Judicial Service Commission

Report by Wim Trengove SC and Marumo Moerane SC, the representatives of the General Council of the Bar on the Judicial Service Commission (JSC).

Composition of the JSC

In terms of s 178(1)(h) of the Constitution, the Judicial Service Commission ("JSC") was enlarged by the addition of six members of the National Assembly. The JSC recommended an amendment to s 178 of the Constitution Act to permit alternates to be appointed inter alia for the representatives of the advocates' profession.

Meetings of the JSC

The JSC itself met twice from 6 to 8 October 1997 and from 6 to 7 April 1998. The joint committee comprising the judge president of the Labour Court and representatives of the JSC and NEDLAC, met once on 19 September 1997. Each of the aforegoing meetings was preceded by a meeting of the JSC screening committee.

Judicial appointments

General

The published procedure of the JSC was amended to allow the screening committee in its discretion, to receive and consider nominations received after the specified closing date.

The GCB recommended to the JSC that in the ordinary course, only candidates who had held acting appointments on the Bench, should be permanently appointed. The JSC agreed to adopt this approach to appointments to the Supreme Court of Appeal and agreed that it was desirable but not necessary for candidates appointed to the other courts to have held acting appointments in those courts.

The chair of the GCB always provided the JSC with the Bar's views and comments on candidates short-listed for judicial appointment. Those views and comments have on occasion been criticised by individual members of the JSC. They have, however, generally been most useful and have made a valuable contribution to the process of judicial appointment.

The Constitutional Court

Judge P M Langa was appointed deputy judge president of the Constitutional Court. Because he was the only member of that court willing to accept nomination for the appointment, the JSC recommended his appointment without an interview.

Judge Z Yacoob was appointed to the Constitutional Court.

The Supreme Court of Appeal

Judge H 0 Van Heerden was appointed deputy chief justice. Because he was the only member of that court willing to accept nomination for the appointment, the JSC recommended his appointment without an interview.

Judge P E Streicher was appointed to the Supreme Court of Appeal.

The High Court

Judge E L King was appointed deputy judge president of the Cape Provincial Division.

Nominations were invited and candidates interviewed for appointment as deputy judge president of the Natal Provincial Division but the JSC resolved to defer the appointment.

The following a pointments were made to the High Court: Judges I Hussain (TPD); F R Malan (TPD); F H D Van Oosten (TPD); A P Blignault (CPD); D M Davis (CPD); B M Griesel (CPD); K K Mthiyane (NPD); A N Jappie (NPD); D S S Kondile (NPD); N B Locke (Tk); Y Ebrahim (Ck); M T R Mogoeng (Bop).

The Labour Court and Labour Appeal Court

Secions 153(1), 153(4) and 169(1) of the Labour Relations Act 66 of 1995 provide for the appointments to the Labour Court and Labour Appeal Court by the president acting inter alia on the advice of the JSC and NEDLAC. Those two bodies agreed on a procedure for the selection of candidates recommended for appointment. The procedure is substantially the same as that ordinarily followed by the JSC except that the screening and interview procedures are undertaken by a joint committee comprising representatives of the JSC and NEDLAC. The JSC and NEDLAC however both take their own final decisions on their respective recommendations to the president.

Judges F Kroon and S S Ncgobo were appointed to the Labour Appeal Court. Judges A A Landman, D Mlambo and R M M Zondo were appointed to the Labour Court.

The Electoral Court

The following people were appointed to the Electoral Court: Judges J W Smalberger; P J van der Walt; V E M Tshabalala; T M Masipa; B Pillay.

The Land Claims Court

No appointments were made.

Acting appointments

The Minister of Justice informed the JSC that it was his policy not to make any acting appointment without the agreement of the head of the court to which the appointment was made.

The JSC agreed to assist the minister and the judges president in making acting appointments to the High Court. People willing to accept such appointments would be invited to complete a questionnaire but not compelled to do so.

Judicial training

The JSC agreed to initiate a programme of judicial training. The Canadian government provided funds for a pilot project*. The planning unit of the Department of Justice inaugurated the pilot project for the judicial orientation of newly appointed judges. The Minister of Justice however assured the JSC that the executive did not intend to assume responsibility for judicial training.

Judges I Farlam and F Brand were responsible for the organisation of the first training seminar for newly appointed judges held in July 1997. The seminar was a success. A sub-committee comprising the chief justice, the president of the Constitutional Court >

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stel en stappe gedoen om sy handelsmerke hier te beskerm. Dit het gedeeltelik saamgeval met die inwerkingtreding van die nuwe Wet op Handelsmerke van 1993, wat onder meer beskerming verleen aan handelsmerke van persone wat op voorgeskrewe wyses verbonde is aan lidlande van die Konvensie van Parys en welke handelsmerke welbekend is in die Republiek.

Vernuwende denke

Dit gebeur nie dikwels dat 'n minderheidsuitspraak van die appèlhof groter gesag afdwing as dié van die meerderheid nie. In die geval van *During NO v Boesak* 1990 (3) SA 661 (A) is dit egter so. Die saak het gegaan oor die geldigheid van 'n verbod wat deur Brig Roy During, destyds afdelingskommissaris van die SA Polisie in die Wes-Kaap, onder die Veiligheidsnoodregulasies op 'n byeenkoms van die Mandela Birthday Committee wou plaas. Die komitee is gestig om verskeie funksies te reël om mnr Nelson Mandela so sewentigste verjaardag te vier, toe hy nog 'n gevangene in Pollsmoor-gevangenis was. In sy uitspraak in daardie saak het Grosskopf aangetoon waarom die beslissing in *Minister of Law and Order v Dempsey* 1988 3 SA 19 (A) verkeerd was en die grondslag gelê vir 'n nuwe benadering tot die hersiening van diskresionêre bevoegdhede. Hierdie slag het hy gevel sonder die wapenrusting wat die 1993 en 1996 Grondwette tans aan ons howe bied. As beginpunt vind hy, op grond van ons eie regspraak, dat die reg om 'n byeenkoms te hou, een van die fundamentele regte in ons regstelsel is (673B). Die kern van sy uitspraak is dat dit in beginsel reg en billik is dat 'n persoon wat op die vryheid van die individu inbreuk maak, die las behoort te dra om te bewys dat sy optrede regmatig is (673G). Hy wys ook daarop dat aangesien die ligging van die bewyslas tot groot hoogte deur beleidsoorwegings bepaal word, daar sterk gesag daarvoor is dat ook by inbreuke op ander fundamentele regte, d w s op die vryheid van die individu in 'n breër sin, die bewyslas om die regmatigheid van sy optrede te bewys behoort te berus op die persoon wat die inbreuk maak (673H).

Die algemene aanvaarding van die korrektheid van sy siening (op hierdie aspekte ook deur die meerderheid van die hof in daardie saak) toon dat daar ondanks opvattinge wat in sekere kringe mag bestaan, tog by die appèlhof soos dit in 1990 daaruit gesien het, 'n vermoë en bereidwilligheid was om met vernuwende denke en toepassing van die ware grondbeginsels van ons reg effektiewe beskerming aan fundamentele menseregte te verleen. Dalk kon die toepassing van die Handveste van Menseregte in die 1993 en 1996 Grondwette met vertroue aan daardie hof opgedra gewees het.

Hierdie voorbeelde uit die werk van Ernie Grosskopf is uiteraard nie bedoel om omvattend te wees nie. Hy was 'n produktiewe en uiters pligsgetroue regter wat talle waardevolle uitsprake gelewer het en in menige gevalle lid was van 'n appèlbank wat nuwe rigting aan 'n debat gegee het. Een voorbeeld hiervan was *East Rand Administration Board v Rikhoto* 1983 (3) SA 595 (A). Van sy ander uitsprake sal ook nog vir jare gesaghebbend bly. Daar kan byvoorbeeld met vertroue voorspel word dat sy uitspraak in *Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) aangaande die appelleerbaarheid van interim bevele en die aard van die diskresie wat 'n hof ten opsigte van 'n tussentydse interdik uitoefen, 'n *locus classicus* gaan word.

Een ding is duidelik: geslagte van studente, regspraktisyns en regters, wat nie die sonderlinge voorreg beleef het om hom persoonlik te ken, voor hom te verskyn of met hom saam te werk nie, sal hom leer ken en waardeer uit sy werke. Lank mag dit ons regspleging en ons opvatting omtrent wat reg en billik is, beïnvloed.

Vir dié wat hom oor die jare op die regbank leer ken en waardeer het, laat sy aftrede 'n leemte wat moeilik gevul sal word.

Sy aftrede bring hom terug na sy geliefkoosde Kaapstad, Tafelberg en Clifton. Sy heeltydse terugkeer word verwelkom deur sy eggenote (Deidre), familie (insluitend drie bewonderende en geliefde Kaapse kleinkinders), talle vriende en kenisse.

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and Judges Brand, Farlam, Mpati, Navsa, Mthiyane and Satchwell, was constituted to take the process further.

Complaints against judges

The JSC does not enjoy any disciplinary jurisdiction but in terms of section 177(1)(a) of the Constitution, a judge may only be removed from office after a finding by the JSC that he or she *'suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct'*. The JSC received a number of complaints against judges and, in the exercise of its jurisdiction under s 177(1)(a), invited the judges concerned to respond to those complaints when they appeared to raise matters of substance. Whenever a judge responded to the complaint, his or her response was referred to the complainant for comment if it appeared that any useful purpose would be served by it. Upon completion of the process, the complaint was considered and a determination made. In every case thus far, the JSC concluded that the matter did not justify a finding of incapacity, incompetence or misconduct of the kind contemplated by section 177(1)(a).

The JSC expressed itself in favour of the creation of a mechanism to deal with complaints of judicial misconduct which fell short of that contemplated by section 177(1)(a). It resolved to mandate the chief justice, the president of the Constitutional Court and Judge A Howard to ascertain the views of the judiciary with regard to the creation of a body with disciplinary powers and procedures to deal with complaints against judges.

The training of lawyers

The JSC expressed its support for the new four-year LLB degree. It deferred discussion and debate on the question whether the degree should be followed by a period of compulsory practical training.

The Hoexter Commission report

The JSC mandated Trengove SC to prepare a report on the Hoexter Commission recommendations for submission to and consideration by the JSC at its next meeting on 12 October 1998.

* See 1997 November *Consultus* 133.