Freedom Under Law v Judicial Service Commission and Another (550/2022) [2023] ZASCA 103 (22 June 2023)*; *Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province 2011 (3) SA 538 (SCA)*.
- <sup>22</sup> Azhar Cachalia, *Is the Judicial Commission "fit for purpose?" A reflection over 15 years*, Lecture given at Rhodes University, 6 August 2024; *Freedom Under Law v The Acting Chairperson: Judicial Service Commission 2011 JDR 0305 (SCA)*; *Cape Bar Council v Judicial Service Commission [2012] 2 ALL 143 (WCC)*; Setumo Stone, *Constitutional Court interviews to be rerun after successful Casac challenge*, *City Press*, 12 August 2021; *Freedom Under Law v Judicial Service Commission and Another (550/2022) [2023] ZASCA 103 (22 June 2023)*; Emsie Ferreira, *Freedom Under Law accuses JSC of flouting court order on supreme court of appeal vacancies*, *Mail & Guardian*, 24 February 2024.
- <sup>23</sup> *Judges Matter*, "Judicial governance in South Africa", November 2023, pp. 14-16.
- <sup>24</sup> All judges other than the Chief Justice, the Deputy Chief Justice, and judges of the Constitutional Court, are appointed by the President on the advice of the JSC. The process for appointing Constitutional Court judges gives scope to the President to choose from a shortlist provided by the JSC, while the President need only consult with the JSC (among others) when appointing the Chief Justice.
- <sup>25</sup> For example, CASAC took the JSC to court to set aside the April 2021 interviews, while *Freedom Under Law* challenged the decisions coming from the October 2023 sittings. In both cases the JSC agreed to settlements. *Judges Matter*, "New research on the JSC appointments process shows cause for concern, but there is hope", 4 April 2022. Accessed at <https://www.judgesmatter.co.za/opinions/new-research-on-the-jsc-appointments-process-shows-cause-for-concern-but-there-is-hope/>; *Freedom Under*

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<sup>26</sup> Pierre de Vos, Fix the JSC rather than banning John Hlophe from serving on it, Daily Maverick, 11 July 2024.

<sup>27</sup> Judges Matter, 50-day countdown: Chief Justice Raymond Zondo's legacy as Chief Justice, 12 July 2024. Accessed at <https://www.judgesmatter.co.za/opinions/chief-justice-raymond-zondos-legacy-as-chief-justice/>



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