



**REPUBLIC OF SOUTH AFRICA
JUDICIAL SERVICE COMMISSION**

**SUMMARY AND EXPLANATION OF THE CRITERIA AND GUIDELINES
USED BY THE JUDICIAL SERVICE COMMISSION
WHEN CONSIDERING CANDIDATES FOR JUDICIAL APPOINTMENT**

- 1 At its special sitting held in Johannesburg on 4 April 2022, the Judicial Service Commission (JSC) considered and reviewed:
 - 1.1 the guidelines for questioning candidates for judicial appointment to the Constitutional Court adopted in 1994; and
 - 1.2 the criteria for judicial selection adopted in 2010.

The JSC's decision and approach

- 2 The JSC resolved to review and update the guidelines and publish its understanding of the criteria for judicial selection.
- 3 The JSC's purpose is to enhance the public's understanding of the JSC's selection of judicial officers and to ensure openness and transparency.
- 4 The interpretation articulated in this document is not exhaustive or definitive. Nor does it set a list of pre-determined questions. The factors to be taken into account

do not constitute a closed list or restrict questioning, provided that all questions must be relevant to the criteria. The weight to be attached to individual factors may differ depending on the circumstances.

The Constitutional Criteria

5 Section 174 of the Constitution provides as follows:

- (1) *Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.*
- (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.*

6 Section 165(2) of the Constitution provides as follows:

The courts are independent and subject only to the Constitution.

7 These criteria are captured as follows:

7.1 is the candidate an appropriately qualified person?

7.2 is the candidate a fit and proper person?

7.3 would the candidate's appointment help to reflect the racial and gender composition of South Africa?

7.4 would the candidate be independent?

8 The constitutional requirements are framed in broad and general terms. The factors set out below explain the requirements.

Appropriately qualified

- 9 This concerns the candidate's academic and professional qualifications, technical competence, skill and experience. It is not a reference to academic qualifications only, but also covers legal knowledge and experience.
- 10 It is desirable for applicants to be assessed on their own merits to determine whether they meet the "appropriately qualified" requirement.
- 11 The JSC will consider the candidate's judicial track record and good judgement. Generally, it is desirable for candidates to have acted in the court to which they seek appointment, but this must not be elevated to an essential requirement. Regard will be had to the candidate's ability to run a court room, a working knowledge of court procedure and forensic skill.
- 12 The particular court and its level within the judicial hierarchy should be factors influencing what makes a candidate appropriately qualified for appointment. This would include that:
 - 12.1 candidates for specialist courts would be expected to have particular experience and skill in the relevant area; and
 - 12.2 in addition to other qualities, those applying for leadership positions in the judiciary should have vision, leadership qualities, good interpersonal skills and have demonstrated maturity of judgement.

Fit and proper

- 13 This concerns a holistic assessment of a candidate's suitability for appointment to the bench, with reference to a broad and cumulative reading of multiple factors, which will include integrity, knowledge, scholarship, experience, dignity, humility, judgement, wisdom, independence, character, courage, forensic skill, capacity for articulation, diligence, energy and industry. Character includes considerations such as whether a candidate is honest, truthful, trustworthy and whether they keep their word.
- 14 Consideration will be given to whether the proposed appointee is a competent and experienced person, including whether they are technically competent and have the capacity to give expression to the values of the Constitution.
- 15 Judges must interpret and enforce the Constitution in such a way as to support its fundamental values of democracy, the rule of law and the protection of fundamental human rights in accordance with sections 7(2) and 39(2). Judges must be able to discern and articulate the principles which underlie the Constitution. For example, they must understand the importance of a commitment to the realization of socio-economic rights, especially for poor people, and access to justice.
- 16 Candidates must be capable of applying or distinguishing previous decisions of other courts, and they must be able to give expression to the moral convictions of an open and democratic society based on freedom and equality. Judges must be able to explain cogently and concisely why they rejected any plausible

argument. They must have the ability to explain their decisions clearly and succinctly to all those involved.

- 17 All this requires considerable forensic and intellectual ability, an appreciation of the practical workings of court procedure, a thorough and general knowledge of law and an appreciation of the relevant ethical duties and rules designed to protect the integrity of the legal process.
- 18 The candidate should have a good judicial temperament. This includes such factors as fair-mindedness, humility, impartiality, courtesy, patience, respect, fairness, sensitivity to social context, commitment to public service and the equal administration of justice.
- 19 Consideration will be given to whether the candidate is a person with the necessary energy and motivation, diligence, stamina, industry, work ethic and productivity, particularly in respect of the delivery of judgments without undue delay.

Reflection of the racial and gender composition of South Africa

- 20 It is a constitutional imperative that race and gender must be taken into account in the selection of judges to achieve representativity and diversity.
- 21 The constitutional instruction must be understood as reflecting that the Courts, to do justice, must have the capacity to understand and relate to the experiences of all South Africans. The concern is with the effectiveness of the Court as an instrument of justice. The constitutional instruction is based on the conviction that the Court must be constituted from a broad enough spectrum of South African

society to be able to understand the experience of all South Africans and empathise with their needs. The ability to understand the experience of a race or a gender and empathise with its needs is generally present to a much greater degree in those who have lived that experience than in those who have merely studied it.

- 22 The “*need to constitute a court which is ... representative in respect of race and gender*” cannot be understood to rigidly or mechanically require that each court represents the races and genders in direct proportion to their share of the national population. It is recognised that a balance must be struck: whilst a particular court may not represent the races and genders in direct proportion to their share of the national population, the racial and gender composition of the judiciary remains an important factor. Diversity is a quality without which the Court is unlikely to be able to do justice to all the citizens of this country, but it is not an independent requirement, superimposed upon the constitutional requirement of competence. Properly understood, diversity is a component of competence – the Court will not be competent to do justice unless, as a collegial whole, it can relate fully to the experience of all who seek its protection. It is for this reason that, if the Court does not meet the standard set by the constitutional instruction, it will lack the confidence of the nation, and consequently lack legitimacy.
- 23 The constitutional instruction suggests a general concern that judges should be sensitive to the experience and needs of all who supplicate for justice before them. A capacity for empathy and an appreciation of the needs of the community are therefore relevant considerations in the selection of judges.

- 24 In evaluating a candidate's professional experience and potential, the JSC may take into consideration that opportunities for advancement in the profession for black persons and women were limited by institutional, historical, systemic and other barriers. The reality of race-based and gender-based bias, which hinder worthy candidates from obtaining experience and competency in certain areas of practice, should not result in candidates being unfairly disqualified. Where a candidate who will not enhance racial or gender representativity is better qualified in an important respect, the JSC should give due consideration to that fact in weighing all relevant factors. These may include the overall needs of the judiciary at the relevant time, the performance and needs of the relevant court, discrimination that still pervades legal practice and the extent to which the candidate may have been historically prejudiced.
- 25 A candidate's commitment and contribution to transformation will be considered. In addition, the candidate's commitment and participation to community-based and professional structures will be considered.
- 26 The message that a particular appointment may convey to the community at large will also be considered.

Independence

- 27 Judges should make their own decisions independently and be possessed of courage, fairness and good judgement.
- 28 Judicial independence means that the judge is required to make up his or her own mind on an issue, independently of pressure or coercion from some other

person or body, and independently of loyalty or affiliation to some other person or body.

- 29 The judge must have the courage and the integrity to be able to resist pressure, which may be external, such as political, commercial or personal, or internal, such as a desire for popularity and even the pressure of a direct threat. A judge should not be diverted from the judgment which he or she believes is required by the evidence and the law.
- 30 Since membership of a secret society or a close political affiliation or loyalty may have a bearing on a candidate's capacity to be an independent judge, a candidate may be questioned about such a membership, affiliation or loyalty.
- 31 This does not mean that the candidate has to be free of personal convictions, political or other, that might be relevant to a case. But the candidate must have the capacity to put her or his own convictions at a sufficient distance – to view those convictions with sufficient detachment – to be able to evaluate the arguments and the evidence in the case with an open mind. Openness to persuasion is an indispensable quality in a judge.
- 32 It is clear that a judge cannot be relied upon to bring these qualities to bear unless she or he is a person of courage and integrity. A person of integrity is someone who is faithful to his or her principles and oath of office. None of this means that the character of a candidate for appointment to the Court has to be free of all lapses or blemishes; but a personal history of hypocrisy, dishonesty, opportunism or expediency will disqualify a candidate from being appointed to a judicial office.

Guidelines regarding the JSC's approach to the interviews

- 33 Questions put by commissioners to a candidate must be relevant to the criteria. It is the duty of the chair of the JSC to enforce this guideline. In doing so, the chair will enjoy a discretion. After hearing the commissioners, the chair's ruling on the permissibility of a question will be final.
- 34 A candidate may not be asked a question which cannot be answered without giving an undertaking or a commitment about how the candidate would answer that question if it arose for decision before the Court. Questioning of this kind is not compatible with a judge's duty to approach issues entrusted to them for adjudication independently and with an open mind, as judges should not commit themselves to an answer before hearing argument. A candidate must decide impartially and so can offer no forecasts, or hints, that may indicate a disregard for the specifics of the particular case.
- 35 The object of the selection process is to discover the candidates who are best qualified for the Court and that judges of the highest calibre possible are appointed. The search is therefore primarily for positive qualities, not disqualifications.
- 36 This does not mean that the JSC can ignore serious disqualifying allegations. In regard to such allegations, and because they may affect a candidate's reputation or dignity or otherwise intrude into the candidate's privacy, and/or the reputation or independence of the judiciary, the following guidelines will be applied:
- 36.1 the allegation must be of such a nature that, if true, could potentially render the candidate not a "*fit and proper*" person;

- 36.2 unless a sufficient substantiation for the allegation exists, the matter should not be raised with the candidate during the interview;
- 36.3 prior to any questions being put to the candidate, the candidate must be given an adequate opportunity to consider and address the allegation;
- 36.4 the JSC will receive input from the Objection Committee.