

## Is the appointment of acting judges transparent?

By Tabettha Masengu and Alison Tilley

The appointment of judges is important in any society. As the third arm of government, tasked with upholding rights and adjudicating disputes, a functioning credible judiciary is essential to constitutional order.

There are a number of reasons for that, most of them trite. A society that is presided over by a judiciary they do not trust will reject their judgments. An executive ordered to act or desist from acting by a judge (who does not believe the judiciary to be legitimate) risks that executive ignoring those judgments. And of course, a credible, transformed judiciary is a requirement of the Constitution.

Lest we forget, the judiciary, and we include the magistracy, were a central platform in upholding Apartheid. In order to build the credibility and legitimacy of the judiciary post 1994 we agreed, in the Constitution, to tackle transformation of the judiciary, as all other aspects of our society, in order to address the demographics of the Bench, broadly defined, and to ensure that the Bench would carry forward the project of a constitutional state, built on the values of equality and dignity. The Constitution set out the creation of the Judicial Service Commission (JSC), and set out the process for appointment of judges, and magistrates.

For the JSC to appoint a person, they have the following criteria in terms of s 174 (1) of the Constitution:

‘Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer ...

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.’

There are no other legislated guidelines.

In 1998 the late Chief Justice Ismail Mahomed introduced the guidelines (the Mahomed guidelines). These suggested that in elaboration of the first three –

- the applicant had to be a person of integrity;
- a person with the necessary energy and motivation;
- a competent person, both technically as a lawyer, and with respect to the capacity and ability to give expression to the values in the Constitution;
- an experienced person, both technically, with the capacity and ability to give expression to the values in the Constitution;
- a person with appropriate potential, so that any lack of technical experience could be made up by intensive training; and
- whether the applicant’s appointment would be symbolic in sending a message to the community at large (see [www.justice.gov.za/reportfiles/1999reports/1999\\_judicial%20service%20comm.htm](http://www.justice.gov.za/reportfiles/1999reports/1999_judicial%20service%20comm.htm), accessed 12-5-2015).

These criteria were adopted by the JSC in 2010.

According to advocate Milton Seligson, SC, an important requirement developed by the Commission is that an applicant must have acted as a judge in that court, and delivered a satisfactory level of performance, measured both qualitatively with reference to judgments delivered, and the comments of the permanent judges who have worked with the candidate, and in terms of the level of diligence displayed in producing judgments, and not having delayed unduly in handing down reserved judgments (unpublished paper by Milton Seligson SC, 2-11-2009).

The JSC itself has elaborated the important criteria as –

- the recommendation of the Judge President;
- the support of the candidate's professional body;
- the need to fulfil the constitutional mandate around transformation so as to reflect the ethnic and gender composition of the population;
- the judicial needs of the division concerned;
- the candidate's age and experience, including whether they have served as an acting judge in that division; and
- the relative merits and strengths of the candidates in relation to one another (Susannah Cowen 'Judicial Selection in South Africa Democratic Rights and Governance Unit Working Papers Series' October 2010 ([www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf](http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf), accessed 12-5-2015)).

### **Do attorneys fit in to this process of being appointed?**

They clearly do. A number of attorneys have been appointed as judges in the past four years. Attorneys who have been appointed have had previous experience as acting judges. In fact, we would go further, and assert that all recent appointments in the last four years to the High Court have had acting experience, whether they were counsel, attorneys, or magistrates. At a conference hosted by the Democratic Governance and Rights Unit of the University of Cape Town in Paarl in November 2013, former Constitutional Court judge Zac Jacob, asserted that acting experience as a judge was not in fact a criteria for appointment. He is, *de jure*, correct. But, the *de facto* situation is that all the candidates for High Court positions, in front of the committee, have acting experience and the lack of it thereof means one is unlikely to even be shortlisted.

### **How do attorneys become acting judges?**

That is the obscure part of the process. The Judge President (JP) responsible for each division oversees the process. Previously, the JP would simply appoint counsel to act, based on his or her experience, and that of the judges on the bench in that division. Now, it is clear that in order to put forward diverse candidates the JP will draw from three pools, the attorneys, the magistracy and counsel. How do candidates come to the attention of the JP? This is the least transparent part of the appointments process for judges.

Section 175 (2) of the Constitution empowers the Minister of Justice and Constitutional Development to appoint acting judges after consulting the senior judge of the court. Ordinarily the Minister does not play an active role in the process, but merely appoints the candidates he or she is presented with. Former Minister Bridgette Mabandla who was the Minister of Justice under the Mbeki government was known to actively request that lists of acting appointments should contain a certain number of women. (See Angela Quintal 'Justice minister branded a racist' 26-1-2007 *Independent Online* ([www.iol.co.za/news/politics/justice-minister-branded-a-racist-1.312496?ot=inmsa.ArticlePrintPageLayout.ot](http://www.iol.co.za/news/politics/justice-minister-branded-a-racist-1.312496?ot=inmsa.ArticlePrintPageLayout.ot), accessed 12-5-2015) and Wyndham Hartley 'No sinister agenda in transformation of judiciary, Radebe assures MPs' 6-8-2012 *Business Day* ([www.bdlive.co.za/articles/2009/06/25/no-sinister-agenda-in-transformation-of-judiciary-radebe-assures-mps](http://www.bdlive.co.za/articles/2009/06/25/no-sinister-agenda-in-transformation-of-judiciary-radebe-assures-mps), accessed 12-5-2015)). While it is acknowledged that Minister Michael Masutha can play a large role in how acting appointments are conducted, the absence of publicised guidelines, make it difficult to assess where and how he should do so.

### **Is there an advertising process for acting?**

Some divisions seem to advertise by way of a circular to relevant professional bodies. For example, JP Dunstan Mlambo of the Gauteng Division has stated the challenges he encountered in having female advocates putting themselves forward once the circular has been issued. Some divisions have an acting appointments committee that assist the JP in arriving at his or her decision while other JPs make decisions on their own. Either way, an attorney would need to be noticed or be known to the courts for them to be a person of interest. But let us consider the situation of an attorney working in a smaller town in South Africa. They will appear regularly in front of local magistrates, but perhaps not that frequently in the High Court. Most attorneys still brief counsel for High Court appearances, especially if they do not have many High Court matters. What opportunity do they have for appearing in front of a High Court judge regularly enough to build up a reputation in a division? It could be argued that in smaller divisions, the social networks may be sufficient, and sufficiently transformed, that attorneys can come to the notice of judges, and the JP in particular.

But that is not a very transparent process, and would be dismissed out of hand as unfair by most human resource (HR) managers. It is also dangerous, in the sense that we often trust those who are part of our social networks. JPs do not have HR managers on hand to ensure an open process, nor do they have the mechanisms and time to do some of the basics, namely, to check whether a degree exists; whether experience claimed is actually true; and what the peers of the candidate say about them. In fact, where the candidate is a magistrate, the judgments of that magistrate are not available to the JP, or anyone else for that matter, as a direct result of the antiquated paper based system of our lower and High Courts.

So how is one to know whether a selected candidate for acting appointment is in fact a fit and proper person? And how do they know if a candidate is committed to the transformatory project of the Constitution? How do you know if their judgments are imbued with the values and precepts of the rights contained in the Constitution? You cannot and even less so for an attorney.

It is little wonder that JPs avoid plunging into these murky waters, and end up looking at word of mouth recommendations for those who should take up acting positions. Word of mouth recommendations do not initially sound like a bad idea. People who are well versed with potential candidates can give an opinion on whether the said candidate is hard working, smart, and knowledgeable and is 'ripe' for judicial appointment. However, this is no panacea – you will recall the startling case of Mr Sibusiso Msani, a Regional Court Magistrate from KwaZulu-Natal interviewed for a High Court position in April 2014. He was a candidate who had acted six times on the said Bench since 2010 (Rebecca Davis 'Analysis: Judging the Judges' 6-6-2014 *Daily Maverick* (<http://www.dailymaverick.co.za/article/2014-06-06-analysis-judging-the-judges/#.VVHN4PmqpBd>, accessed 12-5-2015)).

He was subsequently not appointed, but his interview raised concerns about the due diligence or lack thereof being done on potential judicial candidates. We would not hesitate to suggest that such a candidate is not one who was upholding and protecting the constitution and the human rights entrenched therein.

So how do we widen the pool of candidates, while recognising the difficulties JPs have in identifying candidates who meet the criteria of being the demographics of the Bench and who ensure that the Bench will carry forward the project of a constitutional state, built on the values of equality and dignity? This is not an easy question to answer but we would suggest a few starting points.

- The need for a transparent process in appointing acting judges, which entails that there be guidelines for their appointment that are publicly available. On the JSC agenda in October 2014 was the issue of guidelines for acting appointments and we hope that this is a sign that there will soon be guidelines that prospective candidates can refer to.

- The guidelines need to be uniform for the most part otherwise, attorneys and other professionals acting appointment aspirations will depend on what type of JP their province has. We acknowledge that some leeway should be left for divisions to have a few differences for reasons such as the need for specialists in areas such as maritime law in Western Cape and KZN. Nevertheless, the basic principles of fairness must be maintained. Thus if the JP informs the respective law societies through a circular that he or she is in need of acting judges, all members of that society should receive the notification and should know exactly what the process entails. This is particular necessary if we are to see more attorneys being interviewed for permanent positions in order to continue to refute notions that only advocates, and better yet, senior counsel are adept in the ways of the courts.
- There must be uniform guidelines regarding feedback once candidates have completed their acting stints. Some candidates have reported the lack of feedback from their JPs while others receive helpful face to face reports.

Such a process can only support the transformation of the judiciary, in both its demographics, and its deepening of the constitutional project.

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