



**REPORT ON THE JSC INTERVIEWS IN CAPE TOWN,
APRIL 2010.**

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Background

From 12 to 19 April 2010, the Judicial Service Commission (“JSC”) held interviews in Cape Town for numerous High Court, Labour Court, Labour Appeal Court (LAC), Deputy Judge President and Judge President positions. As part of its ongoing work in the area of judicial appointments, DGRU made a submission to the JSC, emphasising the qualities we felt should be looked for in aspirant judges.¹ These qualities were identified in terms of the requirements of Section 174(1) of the Constitution, that judges be “fit and proper” and “appropriately qualified”. To be “fit and proper”, we suggested that candidates ought to show a commitment to constitutional values; an independence of mind; a disposition to act fairly and impartially; high standards of ethics and honesty; and a judicial temperament. The requirement of being “fit and proper”, we suggested, relates to a candidate’s formal qualifications, experience and potential.

We suggested that in order to assess these qualities, Commissioners might look to ask questions about candidates’ “judicial philosophy”, which we defined to include a candidate’s commitment to constitutional values, their views on the role of the judiciary, constitutional interpretation and ethical and ideological issues relevant to the judicial function. We pointed out that these suggestions were made in the absence of clear criteria having been made public by the JSC in terms of which it recommends appointments.²

How did the JSC fare in assessing these criteria at the interviews? We highlight what we believe were the most significant issues raised, and attempt to make some constructive suggestions as to how problems observed in the process might be addressed.

Equality of focus - problems of the absence of clear criteria for appointment

What we consider to be the biggest issue raised by the hearings begins with an observation which might on its face seem almost trivial. However, we believe it offers a clue to more deep-seated difficulties with the functioning of the JSC.

It was very apparent that the commission suffered with time management problems during the interviews. Interviews were scheduled to last for 40 minutes per candidate in the case of High Court and Labour Court candidates, and 1 hour in the case of Judge President candidates. Whilst the interviews for Judge Presidents’ positions generally ran according to schedule, there were serious issues with High Court and Labour Court interviews running well over time. Several High Court candidates had interviews which lasted for an hour and a half or longer. When these delays were added to unscheduled closed deliberations to discuss procedural matters, it resulted in some days when interviews would finish a several hours after the scheduled time - before the Commission even got to its final deliberations.

This may not seem to matter very much. After all, the Commission should surely not be limited to a fixed period of time if issues arise in a particular interview which warrant more detailed questioning. Some candidates may require more

¹ See <http://www.dgru.uct.ac.za/usr/dgru/downloads/JSCsubmissionApril2010%20.pdf> for the full submission.

² See Susannah Cowen, *Judicial Selection in South Africa*, pp. 7-8. As Cowen points out, there are indications from which may be gleaned what criteria the JSC looks for in recommending appointments. However, there is little reference to what qualities the Commission seeks in a South African judge.

lengthy questioning than others, and the Commission is fulfilling a constitutional mandate to appoint appropriately qualified and fit and proper people to the bench, whilst having regard to transformation imperatives. The importance of this task, it may be argued, cannot admit of clock watching.

Nonetheless, we believe that these time management issues are problematic as they create unequal interviewing circumstances among similarly-placed candidates. It was noticeable that on certain occasions interviews which took place earlier in the day would last longer, with a large number of commissioners asking questions. Later in the day, once it became apparent that interviews were running well behind schedule, it was perceptible that interviews began to move faster, with only the Chief Justice and sometimes the relevant Judge President asking questions, and the rest of the commissioners remaining largely silent. This may be attributed partly to the length of the interview process. Six days of interviewing is a long time and may understandably have a negative effect on the commissioners.

Nevertheless, we submit that it is undesirable for such a situation to take place, as it is unfair on both candidates who are subjected to more intense questioning - which may weaken or strengthen their prospects of appointment - and also for candidates who are not questioned in as much detail, as it does not allow the latter to demonstrate their aptitude for the job.

We suggest that, at the heart of this problem lies a lack of a clearly defined and shared understanding within the commission as to what criteria to apply to the appointment of judges. This impacts on the type of questions asked. We noticed during the interviews is that there does not appear to be a set standard of questions. Some candidates were asked a plethora of questions by the commissioners, whereas other interviews were very short because the commissioners seemed not to have questions for the candidates. This is a clear discrepancy in questioning and it creates a perception that interviews are not the main tool used to ascertain the suitability of the candidates. We submit that there should be a core set of questions that should be asked to all candidates, and then followed by follow-up questions from the commissioners. This will assist in determining whether the candidate is competent and meets the attributes required in a judge.

We therefore suggest, as our central observation from these interviews, that the JSC's apparent lack of a clear, unified vision of what criteria to apply in appointing judges, what qualities in a candidate would qualify them as an ideal judge, and what questions to ask in order to establish whether candidates possess these criteria.

We proceed to analyse the questions which were asked at the interviews, in order to highlight cases where we feel the JSC is on the right track; as well as those where we feel the questioning did not ultimately help the commission to discharge its constitutional mandate. From observing the interviews, we have noted that questions might be characterised as falling into three categories: those which relate more to the general functioning of the legal system; those which relate to broader issues and challenges facing South African society; and finally questions which would allow commissioners to pinpoint judicial qualities in candidates (we deal with the question of transformation in a later section of the report).

We pause to make some observations. Firstly, we should not be understood as overlooking or trivialising the difficulty of the task facing the JSC. Secondly, we do not suggest that questions which we characterise in the first two categories are therefore necessarily irrelevant. Indeed, it is evident that they may often be entirely appropriate to assessing a candidate's judicial philosophy, judicial temperament, or mindset in relation to constitutional values. However, it must also be said that our view, from observing both these interviews and the Constitutional Court interviews in 2009, is that questioning often becomes sidetracked on issues which do not seem to assist the JSC in establishing the judicial attributes of a candidate. It is our view that this is a result of asking questions which tend to stray from the task of identifying the qualities of an ideal South African judge.

Some examples follow. This is not in an attempt to victimise or ridicule the commissioners who asked the questions (no commissioners are identified by name); nor is it intended to be a complete list of questions we believe to be problematic or praiseworthy. Rather, it is an attempt to provide a representative sample of the types of questions which we suggest may be sidetracking the commission from fulfilling its constitutional mandate; as well as those which we feel are most helpful in assisting to fulfil it.

Questions relating to the state of the legal system

A frequent example of such questions were those relating to the issues of access to justice, and the languages used in the courts. These questions may to an extent be relevant, in that they could show how sensitive judges are to issues which impact on constitutional rights and values. However, there seems to be a tendency to ask these questions in a very general manner, which requires candidates to engage in high level policy formulation. This is not irrelevant to the judicial function, as judges may be required, for example, to pronounce on the constitutionality of a language policy. However, these kinds of questions often do not elucidate answers which enable the suitability of a particular candidate to be assessed. We suggest that this is due, at least in part, to the abstract and general level at which the questions are asked. We would therefore suggest that, whilst these questions are not inappropriate to ask, they ought not to form as much of the core of interviews as they do, as they do not enable the JSC to test the suitability of individual candidates' judicial qualities.

Another dominant theme in the questioning was reference to the backlogs in South African Courts, with commissioners noting the link between this issue and the right of access to justice. Candidates for both judges and judge president's positions were asked about what steps they had taken to streamline court backlogs. Candidates were frequently questioned about the issue of reserved judgements, both in respect of themselves and their division or the judiciary in general. Some candidates were also asked about the proposed restructuring of the High Courts - questions which did not seem to relate obviously to any judicial qualities. Again, these questions are clearly relevant to the extent that they allow the JSC to interrogate, amongst other things, a candidate's courtroom management skills. However, the questioning again often seems to acquire a focus on matters of broader and abstract legal policy, which risks becoming tangential to the candidate's own specific aptitudes.

We observed a similar tendency in interviews for the Labour Appeal and Labour Courts. Candidates were asked to reflect on whether the specialised Labour Courts

had been successful in dealing with labour matters expeditiously. Candidates for these courts were also asked to address the causes of delays in Labour cases, and how these could be avoided. Questions of institutional structure of the labour courts were put to most of the candidates for these courts. Some candidates were asked to comment on whether there were aspects of labour legislation which might need revision.

One High Court candidate was asked to give his views on a no fault system of liability in motor vehicle accident system, and other matter relating to the Road Accident Fund. We are not sure that this line of questioning was of great assistance to the commission in assessing the candidate in question.

Candidates for High Court positions were asked about the type of work which Acting Judges should be given to prepare them for the bench. Such questions would be helpful to put to candidates for judge president positions, but did not make an obvious contribution to assessing a candidate's suitability as a judge.

Another candidate was questioned quite extensively about disciplinary steps he had taken as the chairman of the Pretoria Bar Council. Such questions may be highly appropriate to determining whether, for example, a candidate has a suitable judicial temperament. However, in this instance the questioning seemed to go beyond this to become an interrogation of the actions of the Bar council. We would respectfully suggest that such questioning needs to be more tightly focused in order to make best use of the commission's time.

Questions relating to general challenges facing South African Society

These questions included the (frequent) questions to candidates as to how the problems of race and gender balance on the bench can be remedied, and how Section 174(2) of the constitution should be interpreted and applied. Often this took the form of candidates being asked about the racial or gender composition of the Division to which they were applying, implicitly requiring candidates to justify their own possible appointment. In other cases candidates were expressly asked how their appointment could be reconciled with the demands of transformation. Candidates were also asked what contribution to transformation they themselves had made. These questions were at times very specific - one white candidate who had received favourable comments from Advocates for Transformation about his interaction with black advocates was asked whether he interacted with black colleagues socially or only at work. Another was asked about the extent to which the tennis club of which he was a member had transformed. We deal with the issue of transformation more fully in the next section of this report. For now, whilst such questions may potentially be usefully in establishing whether and to what extent a candidate's views are consonant with the values of our pluralistic, multi-racial and multi-cultural society, we suggest that commissioners need to consider carefully how to craft such questions in order to ensure that candidates are not put in position where it seems they are personally being held accountable for transformative issues facing the legal profession and the broader South African community.

Questions were asked of certain candidates in relation to previous political views and activities. It was not always immediately apparent how relevant the answers elicited would be in determining the candidate's suitability for judicial appointment. One candidate was asked whether he having represented a former

SADF officer as an advocate contradicted his own previous political involvement. Another candidate was questioned about the release of a report of a commission of inquiry for which he had acted as counsel. Do such questions perhaps go beyond what is necessary to establish fealty to constitutional values? As another commissioner later pointed out, an advocate's choice in accepting or declining a brief is limited.

One candidate was questioned about whether (during an acting appointment in Venda) he had learnt any African languages. Whilst we certainly approve of judges being encouraged to learn other languages, and are conscious of the historical marginalisation of African languages in the legal system, such a line of questions poses potential problems in terms of the equality of treatment of candidates. It was striking that only a small proportion of the white judges interviewed were asked about their ability to speak African languages. It is likely that many white judges would not be able to speak African languages, and such an answer may well be seen to reflect negatively on their candidature. Therefore, we suggest that if the question is to be asked, it ought to be asked of all, or at least a significantly greater number, of candidates.

In concluding these two themes, we would commend the comments of one commissioner, who highlighted the need to remember that candidates spoke for themselves (we took this to mean that candidates should not be expected to answer for problems of, for example, transformation, in the broader community). This highlights the difficulty that some of the questioning of candidates presented, in that it called on candidates to deal with some wide-ranging issues that arguably go beyond their individual candidature.

Questions relating to candidates' judicial qualities

We were encouraged to note that a significant number of questions asked of the candidates went directly to the qualities which made them suitable for judicial office. These include questions about candidates' previous adjudicatory experience, as acting judges, magistrates or as small claims court commissioners. One candidate was asked about his involvement with the Disciplinary Committee of a religious group. We do, however, regret that even greater emphasis was not given to adjudicatory experience, in particular to the judgements candidates wrote during their acting appointments. Not all candidates were asked about specific judgements they had written - in fact, it was our impression that only a minority of candidates were asked such questions. We also note that, when candidates did speak about cases they had been involved in, they would often speak descriptively, and questions were seldom asked to elicit deeper responses which might have revealed more about issues such as their view of the judicial function, and relevant questions of substantive law. On other occasions, candidates spoke at great length about the factual background of cases - which may in itself be revealing about their suitability for the bench - and we would encourage the commission to direct candidates to focus their comments on pertinent aspects of the cases.

One substantive issue which was raised with candidates for the Labour courts was the interaction between Labour law and constitutional law. In light of our submission, pointing out that the constitution is central to the South African legal system, we welcome such questions and would encourage commissioners to put equivalent questions to candidates for High Court positions (this was done in some cases, but infrequently). Candidates for the LAC were asked to describe how they would exercise appellate functions. We would also suggest that this could be a

good question to ask of High Court candidates, who if appointed would exercise appellate jurisdiction over the Magistrates Courts.

Candidates were also asked about their practical legal experience - i.e. their work as attorneys and advocates. It was evident that great weight is attached to candidates having appreciable experience as acting judges. Issues of timekeeping and courtroom management were raised. Candidates were also asked about leadership qualities, and in some cases the adjustment they would have to make having previously held leadership positions in lower courts. Questions relating to judicial temperament were also asked, including what qualities candidates thought this included, and candidates' views on how judges ought to conduct themselves towards practitioners and litigants were elicited in some cases. Some candidates were asked what qualities a judge should possess, and in some cases a specific quality was put to a candidate as being a requirement for judicial office, and candidates were asked why these qualities were important.

Candidates for Judge President positions were asked about their relationship with other judges in their division. A candidate was asked how he would deal with being unfamiliar with the culture of the community served by the judge. Some candidates were questioned about reporting practitioners to professional bodies for infringing professional duties.

It is commendable that several members of the commission asked candidates questions about their judicial philosophy, in line with our suggestion in our submission prior to the hearings. It was also noticeable that some candidates spoke to this issue of their own accord, and we commend how commissioners would also pick up on issues of judicial conduct mentioned by candidates, and ask them to explain the philosophy underlying a particular decision or approach to case management.

Several questions were asked which may be seen as getting candidates to speak about their judicial philosophy. One candidate was asked how she understood the role of a Presiding Officer, and what differences and challenges were encountered as a magistrate as compared to a presiding judge. Candidates were asked how they would avoid their 'personal feelings coming to the fore', and what role a judge's background should play in the judicial function. A variant on this was to ask a candidate what value they would bring to the bench in light of their background. On occasion commissioners expressly asked candidates to articulate their judicial philosophy, or personal philosophy, and how they would apply this in adjudicating. One notable framing of the question was to observe that over time, a pattern emerges in a candidate's judgements, which demonstrates their judicial philosophy towards the adjudication process, and to ask candidates to articulate what this would be in their case. One candidate was asked a broader question as to her philosophy in terms of what kind of country she saw South Africa being in the future; and another candidate was asked to describe his background when growing up.

Candidates were also asked about what they understood the role of a judge to be under South Africa's constitutional democracy; with specific questions being put about the separation of powers. A related question was put as to the role played by judges in transforming South African society and in transforming the legal system. Candidates were asked about their view of the principles of judicial independence and accountability. It was noted that in certain cases, questions impacting on the possible judicial independence of candidates were put in terms of

a generalised impression or feeling about their adjudicatory record, without specific examples of possible lack of independence being cited.

DGRU will be conducting further research on how the concept of “judicial philosophy” may be understood, as well as the types of questions which commissioners might consider asking in order to assist candidates in articulating their judicial philosophy.

Based on the questions asked during the interviews, what does the JSC seem to be looking for in its nominees?

Whilst we would not claim that this is a comprehensive list by any means, the following may be helpful as a reference point for some of the major qualities which, based on the questions asked by commissioners, the JSC appears to be looking for in order to recommend a candidate for appointment. For this section, we disregard questions which we consider to be of less relevance, as discussed above. As we have previously noted, there is a lack of clearly articulated qualities which the commission for judicial appoint from the commission. This section merely notes some of the themes which emerge from the questions commissioners ask.

For High Court judges, it is clear that significant experience as an acting judge is required. Some candidates (including some who were ultimately nominated) were questioned on whether they had had sufficient acting experience to justify a permanent appointment. Also other adjudicative experience seems important e.g. magistrates, small claims court. Commissioners also seem to look for a range of civil and criminal experience.

All candidates must clearly have considerable experience in legal practice - most candidates were current or former attorneys or advocates. The breadth of experience also seems to be a factor here. One candidate, a former magistrate, was asked questions about a submission by professional bodies that she lacked sufficient practical experience.

An interesting issue to emerge was candidates’ broader involvement in the community. Often this is linked to questions about transformation - some candidates were questioned on their perceived lack of direct involvement in furthering transformation. It seems that the JSC wants to see that candidates are putting back into their communities, and that commissioners felt that the absence of such involvement would diminish candidates’ ability to appreciate the challenges facing the country, and the values and culture of the community. The absence of such involvement seemed to tell against some candidates. This is an interesting premise, and one that is worth interrogating more closely as to whether such involvement is indeed a good indicator of a judge’s ability to empathise with the broader community and appreciate the challenges facing the country. The issue of equality of focus is pertinent here, as not all candidates seemed to receive equal scrutiny on this issue.

Transformation

Understandably the issue of transformation of the judiciary came up in many of the interviews. The exclusionary nature of the apartheid system remains evident in many of our courts. It remains a reality of our society that non-whites and women

are not adequately represented on the bench and the situation has not improved significantly enough in the last 16 years of democracy.

The drafters of the Constitution enacted s174 to try and resolve this problem. Section 174 (1) states that the judges should be fit and proper persons and section 174(2) states that the judiciary must broadly represent the racial and gender composition of the South African society. We have consistently submitted to the JSC that there is not hierarchy amongst the two provisions, and neither should succumb to the other.

The question that arises is how then can our society balance the two imperatives, without leaving out the candidates who, otherwise are qualified, but perhaps fall outside a certain race? It was clear during the interviews that the JSC appreciates the urgency of transforming the bench. However, emphasis was mostly, it seems when one looks at the questioning trend, on racial transformation (although we note that several commissioners raised concerns about the lack of gender transformation in many courts). This is seen in a number of questions about transformation that was posed mainly to white male candidates. As a member of public, one had a sense that white male candidates had to justify why as white males should they be appointed. One member of the JSC asked a candidate whether it would be justified for the JSC not to appoint white candidates in the interest of section 174(2). The rational answer that could be given would be one which is engineered to satisfy the commission that a candidate has a “transformed mindset”. The question then becomes whether our judiciary is developed enough to such an extent that we can afford to lose good candidates who happened, through accident of birth, to be of a particular race.

Some public criticisms have been made of the JSC for putting these kinds of questions to white candidates. But the other side of this is that it is only fair to put the question, since the transformational imperative is one that commissioners are required by the constitution to take into account. Is it not better therefore that candidates be given the opportunity to promote their suitability in light of such a fundamental consideration?

A problem emerges, however, when candidates are asked (as they often are) questions such as “what is your view of transformation?” As this question is very broad, it is often difficult for candidates to articulate a cohesive answer within the constraints of the interview situation. Commissioners on occasion articulated a desire to ensure that candidates were not merely paying lip service to their commitment to transformation. We believe that in order to do, it would be helpful to ask narrower, more focused questions in order to elucidate candidate’s views on transformation.

To do so, it is necessary to develop a fuller understanding of exactly what is meant by transformation in the context of judicial appointments. It appears from observing the interviews that commissioners view the importance of transformation as extending beyond compliance with Section 174(2) of the Constitution. The concept of a “transformative mindset” is often invoked. But what exactly does it mean? How do commissioners understand the concept? And what role does it play in determining whether a candidate is worthy of nomination?

As noted above, we observe that there is a tendency for questions eliciting views on transformation to be put predominantly to white candidates. In light of the historical context in which the commission operates, this is understandable.

However, we would urge caution against such questioning giving the impression that the commission has a presumption that white candidates are likely to be untransformed. One way in which the question was put was to ask a candidate how his appointment would further transformation in terms of race or gender, either directly or indirectly. If the question is to be put, this seems to be a preferable way of framing it, since a candidate who might not further transformation in terms of their own race or gender might, for example, make a significant impact on the transformation of the bench by mentoring and developing black and female judges.

The issue of transformation, we submit, goes further than just race, and innovative ways should be found to tackle the issue. One such way is to change focus in questioning about transformation during JSC interviews. Instead of transformation questions being posed mostly to white male candidates, we respectfully submit that such questions should be posed to all candidates. Collectively, these candidates have the ability to come up with innovative ways of ensuring that the judiciary is transformed. A candidate raised a point that the situation of transformation does not begin when there is a need to appoint judges, but has to be dealt with by looking at students entering first year of university. Currently there is a small pool of black women in the bar, and this needs to be rectified in order that, in the future there can be nominations that could be brought forward from that group. Thus the issue of transformation is deeper than just who get nominated but is the one that needs to be tackled not only by the legal profession but also by the society at large.

It was heartening to observe several commissioners expressly commenting that transformation entails a consideration of the mindset and values of a judge. We submit that this must be so, and the identification of such values must begin with the constitution.

Conclusions and Recommendations

As was discussed at the beginning of the report, we suggest that the overriding problem facing the work of the JSC relates to the lack of a clear unpacking of the qualities of ideal judge. We believe that much of the time-keeping difficulties which the commission appears to be experiencing may be attributed to a lack of a clear identification of what questions ought to be asked - and that in turn can only take place once there is a shared understanding among all members of the commission as to what criteria the JSC is looking for in candidates. We note that similar issues were in evidence during the September 2009 hearings, with a differently-composed JSC under a different chairman - therefore, the issue appears to be a fundamental and deep-lying one that is not affected by the presence or absence of certain individual commissioners.

How can these issues be remedied?

It is apparent from our submissions above that the issue of the attributes of an ideal judge should be investigated by the JSC. This would help JSC members to pose questions in a way that would point them towards finding candidates that meet that criteria. Thus JSC members would know what questions to ask in order to determine the suitability of candidates to be appointed as judges. This would help eliminate any perceptions that the public may have about criteria used in

appointing judges. The question in the minds of the public is what extent do politics play a role (if at all) in the appointment of judges. This stems from the fact that some of the candidates they perceive as good were not appointed. This perception problem would be solved if the public knew the attributes that the JSC looks for in a judge.

The question of what the concept of “judicial philosophy” means in the South African context, and how this can best be interrogated by the JSC, is one which should be given further attention. As mentioned earlier in this report, DGRU will be conducting further research on this issue, which we hope may be of some assistance to the JSC.

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