

# An Analysis of Judicial Selection and Appointments in Zimbabwe<sup>1</sup>

## Introduction

The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance. Without independence, the judiciary cannot play its role as the protector of the Constitution and the fundamental values embodied in it, including the rule of law, fundamental justice, equality and preservation of the democratic process.<sup>2</sup> Submissive judges do not enhance independence. They undermine it whilst simultaneously destroying public confidence in the judiciary. Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice.<sup>3</sup>

The doctrine of separation of powers assumes that the three arms of state will be able to provide the necessary checks and balances on each other. In order to do so, each must be able to perform its constitutional role effectively. Without independent judges, it is difficult to sustain a democracy based on freedom for all and the rule of law. The judiciary, being the weakest of the three arms of government, depends on public confidence, respect and support for its effectiveness.

The late Chief Justice of South Africa, Justice Ismail Mahomed, had this to say:<sup>4</sup>

“The independence of the judiciary and the legitimacy of its claim to credibility and esteem must in the last instance rest on the integrity and the judicial temper of judges, the intellectual and emotional equipment they bring to bear upon the process of adjudication, the personal qualities of character they

---

<sup>1</sup> Copyright reserved © Zimbabwe Lawyers for Human Rights, December 2014. Written by Maureen Shonge, content edited by Tererai Mafukidze and edited by Irene Petras. Contribution to observation of appointments process, data collection and analysis: Nosimilo Chanaiwa and Connie Nawaigo.

<sup>2</sup> See the case of *Beauregard v Canada* (1986) 2 SCR 56 at p 70.

<sup>3</sup> *Ell v Alberta* (2003) SCC 35 at para 29.

<sup>4</sup> In his address to the International Commission of Jurists in Cape Town on 21 July 1998 on “Independence of the Judiciary”.

project, and the parameters they seek to identify on the exercise of judicial power.”

The process of appointment of judges is therefore central to judicial independence. If the appointment process is unsound, unfit persons will be elevated to the bench. Unfit judges are unlikely to enhance the independence of the judiciary. A judiciary that is not independent cannot perform its constitutional duty, which is to protect rights and the Constitution and to hear cases and determine them without fear, favour or prejudice. An independent judiciary is central to the achievement of a modern democratic society.

Public confidence in the judiciary is the “essential condition for realising the judicial role ... in the judge”.<sup>5</sup> The judiciary relies on the acceptance and enforcement of its decisions on its own credibility. That attitude towards the decisions of courts is what is termed “confidence in the judiciary”.<sup>6</sup> That confidence is vital to the observance and preservation of the rule of law. It is important to understand that such confidence in the judiciary is not dependent on the belief that all judicial decisions are wise, or that all judicial behaviour is impeccable. As Justice Gleeson put it:

“What it requires, however, is a satisfaction that the justice system is based upon values of independence, impartiality, integrity, and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully.”<sup>7</sup>

The major challenge for any judiciary is to sustain public confidence in the judiciary. Confidence in the judiciary is dependent on several factors, namely:

- diversity both in the judiciary and in the institution that is responsible for the appointment of judges;
- consistent and public criteria for the appointment of judges;
- open and public hearings for the selection and appointment of judges;
- actual and perceived independence of the judiciary.

---

<sup>5</sup> Barak A *The Judge in a Democracy* (2006) Princeton University Press p 109.

<sup>6</sup> Gleeson M, Chief Justice of Australia “Public Confidence in the Judiciary” (paper delivered at the Judicial Conference of Australia, 27 April 2002) p 1.

<sup>7</sup> Gleeson p 4.

In diverse societies, the diversity of the bench is also a significant imperative for the effective dispensation of justice.<sup>8</sup> Diversity goes beyond gender and encompasses regional origin, tribe, race, disability and many other factors. A judiciary that requires universal acceptance must reflect the universality of society. The lack of diversity undermines the legitimacy of the judiciary as an institution. The judiciary is a powerful, yet unelected, institution and its personnel should therefore be drawn from diverse groups. It will be unable to achieve legitimacy if it does not reflect the diversity of society or of the legal profession. Any failure to appoint well qualified candidates from different backgrounds will be seen as a deliberate exclusion from participation in power. There is general acceptance now that the diversity of the bench improves the quality of decision-making.

## **Historical aspects of judicial independence**

At Independence the judiciary in Zimbabwe was mostly white. The first major challenge was to open up the judicial system to the majority of the population. However, the appointment process mirrored the then trusted British “tap-on-shoulder” system. Section 84 of the former Constitution provided that the Chief Justice, Deputy Chief Justice, judges of the Supreme Court, the Judge President and judges of the High Court were appointed by the President after consultation with the Judicial Service Commission (JSC).

Where the President’s appointment of any of these judicial officers was inconsistent with any recommendation made by the JSC, the President was required to inform Parliament as soon as was practicable. This requirement did not, however, endow Parliament with any power to rescind or vary the appointment. It was simply a courtesy notice. The President therefore enjoyed extensive selection and appointment powers that made the appointment of judges open to manipulation. If the President was intent on appointing a person who only met the minimum legal qualifications, he could.

The appointment process to the bench was also secretive. No interviews were conducted. No vacancies were announced or advertised. Some lawyers were approached secretly; other more willing candidates approached powerful people to inform them of their desire to be appointed judges. Party political factors and connections played a crucial role. If the executive was happy, the appointments

---

<sup>8</sup> Justice Yvonne Mokgoro, former judge of the Constitutional Court of South Africa “*Judicial Appointments*” (paper delivered at the Middle Temple and SA Conference on Judicial Independence, December 2010).

were usually pushed through. If this was not the reality it was, at the very least, the perception within the legal profession and the broader society.

The JSC itself was made up of presidential appointees.<sup>9</sup> It consisted of the Chief Justice, the Chairman of the Public Service Commission, the Attorney-General and two or three other members appointed by the President. Of these two or three additional members, one of them had to be a current or former judge; or someone who was or had been, for not less than five years, qualified to practise as a legal practitioner in Zimbabwe, or possessed such legal qualifications and experience that the President considered suitable and adequate for appointment to the JSC. The remaining additional member(s) were to be chosen for their ability and experience in administration, their professional qualifications or their suitability otherwise for appointment.

With a JSC that was made up of the President's appointees, the President had even greater power in determining who would be appointed. Of course some of the JSC commissioners were members *ex officio*. However, they owed their qualifying position to the President. Save for the Chief Justice, who enjoyed some security of tenure, and practising lawyers who were selected as additional members, the rest of the state office bearers knew that acting against the interests of the President could prejudice their careers. As a result, the President was bound to have his way if he insisted upon it.

The former Constitution did not give any role to the minister responsible for justice in the selection and appointment process. However, it was generally accepted that the minister played a critical role in choosing candidates for the JSC's consideration and recommending them to the President. In fact, it was generally accepted that the President relied on the Minister to point out "suitable" candidates and depended upon his advice when considering the JSC's recommendations.

The obviously unsatisfactory selection and appointment process for judges was the motivation behind the push, and ultimate decision, to introduce a comprehensive and substantially open process of selection and appointment.

## **Judicial independence under the new Constitution**

Section 165(2) of the new Constitution<sup>10</sup> provides:

---

<sup>9</sup> See section 90 of the former Constitution of Zimbabwe.

<sup>10</sup> Constitution of Zimbabwe Amendment (No. 20) Act of 2013.

“Members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence in order to maintain public confidence in the judicial system.”

The Constitution contains several detailed provisions that are intended to protect and enhance judicial independence. Sections 164(1) and (2) state that:

“ (1) The courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice.

(2) The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore—

- (a) neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts;
- (b) the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165.”

The new Constitution imposes a negative duty on every person NOT to interfere with the courts. A positive duty is also imposed upon the state through legislative and other measures, to *assist* and *protect* the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. The duty on the state does not end with the promulgation of laws. It extends to “other measures” which include policies, financial support, physical action, amongst others. The appointment of judges who are unsuitable for judicial office would now constitute a failure to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

Furthermore, the foundation of any democratic state lies on having a solid and democratic constitution supported by independent and credible institutions, especially the judiciary.

For Zimbabwe, one major challenge that still exists is to ensure that no individual or interest group enjoys unfettered power to appoint and promote judicial officers at will. The appointment process must therefore ensure that only those in possession of the required legal skills and competency, undoubted integrity and

solemn commitment to the protection of human rights, the efficient delivery of justice, and promotion of the rule of law, are appointed.<sup>11</sup>

## The Judicial Service Commission (JSC)

The extent to which the appointment of judges is free from political manipulation is largely reliant on the independence of the JSC.<sup>12</sup> The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* and the *United Nations Principles on the Independence of the Judiciary* recommend that judicial officers should be selected by a body that is independent from the executive and the legislature to guarantee judicial independence and impartiality in the discharge of its constitutional duties.<sup>13</sup> Therefore the body that is responsible for the selection and appointment process is important in ensuring the integrity and transparency of the process.

The current Constitution of Zimbabwe recreates a JSC which plays a role in the appointment of judges.<sup>14</sup> Furthermore, under the new Constitution the JSC itself is a widened body that is intended to be representative of the various interests connected with judicial work. It is now a body consisting of 13 members who are the following:

- (a) The Chief Justice;
- (b) The Deputy Chief Justice;
- (c) The Judge-President of the High Court;
- (d) One judge nominated by the judges of the Constitutional Court, the Supreme Court, the High Court, the Labour Court and the Administrative Court;

---

<sup>11</sup> Mafukidze T *The Judicial Process Needs Reform* unpublished paper (December 2011).

<sup>12</sup> Chidzuza L *Towards The Protection Of Human Rights: Do The New Zimbabwean Constitutional Provisions On Judicial Independence Suffice?* [2014] PER 17. Available on <http://www.saflii.org/za/journals/PER/2014/17.html> [last accessed on 8 September 2014].

<sup>13</sup> Hodzi O *Reforming the Criminal Justice System in Zimbabwe: Lessons from Kenya* (March 2011).

<sup>14</sup> Section 190 of the Constitution of Zimbabwe deals with the functions of the JSC which are: "(1) The Judicial Service Commission may tender advice to the Government on any matter relating to the judiciary or the administration of justice, and the Government must pay due regard to any such advice. (2) The Judicial Service Commission must promote and facilitate the independence and accountability of the judiciary and the efficient and transparent administration of justice in Zimbabwe, and has all the powers needed for this purpose. (3) The Judicial Service Commission with the approval of the Minister responsible for justice may make regulations for any purpose set out in this section. (4) An Act of Parliament may confer on the Judicial Service Commission functions in connection with the employment, discipline and conditions of service of persons employed in the Constitutional Court, the Supreme Court, the High Court, the Labour Court, the Administrative Court and other courts".

- (e) The Attorney-General;
- (f) The Chief Magistrate;
- (g) The chairperson of the Civil Service Commission;
- (h) Three practising lawyers of at least seven years' experience nominated by the Law Society;
- (i) One professor or senior lecturer of law designated by an association representing the majority of teachers of law at Zimbabwean universities. In the absence of such an association, the academic is appointed by the President;
- (j) One person who has practised for at least seven years in Zimbabwe as a public accountant or auditor, designated by an association constituted under the law which represents such person; and
- (k) One person with at least seven years' experience in human resources management, appointed by the President.

First, an interesting new feature of this composition is that there are term limits for appointees who are not members by virtue of the office they hold. Members designated by judges, the Law Society, the legal academics, and the accounting profession together with the human resources practitioner appointed by the President, hold office on the JSC for one non-renewable term of six years.<sup>15</sup>

This limitation is intended to infuse the JSC with new blood, while striking a good balance with the need for continuity. Term limits also help limit the danger of the formation of powerful cliques that may undermine the independence of the JSC.

Second, there appears to be room for members designated by their colleagues to be "recalled", in which case they may be forced to resign due to peer pressure. This may be an incentive for good performance on the JSC. Decisions of the JSC will naturally be determined by the vote of the majority of the membership. These members of the JSC have to account to colleagues and professional bodies who nominated them for the exercise of their constitutional responsibilities. This reduces the risk of political patronage.

Third, six of the thirteen members of the JSC are not appointed by the President, which is an improvement. It is clear from the composition of the JSC that the President's influence over the appointment of members of the JSC has been reduced compared to the situation under the former Constitution.<sup>16</sup> Although some members sit on the JSC by virtue of being appointed to an office by the President,

---

<sup>15</sup> Section 189(3) of the Constitution.

<sup>16</sup> Chiduzza L (n 12 above).

considerable efforts have been made to ensure that there is independent representation in the JSC. Such independent representation will therefore ensure, at least on paper, that appointments to the judiciary are made more impartially and without party political considerations.<sup>17</sup>

Fourth, potentially up to ten of the thirteen members will have some legal training. Judicial appointment processes ought to be dominated by persons who have a decent appreciation of the demands of judicial work, and the skills that are required to prosper in it.

Finally, the membership of the JSC consists of a wide array of persons with fairly diverse background and interests. Zimbabwe is possibly the first country in the world to require a public accountant or auditor to be involved in judicial appointments.<sup>18</sup>

The South African JSC is, however, more diverse in its composition. In some respects this is, in fact, its weakness. It is chaired by the Chief Justice and includes at least three judges, lawyers from the advocates', attorneys' and legal academics' professions. It also includes the Minister of Justice, parliamentarians and persons designated by the President after consultation with leaders of all parties represented in Parliament. When selecting judges of a specific high court the South African JSC also includes the premier of the relevant province. However, concerns have been raised about the fact that politicians are in the majority in the South African JSC, which brings in political influence. The ideal is that the majority of members of a JSC always be persons who are in the legal profession or who are associated with the administration of justice.

The composition of the JSC of Kenya under the old constitution comprised five members that included the Chief Justice as Chairman, the Attorney-General, a Judge of the Court of Appeal, a *puisne* (junior) Judge of the High Court and the Chairman of the Public Service Commission.<sup>19</sup> The JSC was therefore comprised of direct or indirect presidential appointees whose independence from the executive was questionable. In order to safeguard the independence of the JSC, the new Kenyan Constitution provides that the JSC shall consist of the Chief Justice, who shall be the chairperson of the Commission; one Supreme Court judge and one Court of Appeal judge, elected by other Supreme Court judges and Court of Appeal judges

---

<sup>17</sup> Chiduza L (n 12 above).

<sup>18</sup> Of course this appointment may be related to the other JSC's responsibility to run the entire judiciary as an independent institution.

<sup>19</sup> Article 68(1) of the old Constitution of Kenya.



respectively; one High Court judge and one magistrate, one a woman and one a man, elected by members of the association of judges and magistrates; the Attorney-General; two advocates, one a woman and one a man, with 15 years' experience each, elected by members of the Law Society of Kenya; one person nominated by the Public Service Commission; and two people, a man and a woman who are not lawyers, appointed by the President with the approval of the National Assembly.<sup>20</sup> The last two are meant to represent the public. With the exception of the Chief Justice and the Attorney-General, all other members of the Commission shall hold office, provided they remain qualified, for a term of five years and can serve a maximum of two terms only.<sup>21</sup>

With this composition, Kenya's JSC appears to be representative and it can be expected to discharge its mandate with a fair degree of independence from the executive. One of the functions of the Kenyan JSC is to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice, and in doing this the JSC is to recommend to the President persons for appointment as judges.

## **Appointment of judges under the new Constitution**

Under the former Constitution the appointment process was dominated by the executive. The existence of vacancies, the nomination of potential appointees and the appointment processes were opaque. As a result, the public sometimes viewed the bench as a reflection of political connections rather than a competent panel of deserving jurists.

The appointment process under the new Constitution reveals a deliberate move towards openness and accountability. It seeks to limit executive influence in judicial appointments by limiting the power of the President to push his preferences. This is an opportunity to improve public confidence in those appointed to the judiciary.

The Chief Justice, Deputy Chief Justice, the Judge-President of the High Court and all other judges are appointed by the President in accordance with section 180.<sup>22</sup> The Constitution does not differentiate between the manner of appointment of the leaders of the judiciary and *puisne* judges. Some jurisdictions permit greater

---

<sup>20</sup> See <http://www.judiciary.go.ke/portal/the-judicial-service-commission.html> [last accessed 23 October 2014].

<sup>21</sup> Article 171 of the new Constitution of Kenya.

<sup>22</sup> Section 180(1) of the Constitution of Zimbabwe.

political involvement in the appointment of judges to apex courts and the appointment of their leaders. For example, in South Africa there are special provisions relating to the appointment of the Chief Justice, his deputy, Constitutional Court judges and the President and Deputy President of the Supreme Court of Appeal. Under the South African Constitution the “greater the potential influence of the judge, the greater the involvement of political actors outside the JSC”.<sup>23</sup> The President, after consulting the JSC and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice, and after consulting the JSC alone, appoints the President and Deputy President of the Supreme Court of Appeal.<sup>24</sup> Judges of the Constitutional Court of South Africa are appointed after consultation with the Chief Justice and the leaders of political parties represented in the National Assembly.

Contrary to this, a uniform appointment process obtains in Zimbabwe. The JSC is required to advertise the position;<sup>25</sup> invite the President and the public to make nominations;<sup>26</sup> conduct public interviews of prospective candidates;<sup>27</sup> prepare a list of three qualified persons as nominees for each vacant office;<sup>28</sup> and submit the list to the President.<sup>29</sup> The President must select one of the nominees from the JSC list for appointment.<sup>30</sup> This process is to be preferred as it does away with perceptions of, and actual, politicisation of the appointment process.

If the President considers that none of the persons on the list submitted by the JSC is suitable, the President must request the JSC to submit a further list of three qualified persons. The President is then required to pick from the second list. The President cannot object to the second list.<sup>31</sup>

These provisions introduce new critical components meant to curb the abuse of political power in the making of judicial appointments. They are intended to, as

---

<sup>23</sup> Olivier M “The Selection and Appointment of Judges” in *The Judiciary in South Africa* Cora Hoexter & Morne Olivier (eds) (2014) Juta p 128.

<sup>24</sup> Section 174(3) of the South African Constitution.

<sup>25</sup> Section 180(2)(a) of the Constitution of Zimbabwe.

<sup>26</sup> Section 180(2)(b) as above.

<sup>27</sup> Section 180(2)(c) (n 25 above).

<sup>28</sup> Section 180(2)(d) (n 25 above).

<sup>29</sup> Section 180(2)(e) (n 25 above).

<sup>30</sup> Section 180(2) (n 25 above).

<sup>31</sup> Section 180(3) (n 25 above).

much as possible, insulate the bench from political appointments and are critical to securing the independence of the judiciary.

A further difference to the South African situation is that their Constitution requires that the list for appointment to the Constitutional Court must contain three more names than the number of appointments to be made, whereas the Zimbabwean JSC can send one name for each position. The President has no discretion in this regard.

Promotion within the judiciary is also now subject to public contestation. This will improve the quality of performance of judges in the High Court as promotion will be subject to public assessment of performance in their current office. Further, the tendency to promote based on seniority offers no incentive for better performance. Promotions based on merit will motivate those that work hard.

Some of the challenges which remain include the following:

First, the Zimbabwean Constitution requires that the JSC provides a list of three qualified nominees for each vacant office. This is quite bizarre when there are many vacant positions. In October 2014, the JSC had to interview candidates for six High Court positions. The JSC has interpreted the provision to mean that it would have to send 18 names to the President. The tragedy with this is that if the JSC prepares the list from number one to eighteen based on preference, the President is free to pick numbers 13 to 18. What it then means is that the President can pick the weakest on the list.

In South Africa, assuming the same number of vacancies on its Constitutional Court, the list would include nine nominees. This means that the President would be required to pick six from the best nine. Such a narrow list ensures that the best are always appointed. The executive discretion available to the President in these Constitutional Court appointments is removed in the case of other judicial appointments to the Supreme Court and the High Court. These are made on the advice of the South African JSC which essentially means that President appoints persons that have been selected by them. This highlights that although the President has executive discretion in very senior judicial appointments in South Africa, the JSC is the key player in judicial appointments. The role of the South African JSC has the effect of diluting Presidential power and therefore his overall influence in the judiciary.

Second, the JSC may end up putting names forward just to fill in the required numbers. Of course, that cannot be a rational exercise of power.

Third, the Constitution gives the President the power to nominate candidates. This is dangerous as the indication of presidential preferences may influence the minds of the JSC members. When it comes to appointment, the President may prefer his nominees ahead of other better qualified nominees, should his or her nominees make the list.

Finally, while the process of selection is now open and vacancies are publicised, the presidential nominees are not disclosed. No legal basis has been advanced by the JSC for this secrecy. This non-disclosure introduces a new dynamic. In the interest of accountability and transparency, these presidential nominees must be known. Should any of his nominees fail to make the first list, there is a danger that the President may return this list, as he is entitled to do under section 180(3). Disclosing the list of nominees forewarns the public of the President's preferences, and ensures that the decision of the JSC can be objectively scrutinised. The failure to disclose this information is a failure of transparency the part of the JSC.

## Transparency of proceedings of the JSC

The JSC is constitutionally required in section 191 of the Constitution to conduct its business in a just, fair and transparent manner. Sunshine has been said to be the best disinfectant.

When candidates are interviewed for purposes of making recommendations for appointment by the President, the presence of the media is also permitted. This allows for greater public participation, debate and scrutiny. The JSC's deliberations are, however, insulated from the public glare in that they occur behind closed doors. Recently, the High Court in South Africa has upheld the JSC's objection to the disclosure of the record of its deliberations in the case of *Helen Suzman Foundation v Judicial Service Commission and Others*.<sup>32</sup>

The advertisement of vacancies is a commendable improvement in the appointment process, as it ensures that suitably qualified individuals are aware of the existence of the vacancies and can put themselves forward for appointment to the Bench.<sup>33</sup> It is also a welcome change from the past practices,<sup>34</sup> which were not

---

<sup>32</sup> Case 8647/2013 [2014] ZAWCHC 136; [2014] 4 All SA 395 (WCC); 2015 (2) SA 498 (WCC) (5 September 2014).

<sup>33</sup> See [http://www.herald.co.zw/public-interviews-for-top-judges/July 8, 2014](http://www.herald.co.zw/public-interviews-for-top-judges/July%208,%202014).

<sup>34</sup> Previously there was never any public advertisement of judicial vacancies and judicial appointments were made without any such advertisements, resulting in questions being asked about the credibility of the appointment process. In the past the judicial appointments process was shrouded in secrecy. The public would hear, through an announcement in a newspaper, that

ideal, especially considering that the authority that judges exercise is supposed to derive from the same people who had no knowledge and no role whatsoever in their appointment.<sup>35</sup> Advertisements aid in the appointment of well-qualified and fit individuals to the judiciary and increase openness, transparency and the scrutiny of potential choices. It is submitted that such publicity will therefore increase the professionalism of the judiciary.<sup>36</sup>

There are however no clear criteria set for the JSC in the appointment process. Dr Migai Akech of Kenya argues that where there are no set criteria for appointing judges, the powers to appoint judges will be exercised in ways that, respectively, undermine the institutional autonomy and authority of the judiciary and the independence of judicial officers. As a result, judicial officers are not only insecure in their positions, but may also become enablers of human rights violations and corruption.<sup>37</sup>

Generally, however, the fairly cumbersome appointment procedure introduced by the new Constitution in Zimbabwe ensures that there is a series of quality control mechanisms which will review the proposed appointees' suitability, qualification and skills. In addition, the senior appointees cease to owe their positions to political connections, which is ideal for individual and collective judicial independence. It also presents an opportunity for public observation. It is a good effort in attempts to restore credibility to the bench. However, if the criteria to be used in their deliberations are not known, the failure of the public to understand how the JSC has applied its mind to finalising the list of candidates can undo all the good developments regarding the judicial selection process.

## **Qualification for judicial office**

The formal selection criteria for judges in Zimbabwe are stipulated in the Constitution. The express codification of the minimum qualifications for appointment contributes to the independence of the judiciary and transparency as

---

certain individuals had been appointed a judge of the High Court or Supreme Court without any insight into how the selection would have been done.

<sup>35</sup> Section 117 provides that "The legislative authority of Zimbabwe is derived from the people". Also see Alex Magaisa *Does the public have a role in Zimbabwe's Judicial Appointments Process* available at <http://newzimbabweconstitution.wordpress.com/2014/07/15/does-the-public-have-a-role-in-zimbabwes-new-judicial-appointments-process/> [accessed 16 October 2014].

<sup>36</sup> Chiduzo L *Towards The Protection Of Human Rights: Do The New Zimbabwean Constitutional Provisions On Judicial Independence Suffice?* [2014] PER 17. Available at <http://www.saflii.org/za/journals/PER/2014/17.html> [accessed 8 September 2014].

<sup>37</sup> Akech M *Institutional Reform in the New Constitution of Kenya* (October 2010) p 29.

it limits the possibility of manipulation by those empowered to make judicial appointments.<sup>38</sup> The Constitution establishes the minimum qualification requirements for judges of the Constitutional Court,<sup>39</sup> the Supreme Court,<sup>40</sup> the High Court, the Labour Court and the Administrative Court.<sup>41</sup>

Minimum requirements for the appointment to judicial office for the different courts are also necessary to ensure that individuals who are appointed to the bench are qualified for the job. These formal requirements can be easily tested. While the Constitution lists formal requirements, it is clear that it is insufficient for one to simply have a law degree.

Cowen agrees that the identification of the qualities desired in a judge is a difficult task. She writes:

“The task of identifying the qualities we seek in our judges may not be illusory but it is a daunting one. While some qualities are obvious, there are numerous qualities that are relevant to judicial office just as there are many types of personality that might make a good judge. It is relatively easy to say, for example, that a candidate for judicial office must have integrity, but what that means practically, and how one assesses it, requires careful consideration of a vast literature and much wisdom about judicial ethics. It also needs to be acknowledged that there is no algorithm that can be applied to test whether a candidate will be a good judge.”<sup>42</sup>

### **Age qualification**

A minimum age of 40 years is set for appointment as a judge of the High Court, the Labour Court or the Administrative Court<sup>43</sup> and applies also to the Constitutional Court and Supreme Court.<sup>44</sup> This age limit bears no relationship to the legal qualifications and competency of the person. Considering that a person may attain a law degree at the age of 22, this means that they have to wait some 18 years before they can qualify for appointment. This may have a negative effect by failing

---

<sup>38</sup> Madhuku L “Constitutional Protection of the Independence of the Judiciary: A survey of the position in Southern Africa” *Journal of African Law* (2002) 46(2).

<sup>39</sup> Section 177 of the Constitution of Zimbabwe.

<sup>40</sup> Section 178 (as above)

<sup>41</sup> Section 179 (n 39 above).

<sup>42</sup> Cowen S *Judicial Selection in South Africa* (2013) DRGU Working series p 4.

<sup>43</sup> Section 179(1) of the Constitution of Zimbabwe.

<sup>44</sup> Sections 177(1) and 178(1) as above.

to attract appropriate candidates early in their careers. By the time they are qualified by age, they may be deeply invested in the equity of law firms, making a change of career into judicial office a high personal cost.

Further, as already argued, if the average law graduates are 22 years of age, the requirement that a candidate for judicial office should have been qualified to practice for at least seven years is clearly preposterous. The age limit plays no real role except to delay judicial careers. A person who attains a law degree at 32 may be appointed ahead of one who attained it at 22 for the mere reason that s/he is not 40. The younger person may in fact be better qualified and have greater experience. The former Constitution did not contain any age limitations, and no difficulties in judicial appointments were attributable to the lack of age limitations. In fact, the JSC has in the past offered judicial positions to talented legal practitioners before they turned 40!

### ***Qualification for and/or admission and experience***

In addition to the age limit, the Constitution requires a candidate to:

1. either be or have been a judge of a court with unlimited jurisdiction in civil or criminal matters in a country in which the common law is Roman-Dutch or English and English is an officially recognised language;<sup>45</sup> or
2. be a person who has been qualified to practise as a legal practitioner for at least seven years (ten years for Supreme Court<sup>46</sup> and twelve years for Constitutional Court<sup>47</sup>), whether continuously or not—
  - (i) in Zimbabwe;
  - (ii) in a country in which the common law is Roman-Dutch and English is an officially recognised language; or
  - (iii) if he or she is a Zimbabwean citizen, in a country in which the common law is English and English is an officially recognised language;and is currently so qualified to practise.<sup>48</sup>

---

<sup>45</sup> Section 179(1)(a) (n 43 above).

<sup>46</sup> Section 177(1)(b) (n 43 above).

<sup>47</sup> Section 178(1)(b) (n 43 above).

<sup>48</sup> Section 179(1)(b)(i)-(iii) (n 43 above).

### ***Fit and proper person***

The Constitution requires that for a person to be appointed a judge of the Constitutional Court,<sup>49</sup> Supreme Court,<sup>50</sup> High Court, Labour Court or Administrative Court,<sup>51</sup> she or he “must be a fit and proper person to hold office as a judge”. This requirement sets apart those who simply qualify formally for appointment on the basis of age, post-university qualification, etc from those who really should be judges.

The “fit and proper person” requirement means that a character screening should be done before one is considered fit and proper for judicial office. This brings into consideration the qualities that are necessary for judicial office. Foremost amongst these are: industry, integrity, independence of mind, impartiality, intellect, high moral standards, and an understanding and commitment to Constitutional values.

Justice Mahomed described the characteristics of a judge with his usual eloquence when he said:

“[S]ociety is ... entitled to demand from judges fidelity to those qualities in the judicial temper which legitimise the exercise of judicial power. Many and subtle are the qualities which define that temper. Conspicuous among them are scholarship, experience, dignity, rationality, courage, forensic skill, capacity for articulation, diligence, intellectual integrity and energy. More difficult to articulate but arguably even more crucial to that temper, is that quality called wisdom, enriched as it must be by a substantial measure of humility, and by an instinctive moral ability to distinguish right from wrong and sometimes the more agonising ability to weigh two rights or two wrongs against each other which comes from the consciousness of our own imperfection.”<sup>52</sup>

The assessment of these qualities in a candidate is a matter of value judgement. For that reason, it is highly unlikely that members of the JSC will have the same appreciation of the factors in relation to most candidates, especially first time appointees. Because of this, there has been controversy regarding the criteria used by the JSC to make choices. Commenting on the importance of a publicly known criteria in South Africa, Cowen has argued:

---

<sup>49</sup> Section 177(2) (n 43 above).

<sup>50</sup> Section 178(2) (n 43 above).

<sup>51</sup> Section 179(2) (n 43 above).

<sup>52</sup> Address to the International Commission of Jurists Conference, Cape Town, 21 July 1998. Cited in Cowen (n 42 above) p 5.



“Openness about the general criteria used for judicial selection serves many interests. It enables a principled public debate about the adequacy of the criteria used, it enables those who nominate candidates or comment on nominees to do so optimally, it enables those who may wish to make themselves available for judicial office to assess their own candidacy, and it enables the media to perform their own responsibility to inform the public and generate informed public debate on these matters. Perhaps most critically, however, decision-making is always enhanced when those who take decisions are clear about the criteria that are to be used. Because it is the independence and quality of our legal system that is at stake, accountability is thus serving particularly important ends.”<sup>53</sup>

### ***Gender and diversity***

The Constitution outlines other considerations to be taken into account, such as the gender and diversity of the Zimbabwean society. The latter brings in ethnic, regional and racial representativeness of members of the judiciary. It also raises the issues of disability and marginalised communities.<sup>54</sup>

In order for gender considerations to be effectively implemented there is need for policies to be put in place that support gender balance and the participation of women in the judiciary. This brings in the broad societal debate about opening up opportunities to women. It is important to note that the source of appointments is the legal profession in its widest sense. Traditionally, women suffer from exclusion in the legal profession. It is generally accepted that progress in the legal profession by women is hampered by family duties, male dominance, prejudice and slow progression into partnership positions.

Women earn less money than men, and often work in jobs that carry less prestige and opportunity for advancement. Further, African women constitute the poorest group in Zimbabwe and are more likely to be unemployed. In part, this stems from the traditional division of labour by gender, which demands that women take responsibility for the maintenance of the household and the care of the children. This is no light burden, especially for women who work outside the home. What Goldstone J said in the case of *Hugo* in the Constitutional Court of South Africa has equal application in Zimbabwe:

---

<sup>53</sup> Cowen (n 42 above) p 9.

<sup>54</sup> Section 184 of the Constitution of Zimbabwe states that “appointments to the judiciary must reflect broadly the diversity and gender composition of Zimbabwe”.

“For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources are immense ... The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment ... That parenting may have emotional and personal rewards for women should not blind us to the tremendous burden it imposes at the same time. It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared.”<sup>55</sup>

### ***Appointment of magistrates and other members of the judiciary***

Section 182 requires the promulgation of an Act of Parliament to provide for the appointment of magistrates and judicial officers other than judges. The Constitution further provides that magistrates must be appointed by the JSC. Judicial officers other than magistrates or judges must be appointed with the approval of the JSC. Specifically, the Constitution requires that such appointments be “made transparently and without fear, favour, prejudice or bias.”<sup>56</sup>

### ***The public interviews***

The JSC in Kenya has changed the manner in which it fills judicial vacancies post-2010.<sup>57</sup> Prior to that time, there was no notification that there were vacancies, even when it was clear there was a shortage in the number of judicial officers.<sup>58</sup> Since 2010 the Kenyan JSC advertises vacancies for judges both in the newspapers and online.<sup>59</sup> This is an historic change; previously, only vacancies for magistrates were advertised. The advertisement sets out clearly the constitutional requirements and also requests the candidate to submit a detailed résumé that includes evidence of “community service, financial discipline, *pro bono* activity, involvement as a party in litigation and involvement in political activity, three professional referees and two character references. After processing these applications, the JSC advertises

---

<sup>55</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) 38.

<sup>56</sup> Section 182(c) Constitution of Zimbabwe.

<sup>57</sup> See *Kenyan Jobs & Vacancies and Career Advice* Available at <http://www.careersmartkenya.com/>.

<sup>58</sup> The Judicature Act, 2007, Cap. 8 §7 (Kenya). The Judicature Act sets out the hierarchy of courts in Kenya and specifies the numbers required to fill each court.

<sup>59</sup> See *Latest Kenyan Jobs and Vacancies* Available at <http://www.kenyancareer.com/2011/04/supremecourt-judges-and-high-court.html> [last accessed 29 March 2013].

the names of the applicants and those it has shortlisted for interviewing.<sup>60</sup> This invitation also invites members of the public to write in with any information they have about the candidates.

The interviews are open to the public and have even been aired live on one of the local television stations in real time. Candidates are asked a variety of questions ranging from their legal competence to their views about what members of the public have written about them. Finally, after concluding the interviewing process, the list of successful candidates is made public through broadcast and written media, and then they take the oath of office before the President.

Zimbabwe is on the right track in terms of improving the appointment process. There is however the need to involve the public more, and beyond merely attending the interview process as spectators. The Kenyan approach, whereby members of the public are also invited to write in with any information they have about the candidates, is progressive. The caveat is that the JSC will interview the letter writers, but these proceedings remain confidential. Some of the questions raised by the public are put to the judges. This enriches the process and allows the public to fully participate. Further, this also eliminates rumour-mongering as the candidate is given the opportunity to address adverse comments or perceptions.

In South Africa, all relevant adverse comments or reports received by the JSC are sent to the candidate in advance of the public interviews. The candidate will then have these issues put to him or her well before they participate in the interviews.

This is recommended for future interviews by the JSC in Zimbabwe.

## **AN ASSESSMENT OF THE 2014 JUDICIAL INTERVIEWS**

### **Supreme Court Judge Interviews: 15 July 2014**

#### ***Interviews Announcement***

On 14 March 2014, the Judicial Service Commission advertised three positions on the Supreme Court Bench. The interviews were set for Tuesday 15 July 2014.

---

<sup>60</sup> See Nzau Musau "Shortlisting Complete for Advertised Judges Positions" *The Star* newspaper (28 May 2011) Available at <http://www.the-star.co.ke/national/national/26060-Shortlisting-complete-for-advertised-judges-positions> [last accessed 23 October 2014].

Ten judges, eight from the High Court and two from the Labour Court, were shortlisted for the interviews. The judges being interviewed for the 3 vacant Supreme Court vacancies were:

- i. Justice Samuel Kudya;
- ii. Justice Lavender Makoni;
- iii. Justice Nicholas Mathonsi;
- iv. Justice Susan Mavhangira;
- v. Justice Tendai Uchena;
- vi. Justice Happias Zhou;
- vii. Justice Chinembiri Bhunu;
- viii. Justice Mercy Moyo-Matshanga;
- ix. Justice Euna Makamure;
- x. Justice Charles Hungwe.

The judges appeared before a panel of 10 JSC commissioners, including the following:

- a. Chief Justice Godfrey Chidyausiku;
- b. Deputy Chief Justice Luke Malaba;
- c. Judge President George Chiweshe;
- d. Chief Magistrate Mr Mishrod Guvamombe;
- e. Three legal practitioners designated by the Law Society of Zimbabwe – Mr Lloyd Mhishi (also the President of the Law Society); Mrs Priscilla Madzonga; and Mr. Josephat Tshuma;
- f. An accountant designated by the Public Accountants and Auditors Board, Mrs. Priscilla Mutembwa.

It should be noted that the composition of the JSC was incomplete in terms of the Constitution.

### ***Interview proceedings***

The proceedings started promptly at 9am with welcome remarks from Chief Justice Chidyausiku. He explained why the public had been invited to attend. He further highlighted that the questions that would be put to the judges were standard and they had been agreed to by the JSC before the process started. Commissioners would also be called upon to ask additional questions. The duration of the interviews was supposed to be 40 minutes each. However these time limits were exceeded in some cases.

Some of the questions that were asked included why the judges wanted to be part of the Supreme Court Bench. They were also asked questions which touched on leadership and influence, collaboration and team work, cooperation, planning and

organising, decisiveness, independence, work standards, motivational fitness and integrity and propriety.

Other issues probed for consideration included the judge's judicial record, timeous delivery of judgements, expertise in dealing with complex legal issues, and appreciation and commitment to the values of the Constitution.

During the interviews, the judges being interviewed were also given the opportunity to direct questions to the JSC.

The Chief Justice highlighted that after all the interviews, the commissioners would reconvene *in camera* on 16 July 2014 and deliberate on the recommendations to make to the President. He added that the JSC, in coming to a decision on recommendations, would not only be guided by the interviews but also by the track record and work ethic of the judge.

There was very low turnout from the public, with the majority of those who attended being lawyers. This low turnout could be attributed to poor publicity. It could also be that ordinary people thought the process would be too technical for ordinary souls. It is, however, important that the process includes ordinary people and it is therefore suggested that there must be better advertising, and the interviews must be held at a bigger and more publicly accessible venue.

Additionally, these proceedings, being the first of their kind, should have been aired live on television and on radio to ensure that more members of the public could follow the process. It is not fair to expect member of the public in Chendambuya, Chasiyatende or Zhoumbili to travel all the way to a luxury hotel in order to witness this constitutionally mandated process.

### ***Fairness of process***

The public interview process appeared fair and transparent. The same questions were posed to all judges, with a few variations. However, only two female judges from the Labour Court were asked questions pertaining to court procedure, while none of the other judges were asked the same. While this could be justified by the fact that the panel wanted to assess their knowledge of the law in order to make an assessment of their suitability to advance to the Supreme Court, it could also be viewed as discriminatory.

It is not prudent to advocate that the same questionnaire be followed mechanically. Rather, each candidate should be given the same, or at the least a sufficiently

similar or equivalent, opportunity to answer any question of importance and substance related to the specific appointment.

### ***Appropriateness and relevance of questions***

The decision to ask ten standard questions made the process fair in that the candidates were assessed on fairly level ground. Follow-up questions from the panel related to the specific applicant. The JSC also relied on the data that the commissioners had on the work performance and profiles of the applicants. This data should be shared with the applicants so that where errors exist, they can be corrected in advance of a public interview and JSC deliberations.

The questions asked, though relevant, could have been strengthened by specific questions which speak to the judge's knowledge of the law. In addition, it could have been useful to ask judges for their understanding of legal principles, appreciation of jurisprudence in certain aspects of the law, and constitutional law and the various rights issues more generally, particularly as a deeper understanding of the Constitution must be a leading requirement for judicial office in the higher courts.

In addition, a judge's deeper understanding of gender issues is also important for the discharge of the judicial function. The same applies to children's rights, the rights of minorities, and other such issues. However, these were not addressed in detail.

The Supreme Court is the final court on matters of general law. It is important that judges who seek to be elevated to that court exude a deep understanding of the law, which then enables the judge to review work performed by judges in the High Court and other courts and tribunals. It was not always clear how the questions asked elicited an understanding of the applicants' competence in this regard in a meaningful way.

## **High Court Judge Interviews: 29 October - 1 November 2014**

The JSC held public interviews for prospective judges at Crowne Plaza hotel in Harare from 29 October to 1 November 2014. Forty six people had been nominated by the President and the public. The JSC interviewed all 46 nominees as they met the initial criteria set out in section 179 of the Constitution.

The interviewees were placed in categories according to their working background for purposes of the interviews. The first day was reserved for interviewees who are

practising legal practitioners. The second day was for lawyers working in non-governmental organisations and academic institutions. The third day was a combination of those working outside Zimbabwe and those working in commerce and sectors other than in active litigation. The fourth day was for those working as prosecutors, magistrates and sitting judges.

Three standard questions were put to each candidate. Additional questions were put by other commissioners on the panel.

### ***Interviews – Day One***

Thirteen interviews were carried out. Nine of the interviewees were men and four were women. The three standard questions put to them were:

- (a) The work of a High Court Judge is different from that of a legal practitioner. Describe to us the steps you have taken to acquaint yourself with the duties of a judge. Describe what constitutes the main difference between the two, and how you will be able to bridge the gap in order to cross over.
- (b) Can you tell us of any case where your argument in the High Court developed the law and set a precedent?
- (c) Legal practitioners in private practice have generally shunned appointment to the bench mainly due to the unattractive conditions of service for the bench. Why are you now making that sacrifice?

### ***Interviews – Day Two***

Day two saw applicants employed in non-governmental organisations and academia being interviewed by the JSC panel. A total of 11 people were interviewed. There were seven women and four men. The three standard questions put to them were:

- (a) Describe the extent to which you have familiarised yourself with the work of the High Court.
- (b) The work of the High Court is governed by rules of court. To what extent have you familiarised yourself with the practical aspects? How will you correct the legal practitioners that have been working for a long time with rules and have more experience than yourself?

- (c) If appointed you will be required to preside over cases where people with more practical experience than yourself will appear before you, how will you deal with this problem?

This group was characterised by people who had limited experience in actual litigation and in appearing at the High Court, as well as in using the court rules and procedure. They generally had experience in specialised areas of law, such as labour law or women's rights, amongst other areas. Most of the interviewees were relatively young – in their early forties. The panel placed emphasis on their lack of experience in using the rules and knowledge of the law in different areas.

However, the Constitution has widened the source of appointments. It refers to persons in practice or eligible to practise. It merely stipulates that one should be eligible to practice as a lawyer for seven years.

It is important to state that the diversity of the Bench is achieved by bringing in judges from different backgrounds. The practising wing is not the only ideal source of judges.

### ***Interviews – Day Three***

On day three the JSC interviewed a group of candidates who work outside Zimbabwe and in different capacities. A total of 11 interviews were carried out, six of the interviewees being men, and five women. The following standards questions were put to the interviewees:

- (a) Describe your immediate work in a foreign country, and how this prepared you for the post of High Court judge.
- (b) Working in a court outside Zimbabwe, how will you utilise that experience to enhance justice delivery in Zimbabwe?
- (c) The pool from which judges can be appointed is fairly huge. What in your view places you at the head of the queue?

The majority were magistrates and court officials in neighbouring Botswana and Namibia. One was previously the Registrar at the African Court on Human and Peoples' Rights. All magistrates interviewed currently occupy the position of principal magistrate in the foreign courts. This is the position below that of chief magistrate and is equivalent to the position of provincial magistrate in Zimbabwe. It appeared that in the foreign jurisdictions in which they work, only chief magistrates would be elevated to the bench. Considering that in Zimbabwe, magistrates who were elevated to the High Court Bench had to achieve the office of



regional magistrate first, it will be interesting to see whether this group has a good chance of elevation.

### ***Interviews – Day Four***

Interviews on day four were comprised of prosecutors, sitting judges and local magistrates. There were five men and two women candidates.

The standard questions put to all interviewees were:

- (a) Describe your current work and indicate what you wish the Commission to consider as outstanding.
- (b) What decisions, opinions or cases have you worked on recently which you think contributed to the development of jurisprudence generally and tell us why you think so?
- (c) If appointed to the bench, apart from the usual induction, do you need professional development in any area?

The interviewees in this group had limited interaction with the High Court. Prosecutors only had experience in criminal matters, whilst the magistrates had almost no contact with the High Court. However, the magistrates interviewed were regional magistrates, which could impact positively on their chances of elevation to the High Court.

## **RECOMMENDATIONS ON IMPROVEMENT OF PROCESS OF SELECTION AND APPOINTMENT OF JUDGES**

### **The Nomination Process**

The JSC is required by the Constitution to conduct its business in a “just, fair and transparent manner.”<sup>61</sup> This must be the guiding principle in whatever procedures the JSC adopts for the process of selecting judges.

Calls for nominations must be widely advertised, and not only through the traditional media outlets. Advertisements should be placed in all print media publications, on radio and television, and be decentralised to ensure that all possible candidates are reached, and the widest possible public awareness is achieved. Social media is a reality that cannot be ignored. Such media must be utilised, not only for the call for nominations, but to seek information about

---

<sup>61</sup> Section 191 of the Constitution.

candidates and to advise of the dates and times for interviews. Communication, rather than information, is key. This requires a constant process of information sharing and updates, so that the general public is invested in the process, interested in their public representatives, and more confident in the eventual candidates appointed to these positions.

The nomination process must be open to greater scrutiny. This means that the forms that are completed and submitted to the JSC must be available online and to any person who requests them, in order for the public to be aware of the information which the candidate has placed before the JSC for consideration.

It is also very important for the transparency of the process to know who nominated which candidate. Certain nominations may in fact motivate the JSC to enquire into the suitability of the candidate during the interview process. Allied to this is the need to have the presidential nominees disclosed. Any refusal to disclose this list may in fact be a breach of the right to access to information under section 65 of the Declaration of Rights, which requires disclosure of information in the interests of public accountability.

### ***Disclosure of information on diversity***

One important factor in the Constitution is the requirement for the appointment of judges to broadly reflect the diversity and gender composition of Zimbabwe.<sup>62</sup> Gender is not difficult to discern. It is the “diversity” that is more complex. This diversity ought to be assessed during the interviewing process. The diversity of Zimbabwean society means that the following are crucial aspects: region or origin, disability, background, race, amongst others. It is therefore crucial that the JSC discloses how matters of diversity are to be considered and implemented ahead of the interviews.

In line with this requirement, the JSC ought to disclose the diversity of the judiciary at present, and what is necessary for improvement.

### ***Limiting the number of candidates***

The JSC had to interview 46 candidates over four days. It is fair to state that once the number of interviewees grows to that level, the quality of the assessment is likely to fall. In this regard, the JSC should consider placing a limit on the number of candidates to be interviewed. This will require it to shortlist candidates and a transparent procedure needs to be designed for this, with the input of stakeholders

---

<sup>62</sup> Section 184 of the Constitution.

of the justice delivery system. While all candidates may, *prima facie*, satisfy the basic requirements to be considered as a judge, a more in-depth application form would assist. This could require a lot more detail about contributions to jurisprudence, professional history, understanding of constitutional rights and other legal issues, administrative and substantive experience, and would assist in justifying the shortlisting or “rejection” of candidates. Diversity and gender considerations may be other issues which could be considered in compiling the shortlist and would make for more productive and enlightening interviews, as well as candidates with more depth.

Using the October 2014 interviews as an example, the JSC could have advertised three positions and then shortlisted the best nine, rather than interview for six positions and have to scrape the proverbial “bottom of the barrel” to come up with 18 names. This process needs review.

### ***Shortlisting***

The South African JSC has an ad-hoc subcommittee that is responsible for shortlisting of candidates. All nominations are distributed to the JSC members. This screening committee compiles a shortlist of candidates who meet the constitutional criteria and who have a real prospect of selection, or whose shortlisting has been urged by a member of the JSC. The general criteria is: the views of the Judge-President of the relevant province/court; the needs of the court; the views of the candidate’s professional body; race and gender considerations; the candidate’s age; his/her experience, including whether or not the person has acted as a judge before. The shortlist is then circulated amongst JSC members. Any member who strongly feels that a candidate ought to be added can request the Secretary of the JSC to do so. This list is then distributed to the JSC members and subsequently externally for public comment.<sup>63</sup> After the closing date for comments, the received feedback is distributed to the JSC members. It is suggested that this process be utilised in future appointment processes in Zimbabwe.

### ***Criteria for selection and appointment***

The JSC does not have set criteria for appointment. Publicly announced criteria are necessary in order to ensure that the members of the JSC have a standard reference point when assessing suitability. This would also assist the JSC in accounting for the decisions it makes, particularly after it retreats into privacy after the public

---

<sup>63</sup> Olivier “The Selection and Appointment of Judges” (n 23 above) p 125-126.

interviews – bearing in mind the long-standing public suspicions and perceptions about such private deliberations.

The issue of the criteria has been a controversial subject in South Africa. Though the JSC in South Africa has developed guidelines, it is the interpretation and application of the criteria by the members of the JSC that remains controversial. As Olivier has observed:

“The JSC has consistently failed to clearly articulate its understanding of the criteria. And without conceptual clarity it is impossible to achieve procedural certainty. In other words, we cannot know how the JSC applies the constitutional criteria without knowing what it understands them to mean.”<sup>64</sup>

### ***Announcement of candidates post-interview***

The JSC has not announced its decision in relation to appointments to either the Supreme Court, or the High Court. This is not an ideal situation, particularly as a considerable amount of time has elapsed since the public interviews were held. If accountability is to be achieved, the JSC must announce the persons it has recommended to the President, and do so within a reasonable (and preferably short) period of time after the interviews. This time period should be publicly stipulated. This will enable the public to assess whether the recommendations have any rational relationship with the public assessment of suitability done through the interviews, before memories of the interviews fade. This is not only for purposes of public confidence, but to ensure that candidates themselves are able to move on, whether or not they have been appointed to the bench.

### ***The questions for candidates***

While it is commendable that the candidates generally faced similar questions, it is important that the JSC should be sensitive to some of the questioning. The questions regarding basic procedural issues should have been raised with each candidate. This would create the appearance of fairness.

Secondly, the questioning must be relevant to the selection criteria.

Thirdly, adverse issues received about the candidate should be raised in the interviews only after prior notification to the candidate concerned.

Finally, it is recommended that the JSC opens itself to receive public information and questions relating to candidates, and to pose these questions – particularly

---

<sup>64</sup> Olivier (n 23 above) p 132.

where they are adverse – to the candidate. Prior notice, of course, should be provided to the candidate when such questions and information are to be raised. This ensures more substantive input by the public into the appointment process and again increases confidence in the eventual decisions made.

### ***Length of interviews***

The South African JSC has recently been criticised for the great variation in length of interviews and for its inconsistent questioning of candidates. While there is obviously room for variations in length, the interviews must generally be of comparable length and coverage for each candidate. This would avoid the perception that candidates are pre-chosen, and that the interview process is just a formality.<sup>65</sup>

### ***Opportunity for comment***

Interested persons and organisations did not have sufficient time to conduct research on the judicial track records of shortlisted candidates, and to assess their background for fitness. It is important that this opportunity be given. Comment, especially by persons who understand the workings of the courts, is very important. It enriches the JSC's assessment of candidates.

Secondly, with regards to judges seeking promotion, a serious assessment of the decisions they have made is vital. The SA JSC has greatly benefitted from informed comment from the legal profession and legal academics. In fact, the Johannesburg Bar publishes its assessment reports online.<sup>66</sup>

The public should also be allowed to pose questions and to submit any relevant information they may have. The questions can be submitted to the JSC prior to the interviews.

---

<sup>65</sup> See the discussion of the Judge Plaskett interview by Olivier *The Judiciary in South Africa* at p 148, and at p 181.

<sup>66</sup> See <http://www.johannesburgbar.co.za/reports-to-jsc/>.

ANNEXURE A: Press Statement by JSC Announcing interview dates



**JUDICIAL SERVICE COMMISSION**

*(Striving Towards World Class Justice)*

*Press statement*

**NOTICE OF INTERVIEWS OF CANDIDATES FOR THE THREE POSITIONS  
OF JUDGE OF THE SUPREME COURT OF ZIMBABWE.**

On 14 March 2014 the Judicial Service Commission advertised for nominations to three positions of Judge of the Supreme Court. Following nominations by The President and members of the public, the Judicial Service Commission will interview ten candidates on Tuesday 15 July 2014, starting at 9.00.a.m. The interviews shall be held at the Rainbow Towers Hotel, Jacaranda Room 2.

The ten candidates to be interviewed are:

1. The Hon Mr. Justice C. E. Bhunu
2. The Hon Mr. Justice C. Hungwe
3. The Hon Mr. Justice S. Kudya
4. The Hon Mrs Justice E. Makamure
5. The Hon Mrs Justice L. Makoni
6. The Hon Mr. Justice N. Mathonsi
7. The Hon Mrs Justice S. Mavangira
8. The Hon Mrs Justice M. Moya-Matshanga
9. The Hon Mr. Justice T. Uchena and
10. The Hon Mr. Justice H. Zhou.

In accordance with the provisions of section 180 (2) (C), the Judicial Service Commission shall conduct the above interviews in public. **Members of the public are accordingly being notified of the date, time and venue of the interviews.**

**The Acting Secretary  
JUDICIAL SERVICE COMMISSION.**

## **ANNEXURE B: The Judicial Service Commission Questions Template**

# **JUDICIAL SERVICE COMMISSION**

Applicants Name:

\_\_\_\_\_  
Interviewers Name:

\_\_\_\_\_  
Interviewers Title:

\_\_\_\_\_ Date \_\_\_\_\_

### **Preparation Checklist:**

- ❖ Review application materials for past jobs/experiences that are most relevant to the interview. Record the names of these past jobs/experiences in the Key Background Review section of the Interview guide. Start the oldest job/experience and work toward present.
- ❖ Review definitions of target dimensions in the Planned Question of the interview Guide.
- ❖ Make an estimate of the time that will be available to cover each dimension.

### **Outline for Opening the interview:**

- Greet applicant, giving name and position.
- Explain interview purpose.
  1. Acquaint the interviewer and applicant
  2. Help organisation make fair decision
  3. Help applicant understand organisation/position.

### **Describe interview plan**

1. Brief review of past jobs/experiences
2. Questions to get specific information about those jobs/experiences
3. Information on organisation and position
4. Answer applicants' questions about organisation and position.
5. Both will benefit from using this plan
6. Will be taking notes:
7. Make transition to Key Background Review.

---

## **INTERVIEW GUIDE FOR SUPREME COURT JUDGES**

### **KEY BACKGROUND REVIEW**

Oral Communication or Impact .....

.....

.....

#### **1. Work background**

- a. What do you like best about the position of a Supreme Court judge?
- b. Give an example of a judgment that shows your expertise of special knowledge in any particular
- c. Describe one of your most satisfying legal arguments that was found persuasive and correct by the Supreme Court.

### **BEHAVIOURAL QUESTIONS**

For each question ensure you obtain a full behavioral example covering the:

**Situation** in which the

**Task** to be accomplished

**Action** taken

**Result** of the action

#### **1. Leadership/influence**

Describe the most difficult decision that you have ever made and why you think it was a difficult decision to make? How did you arrive at your decision?

#### **2. Collaboration**

- a. Can you tell us about a legal issue that confronted you where you had to seek ideas/and or vision from persons who are not judges?
- b. Tell us of a case where you had to analyse numerical and financial information. What did you do

#### **3. Team work and cooperation**

- a. Can you give an example of where you had to compromise your position to get a buy- in from another judge? How did you do that?
- b. Is there a case where your opinion differed from that of a fellow judge? How did you express your different view?
- c. Occasionally we have to work with others who may not share the same work ethics with us resulting in frustration or impatience with team members



of the Judiciary. Tell us about the situation. What happened? What did you do?

#### **4. Planning and organising**

- a. How do you keep arguments in court on track? Give an example of where you did this and how you did it?
- b. There are times where one fails to complete tasks within stipulated deadlines. Has this happened to you? When and how did it happen? How did you get out of that situation?
- c. What is your procedure for keeping track of matters that require your attention? How effective do you find this procedure?

#### **5. Decisiveness**

- a. Describe a situation where you had to make a quick or delayed decision and what determined the pace?
- b. When have you ever delayed decisions to give more thought to the situation? What is the longest you have delayed and what were you looking for?
- c. Describe a situation where you made a decision different from a prior decision of your court and how you went about this.

#### **6. Independence.**

- a. Describe a decision that made you stand out from the crowd by taking a stand on an important issue
- b. Tell us about a case where you had to make a decision without much guidance in the form of precedent.
- c. It is often difficult to make an unpopular decision. Have you ever made one such decision? Tell us about it.

#### **7. Work standards.**

- a. Think about times when your work was above standard and when it was below standard. Give the memorable examples that come to your mind. What were some of the reasons for the difference in performance?
- b. Sometimes people come under some pressure to sacrifice quality to complete work on time. Has this ever happened to you? What did you do?

#### **8. Motivational fitness**

The office of a judge must have its stresses, frustrations and problems. Describe some conditions that you have found problematic or frustrating. How do you hope to overcome these if promoted?

**Additional Questions Posed**

Tell us of a situation where your integrity has been compromised

You have dealt exclusively with labour issues and you have not dealt with broader legal issues. How will you deal with these limitations?

What is the biggest challenge that you think you will face?

Did you familiarise yourself with the Supreme Court work?

Can you supervise the work of High Court Judges?

Difference between the court application and court action?