

GCB REPORTS

Judicial Service Commission

Report by Milton Seligson SC, the GCB's representative on the Judicial Service Commission (JSC or the Commission), for the period July 2007-June 2008

Composition of the JSC

The appointment of judges to the High Court is determined by the full Commission consisting of 23 members, at its biannual meetings which are held in April and October each year. In terms of section 178(5) of the Constitution, in relation to any matter other than the appointment of a judge the Commission does not include the six members from the National Assembly and the four members from the National Council of Provinces who serve as parliamentary representatives on the JSC. The parliamentarians accordingly play no part in decisions of the JSC in connection with complaints against members of the judiciary, or other matters relating to the administration of justice, but form part of the JSC in deciding on appointments to the Bench.

In the year under review the judiciary was represented on the Commission by Chief Justice Pius Langa, President Craig Howie of the Supreme Court of Appeal and Judge President Bernard Ngoepe, the Judge President designated by the Judges President of the various divisions, as well as the particular Judge President in whose division of the High Court any vacancy has been advertised. The Bar was represented by Milton Seligson SC and Marumo Moerane SC; the attorneys' profession by Julian von Klemperer and Mvuseni; and the academic branch of the profession by Professor Johan Neethling. The four persons designated by the President were George Bizos SC, John Ernstzen, Kgomotso Moroka SC and Seth Ntai SC. The Minister of Justice also serves on the Commission.

Meetings of the JSC

The biannual meetings of the JSC were held in Cape Town at the Vineyard Hotel Conference Centre from 1-4 October 2007, and at the Cullinan Hotel from 7-9 April 2009. Candidates who had previously been short-listed by the JSC's Screening Committee were interviewed at these meet-

ings for various vacancies in the judiciary. Special meetings of the JSC were also held at the Vineyard Hotel Conference Centre and at the Southern Sun Hotel, OR Tambo International Airport, on 4 October 2007 and 9 February 2008 respectively.

Appointments to the judiciary

The following candidates were appointed to the judiciary at the October 2007 meeting of the JSC:

Natal Provincial Division (two vacancies)

Adv TA Sishi SC
Adv A van Zyl SC

Transvaal Provincial Division (four vacancies)

Mr EM Makgoba
Adv PA Meyer SC
Mr MW Msimeki
Mr TJ Raulinga

Bophuthatswana Provincial Division (one vacancy)

Although interviews were conducted, no recommendations for appointment were made.

Free State Provincial Division (Judge President) (one vacancy)

Judge HM Musi

Free State Provincial Division (two vacancies)

Ms BC Mocomie

Labour Appeal Court (three vacancies)

Judge DM Davis
Judge SV Khampepe
Judge MM Leeuw

Competition Appeal Court (six vacancies)

Judge DM Davis
Judge ML Mailula
Judge FR Malan
Judge NZ Mhlantla
Judge CN Patel

The following candidates were appointed to the judiciary at the April 2008 meeting of the JSC:

Supreme Court of Appeal (one vacancy: President)

Judge L Mpati

Natal Provincial Division (one vacancy)

Ms MS Murugasen

Transvaal Provincial Division (four vacancies)

Mr NF Kgomo
Adv M Victor

Venda High Court (one vacancy)

Although interviews were conducted, no recommendation for appointment was made.

Cape Provincial Division (one vacancy)

Mr VC Saldanha

Free State Provincial Division (one vacancy)

Ms MB Molemela

Eastern Cape Provincial Division (one vacancy)

Adv FBA Dawood

Judicial education and training project

A project involving special training for women legal practitioners and magistrates was introduced in June 2007 by the Heads of Court on the initiative of the Minister of Justice. This programme was aimed at correcting the serious paucity of women candidates for acting and permanent appointments to the Bench and the prevailing shortage of women in the judiciary. About 20 women from all branches of the profession were chosen to participate.

The first phase of the programme involved lectures as well as the study and writing of judgments on various assigned topics. At the end of the first phase an evaluation was conducted by an assessment committee which resulted in 16 candidates being adjudged as ready for the second phase which commenced on 1 October 2007. The candidates were then placed in various courts for two terms, where they were mentored by judges allocated to each of them and were required to write 'mock' judgments. At the end of the training programme in April 2008 the 16 women concerned joined the pool of persons available for consideration as acting judges,

although completion of the programme does not confer entitlement to an acting or permanent appointment.

A new intake of women candidates occurred during June 2008 and the process is being repeated. The candidates are women who have applied to participate in response to public advertisements. Consideration is being given to extending the judicial training project to include men in the future.

Delays in the delivery of reserved judgments

At its meetings the Commission discussed at length the persistent problem of delays in the delivery of reserved judgments and continues to engage the Heads of Court in this regard. Various mechanisms were identified to counter and rectify this recurring problem. The JSC questionnaires for applicants for appointment to the judiciary, and of sitting judges for appointment to higher office, have been amended so as to require all candidates to list any reserved judgments which may still be outstanding at the date of the application concerned.

Legislation affecting the courts and the administration of justice

The Commission agreed, with the concurrence of the Minister, that when draft legislation is proposed and formulated which has an impact on the judiciary and the courts, it is desirable that copies of the relevant bills be received by the Commission at an early stage to enable it to consider them properly and to perform its constitutional mandate to advise the government on matters affecting the administration of justice. This has not always been the case in the past.

GCB letter as to anonymous comments by Bar members on candidates for the judiciary

The Commission decided that no comments by members of the Bar in respect of candidates for appointment to the Bench would be considered if made on the basis of

anonymity. In response to that decision, the GCB wrote to the Commission stating that this decision had led to a significant reduction in the comments received from members regarding the suitability of candidates. Despite reservations expressed by some commissioners, the Commission decided that its previous decision would stand and that it was undesirable that practitioners commenting on candidates should do so on condition of anonymity.

Complaints against judges


The JSC's jurisdiction in relation to allegations of judicial misconduct is limited to cases of gross misconduct or incompetence justifying impeachment in terms of section 177(1) of the Constitution. A number of complaints were received and considered by the JSC concerning the conduct of judges. Several of these complaints were dismissed on the ground that they did not warrant the Commission's intervention, or that they fell outside of its jurisdiction under section 177(1). Some of the complaints have not been resolved, either because aspects thereof are being further investigated or additional information is required, or because the matter is the subject of pending or uncompleted litigation.

The complaints against Judge President Hlophe and the JSC's investigation thereof received wide publicity in the media. As is well known, the JSC (sitting without its parliamentary representatives, as required by section 178(5) of the Constitution) decided by majority in October 2007 that there was insufficient evidence to proceed with a public enquiry in respect of the complaints lodged against the Judge President. The Commission, however, unanimously agreed that the explanations given by the Judge President were unsatisfactory in certain respects and that it was inappropriate for him to have given permission to Oasis to sue Judge Desai without disclosing his relationship with that company. The Commission further resolved that Chief Justice Langa, President of the SCA Howie, and Judge President Ngoye should meet

with Judge President Hlophe to indicate the Commission's concerns with a view to avoiding similar conduct in the future. The JSC also requested the Minister of Justice to ensure that applications for the granting of consent to receive outside remuneration should be streamlined to ensure certainty and that both the application and the consent should be required to be in writing.

During May 2008 the judges of the Constitutional Court lodged a complaint with the Commission against Judge President Hlophe. In the complaint, which was made public by the Constitutional Court, it was alleged that the Judge President had approached some of the judges of the Constitutional Court in an improper attempt to influence the Constitutional Court's pending judgment in four cases involving companies in the Thint Group and Jacob Zuma.

Subsequently, during June 2008 Judge President Hlophe lodged his own complaint against the judges of the Constitutional Court, alleging that they had undermined the Constitution by making a public statement seeking to activate a procedure for his removal for alleged improper conduct before properly filing a complaint with the JSC; that they had violated his rights to dignity, privacy, equality, procedural fairness and access to courts under the Constitution; that they had failed to adopt a procedure that upholds the democratic values of human dignity equality and freedom as required by the Constitution; that their conduct failed to respect, protect, promote and fulfil the rights in the Bill of Rights; and that they failed to adopt a procedure that was fair in that they had not furnished him with any complaint.

As has been widely publicised in the media, these complaints are currently pending before the Commission, which decided at a meeting held on 5 July 2008 that it was necessary to hear oral evidence in order to determine the respective complaints lodged by the Constitutional Court and Judge President Hlophe. The dates for the hearing have yet to be fixed. 

Counsel: choice and expectation

I wonder if all counsel consider how carefully solicitors discuss the identity of counsel with the lay client before any papers land in

chambers. They compare the relative merits of different barristers, consider likely fees and look to secure the right balance between seniority, experience, cost and quality. We don't hire a Rolls Royce for every journey, but when turning up at an ... airport we expect the Ford Fiesta to work properly and do the job for which it was hired – and the same is true of counsel.

David Lock 'Law Firm lessons' in 2008 September *Counsel* 35. 