

JUDICIAL SERVICE COMMISSION

ANNUAL REPORT 2017/18



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA



Judicial Service Commission Annual Report 2017/18



I have the pleasure to present the following report on the activities of the Judicial Service Commission for the financial year that ended on 31 March 2018 in terms of section 6 of the Judicial Service Commission Act.

Mogoeng Mogoeng
Chief Justice of the Republic of South Africa
Chairperson of the Judicial Service Commission

The Honourable Speaker of the National Assembly, Ms Baleka Mbete, MP and the Honourable Chairperson of the National Council of Provinces, Ms Thandi Modise, MP, this report is prepared in compliance with section 6(1) and (2) of the Judicial Service Commission Act, 1994, which provides that the Commission shall within 6 months after the end of every year submit a written report to Parliament for tabling. And the report must include information relating to:

1. the activities of the Commission during the year in question;
2. section 8 matters that the Judicial Conduct Committee dealt with on behalf of the Commission;
3. all matters relating to, including the degree of compliance with, the Register of Judges' Registrable Interests as reported by the Registrar of Judges Registrable Interests; and
4. all matters considered by the Commission regarding the complaints entertained by the Judicial Conduct Committee and alleged acts of misconduct referred to the Judicial Conduct Tribunal. That includes the number of matters outstanding and progress in the processing thereof.



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FOREWORD BY THE CHIEF JUSTICE



The Constitution provides that South Africa is a sovereign, democratic state founded on the values of human dignity, equality, the advancement of human rights and freedoms; non-racialism and non-sexism, supremacy of the Constitution and the rule of law, and a multi-party system of democratic government to ensure accountability, responsiveness and transparency. The Judiciary has an important role to play in protecting and promoting these values which are intended to provide a framework for the transformation of the entire country, including the Judiciary as an institution.

Judicial appointments serve as a major tool in the transformation of the Judiciary in South Africa. It is for this reason that some of the defining features of the role of the Judicial Service Commission (the Commission) is to interview and make recommendations to the President of the Republic of South Africa for judicial appointments and to deal with complaints lodged against Judges. When making the recommendations relating to appointments to the President, the Commission is enjoined by the provisions of section 174 to recommend qualified men and women who are fit and proper persons and consider the need for the transformed Judiciary to reflect broadly the racial and gender composition of South Africa.

During the period under review, the Commission had the opportunity to interview Justice R M M Zondo for the position of Deputy Chief Justice of the Republic of South Africa following his nomination by the President of the

Republic of South Africa. After the Commission's interview of Justice Zondo, the Commission recommended that he was a suitable candidate to be appointed as Deputy Chief Justice of the Republic of South Africa. The President accepted the Commission's recommendation and duly appointed Justice Zondo as the Deputy Chief Justice of the Republic of South Africa, after consulting leaders of political parties represented in the National Assembly.

The Commission was also requested by the President to advise him on the suitability or otherwise of his nominee, Deputy President M M Maya for the position of President of the Supreme Court of Appeal. The Commission duly interviewed Deputy President Maya and recommended that she be appointed as the President of the Supreme Court of Appeal. Following this recommendation, the President appointed Deputy President Maya as the first woman President of the Supreme Court of Appeal.

Furthermore the Commission recommended candidates for appointment in the various Courts including the Constitutional Court and the Supreme Court of Appeal.

The Commission also welcomed new Commissioners, namely Adv D Mpofu SC and Adv J Cane SC, designated by the Advocates' profession in terms of section 178(1) (e) of the Constitution. The two Commissioners replaced former Commissioners, Adv Motimele SC and Adv Hellens SC. On behalf of the Commission, I take this opportunity to reiterate our gratitude to the former Commissioners for their valuable contribution to the effectiveness and efficiency of the Commission.

I wish to thank my fellow Commissioners and the staff of the Commission who have been diligent in enabling the Commission to carry out its important mandate of recommending for appointment, men and women of ability and integrity to the Bench, and of holding Judges accountable.

I am confident that this report will give much needed insight into the activities of the Commission for the past year.

Mogoeng Mogoeng
Chief Justice of the Republic of South Africa
Chairperson of the Judicial Service Commission



A close-up photograph of a wooden gavel with a brass band, resting on a stack of books. The gavel is positioned diagonally, with its head pointing towards the top left. The books are stacked horizontally, with the top book having a red spine. The background is a warm, golden-brown color with some faint, curved lines. The text "REPORT OF THE JUDICIAL SERVICE COMMISSION" is overlaid in white, bold, sans-serif font.

REPORT OF THE JUDICIAL SERVICE COMMISSION

REPORT OF THE JUDICIAL SERVICE COMMISSION

2. FUNCTION AND LEGAL MANDATE OF THE COMMISSION

The Commission is a constitutional body established in terms of section 178 of the Constitution of the Republic of South Africa, 1996. The terms and conditions of office of the members of the Commission are governed by the Judicial Service Commission Act, 1994 as amended (hereinafter referred to as the JSC Act). The primary functions of the Commission are to:

- (a) Interview candidates for judicial positions and make recommendations for appointment to the bench;
- (b) Deal with complaints brought against the Judges;
- (c) Manage the Register of Judges' Registrable interests; and
- (d) Advise national government on matters relating to the Judiciary.



3. COMPOSITION OF THE COMMISSION

The Commission comprises of 23 members appointed as follows:

Section of the Constitution under which designated	Member of the Commission's Name
Section 178(1)(a), Chief Justice of the Republic of South Africa.	Justice M T R Mogoeng, Chairperson of the Commission
Section 178(1)(b) of the Constitution, the President of the Supreme Court of Appeal.	Madam Justice M M Maya
Section 178(1)(c) of the Constitution, a Judge President designated by the Judges President.	Justice M J Hlophe
Section 178(1)(d) of the Constitution, the Cabinet Minister responsible for the administration of Justice.	Honourable T M Masutha (Adv), MP
Section 178(1)(e) of the Constitution, two practising advocates nominated from within the advocates' profession and appointed by the President.	Adv D Mpofu SC Adv J Cane SC
Section 178(1)(f) of the Constitution, two practising attorneys nominated from within the attorneys' profession and appointed by the President.	Mr. M Notyesi Mr. C P Fourie
Section 178 (1)(g) of the Constitution, a teacher of law designated by the teachers of law at South African universities.	Prof N Ntlama
Section 178(1)(h) of the Constitution, six persons designated by the National Assembly from among its members.	Dr M S Motshekga Ms A T Didiza Ms D P Magadzi Mr H C Schmidt Mr J S Malema Mr N Singh
Section 178(1)(i) of the Constitution, four permanent delegates to the National Council of Provinces designated by the Council.	Ms T R Modise Ms T K Mampuru Mr D Stock Mr A J Nyambi
Section 178(1)(j) of the Constitution, four persons designated by the President as head of the national executive.	Adv T Norman SC Adv L Nkosi-Thomas SC Adv T Masuku SC Mr S Msomi



3.1 Committees of the Commission

The Commission has established the following Committees to enable it to discharge its constitutional and legislative mandate more efficiently:

3.1.1 Sifting Committee

The Sifting Committee is responsible for compiling a shortlist of candidates to be interviewed by the Commission at its sittings. It is composed of the following members of the Commission:

- (i) President M M Maya: the Convenor of the Committee;
- (ii) Adv T Norman SC;
- (iii) Adv L Nkosi- Thomas SC;
- (iv) Adv J Cane SC;
- (v) Mr C P Fourie;
- (vi) Mr A J Nyambi; and
- (vii) Prof N Ntlama.

3.1.2 Litigation Committee

The Litigation Committee is responsible for ensuring that all litigation pursued by and against the Commission is handled properly. Its members are:

- (i) Adv T Norman SC: Convenor of the Committee;
- (ii) Adv T Masuku SC;
- (iii) Mr S Msomi; and
- (iv) Prof N Ntlama.

3.1.3 Rules Committee

The Rules Committee is responsible for ensuring that the rules and procedures of the Commission are up to date. The following are its members:

- (i) Adv D Mpofu SC;
- (ii) Adv J Cane SC;
- (iii) Adv T Norman SC;
- (iv) Ms T A Didiza; and
- (v) Mr H Schmidt.

3.2 Secretariat of the Commission

Section 37 of the JSC Act makes provision for the assignment of a number of personnel within Office of the Chief Justice, one of whom must be designated as the

Secretary of the Commission, to provide administrative support to the Commission.

The Secretariat of the Commission is required to:

- (a) provide secretarial and administrative support to the Commission;
- (b) cause all records of matters dealt with by the Commission to be safeguarded;
- (c) maintain a register of all complaints dealt with by the Judicial Conduct Committee; and
- (d) perform such secretarial and administrative tasks related to the work of the Commission, Committee or any Tribunal, as may from time to time be directed by the Chief Justice.

The Secretariat is made up of the following officials:

- (i) Mr S Chiloane: Secretary of the Commission;
- (ii) Ms L Bios: Senior State Law Adviser;
- (iii) Ms M Mondlane: State Law Adviser; and
- (iv) Ms T Phaahlamohlaka: Administrative Officer.

4. REPORT ON THE ACTIVITIES OF THE COMMISSION

4.1 Meetings of the Commission

During 2017, the full Commission met on two occasions: 03 to 07 April 2017 at the Headquarters of the Office of the Chief Justice, Midrand and on 02 – 06 October 2017 again at the Office of the Chief Justice. These meetings were convened as part of the Commission's bi-annual sittings to receive a briefing from both the Chief Justice and the Minister about matters that affect the courts, to address issues that affect the Commission and to interview and recommend candidates for vacancies that arose in the various Divisions of the Superior Courts.

4.2 Appointment of Judges

In terms of section 174(6) of the Constitution, the President must appoint Judges of all courts, with the exception of the Constitutional Court, on the advice of the Commission. In the case of Judges of the Constitutional Court, the Commission is required to submit to the President a list of nominees with three names more than the number of appointments to be made, whereafter the Judges are appointed from the list by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly.



During the period to which this report relates, the Commission advised the President as follows, with respect to vacancies that occurred during the year under review as follows:

4.3 JUDGES APPOINTED DURING THE PERIOD 1 APRIL 2017- 31 MARCH 2018

Court and Position	Names recommended by the Commission	Judges appointed by the President
Constitutional Court Deputy Chief Justice Judge	Justice R M M Zondo Judge N J Kollapen Judge S A Majiedt Judge L V Theron Judge M J D Wallis	Deputy Chief Justice R M M Zondo Judge L V Theron
Supreme Court of Appeal President	Deputy President M M Maya	President M M Maya
Eastern Cape Division of the High Court Judge President Judges	Judge S M Mbenenge Mr N P Jaji Mr M S Jolwana	Judge President S M Mbenenge Mr N P Jaji Mr M S Jolwana
Free State Division of the High Court Judge	Adv P J Loubser SC	Adv P J Loubser SC
Gauteng Division of the High Court Judges (7)	Ms C J Collis Adv N Davis SC Ms M B Mahalelo Adv T A N Makhubele SC Mr C M Sardiwalla Adv D N Unterhalter SC Adv C J Van Der Westhuizen SC	Ms C J Collis Adv N Davis SC Ms M B Mahalelo Adv T A N Makhubele SC Mr C M Sardiwalla Adv D N Unterhalter SC Adv C J Van Der Westhuizen SC
Labour Court Judges (3)	Ms D Mahosi Mr G N Moshwana Adv M P N Nkutha-Nkontwana	Ms D Mahosi Mr G N Moshwana Adv M P N Nkutha-Nkontwana
Mpumalanga Division of the High Court Judge President	Judge President M F Legodi	Judge President M F Legodi
Northern Cape Division of the High Court Judge President	Judge President L P Tlaetsi	Judge President L P Tlaetsi
North West Division of the High Court Judge	Ms T J Djaje	Ms T J Djaje
Western Cape Division of the High Court Judges (4)	Mr T D Papier Mr M K Parker Adv M L Sher SC Mr E D Wille	Mr T D Papier Mr M K Parker Adv M L Sher SC Mr E D Wille



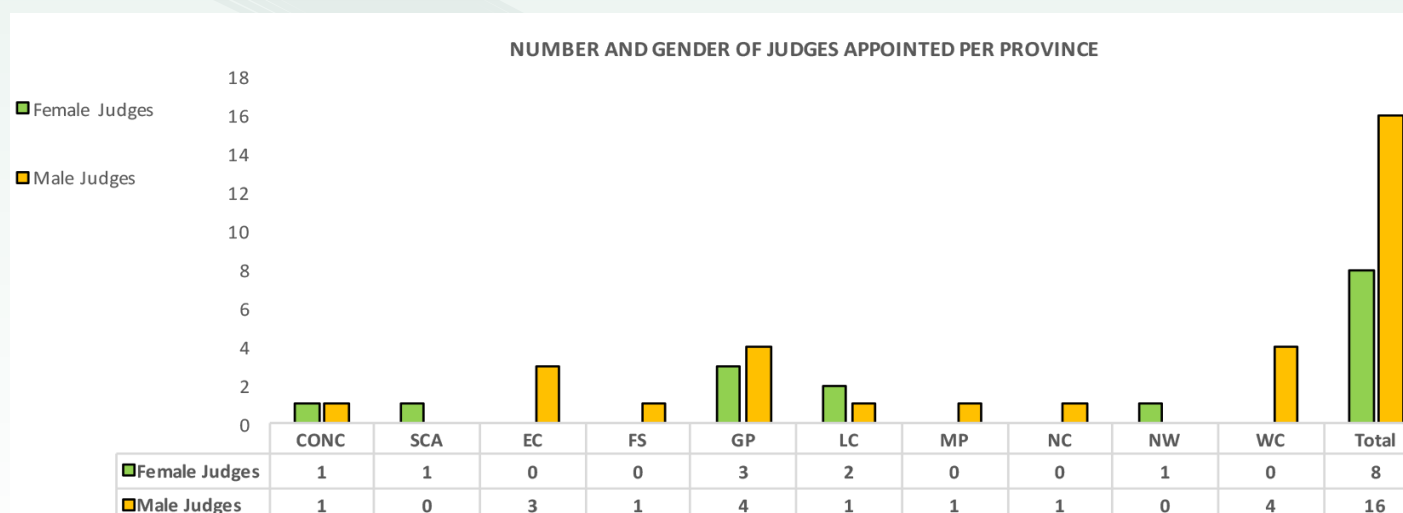
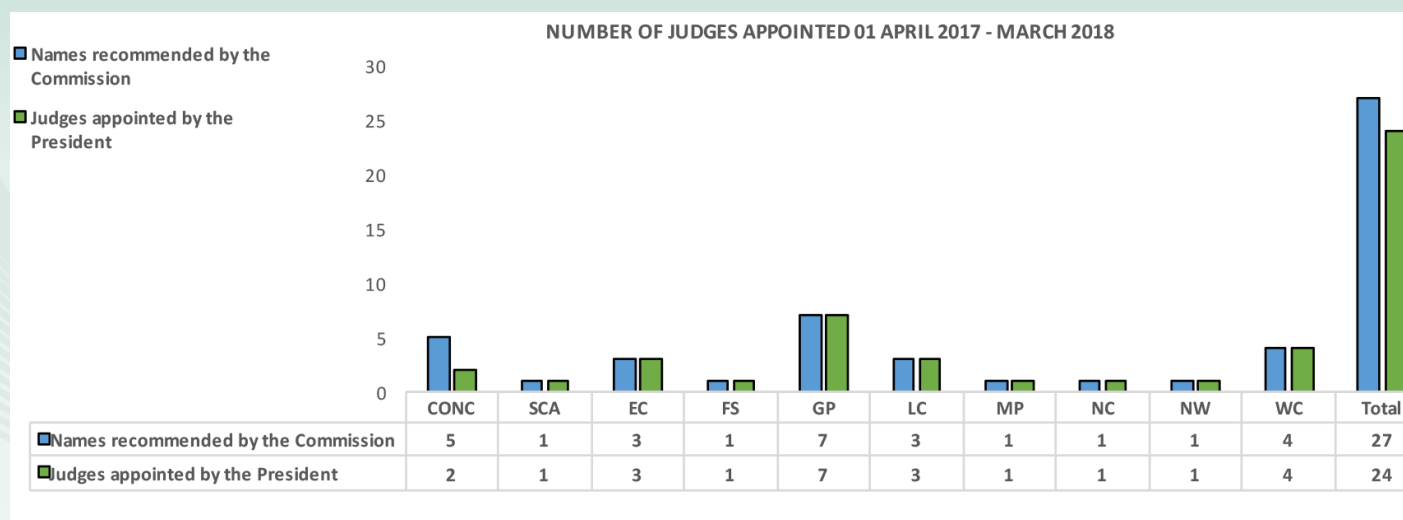
During the period under review, there were 31 vacancies in the Superior Courts for which the Commission had to interview and recommend candidates to the President for appointment as Judges. Of these 31 vacancies, the Commission was only able to recommend candidates for 24 and the President appointed them. The Commission could not recommend candidates to fill the other seven vacancies.

NUMBER OF JUDGES APPOINTED DURING THE PERIOD 01 APRIL 2017 TO 31 MARCH 2018 SPECIFYING GENDER AND RACE

Court	Number of Judges recommended by the Commission	Number of Judges appointed by the President	Number of Females & Race	Number of Males & Race
Constitutional Court	5	2	1 (so-called Coloured)	1 (African)
Supreme Court of Appeal	1	1	1 (African)	0
Eastern Cape Division of the High Court	3	3	0	3 (African)
Free State Division of the High Court	1	1	0	1 (White)
Gauteng Division of the High Court	7	7	3 1 (so-called Coloured) 2 African	4 (3 Whites) (1 Indian)
Labour Court	3	3	2 (African)	1 (African)
Mpumalanga Division of the High Court	1	1	0	1 (African)
Northern Cape Division of the High Court	1	1	0	1 (African)
North West Division of the High Court	1	1	1 (African)	0
Western Cape Division of the High Court	4	4	0	4 2 (so-called Coloureds) 2 (Whites)
Total	27	24	8	16



GRAPH ILLUSTRATING NUMBERS AND GENDER OF JUDGES APPOINTED DURING THE PERIOD 01 APRIL 2017 – 31 MARCH 2018



5. REPORT ON THE ACTIVITIES OF THE JUDICIAL CONDUCT COMMITTEE

Section 8 of the JSC Act provides for the establishment of the Judicial Conduct Committee (Committee) to receive, consider and deal with complaints against Judges.

5.1. Composition of the Committee

Section 8 of the JSC Act provides for the establishment and composition of the Committee, comprising of the Chief Justice, Deputy Chief Justice Zondo, appointed with effect from 1 June 2017, replacing Acting Deputy Chief Justice Nkabinde, and four other Judges, two of whom should be women. During the period under review, the four Judges designated by the Chief Justice, after

consultation with the Minister of Justice and Correctional Services were:

- Justice V Ponnar;
- Judge President M B Molemela;
- Deputy Judge President Goliath; and
- Deputy Judge President P Mojaelo, appointed with effect from 15 September 2017.

5.2. Meetings of the Committee

Section 9(1) of the JSC Act provides for the meetings of the Committee to be determined by the Chairperson. During the period under review, the Committee met on 4 occasions, namely 21 April 2017, 27 September 2017; 04 December 2017 and 03 February 2018.



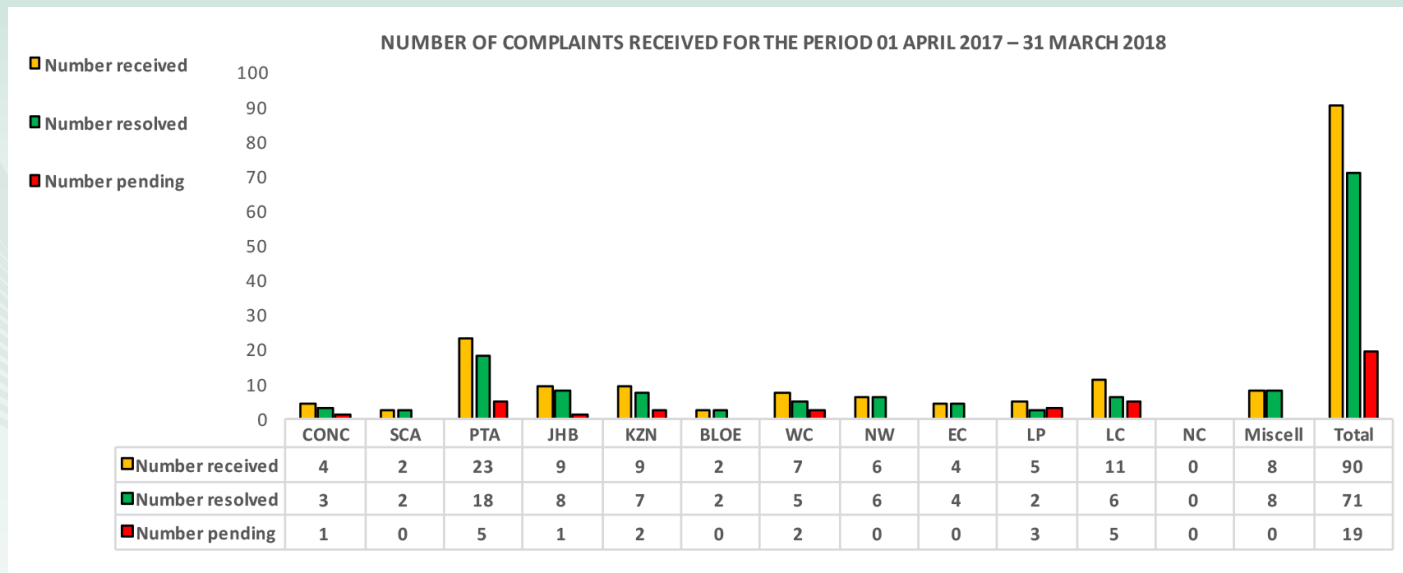
5.3 Consideration of Complaints by the Committee

COMPLAINTS RECEIVED FROM 01 APRIL 2017 – 31 MARCH 2018

COURT	NUMBER RECEIVED	NUMBER RESOLVED	NUMBER PENDING
Constitutional Court	4	3	1
Supreme Court of Appeal	2	2	0
Gauteng Division, Pretoria	23	18	5
Gauteng Local Division, Johannesburg	9	8	1
KwaZulu-Natal Division (Pietermaritzburg & Durban)	9	7	2
Free State Division, Bloemfontein	2	2	0
Western Cape Division, Cape Town	7	5	2
North West Division, Mmabatho	6	6	0
Northern Cape Division, Kimberly	0	0	0
Limpopo Division (Thohoyandou & Polokwane)	5	2	3
Labour Court & Labour Appeal Court (Johannesburg, Port Elizabeth, Durban & Cape Town)	11	6	5
Eastern Cape Local Divisions (Mthatha, Grahamstown & Port Elizabeth)	4	4	0
Miscellaneous	8	8	0
Total:	90	71	19



GRAPH ILLUSTRATING NUMBER OF COMPLAINTS RECEIVED:



For the period under review, the Committee received **90** complaints lodged against Judges. Of this number, **71** complaints were resolved while **19** are still pending.

A large number of complaints are against Judges of the Gauteng Division of the High Court. These complaints mostly relate to litigants who are aggrieved by an order or judgment of the court which the Committee invariably has to dismiss in terms of section 15(2)(c) of the JSC Act. The same sentiment can be expressed about the Labour Court which has the second highest number of complaints. There is a lack of understanding by members of the public as to the types of complaints that the Committee is mandated to deal with hence the large number of miscellaneous complaints that are received. Members of the Committee have taken note of this aspect and are preparing a brochure to address this challenge. It is belived that such a brochure will go a long way to help the public understand that the Committee is not an alternative appeal forum to the Courts.

5.4 Judges referred to the Judicial Conduct Tribunals

In the period under review, the Committee has recommended that the Commission request the Chief Justice to appoint Judicial Conduct Tribunals (Tribunals) in respect of the following Judges:

1. Judge Van Zyl – outstanding judgment (KwaZulu-Natal Division of the High Court);
2. Judge Preller – outstanding judgment (Gauteng Division of the High Court);
3. Judge Henriques – Outstanding judgments KwaZulu-Natal Division of the High Court); and
4. Judge Spilg – outstanding judgment (Gauteng Division of the High Court).

5.5 Meetings of the Judicial Conduct Tribunals

The Tribunal established to investigate and report on complaints lodged against Judges Mavundla, Poswa, Preller and Webster had its meeting on 09 October 2017 to take stock of what needs to be done to commence with the proceedings. And the Tribunal established to deal with the complaint lodged by the former Justices of the Constitutional Court against Judge President Hlophe met on three occasions, 23 October 2017, 14 December 2017 and 05 February 2018. At the meeting of 05 February 2018, it decided that the hearings will be held from 02 until 13 July 2018.



The Tribunal established to deal with complaints lodged against Judge Motata met on 27 October 2017 and decided that the hearings will be held from 17 until 19 January 2018. The hearings were duly held on these days and the Tribunal will submit its report to the Commission in the 2018/2019 financial year.

6. REPORT ON THE REGISTER OF JUDGES' REGISTRABLE INTERESTS

Section 13(3) of the JSC Act requires every Judge to disclose to the Registrar particulars of all his or her registrable interests and those of her or his immediate family members where applicable. The first disclosure must be within 60 days of the date fixed by the President by proclamation, thereafter annually and in such instances as prescribed. This, the President did, by Proclamation in which the commencement of the 60 days was fixed at 29 January 2014.

Regulation 3 of the Regulations requires newly appointed Judges to disclose their registrable interests within 30 days of their appointment as Judges. During the period under review, a total of eighteen (18) Judges were appointed and they all disclosed their registrable interests within the time prescribed by the Regulations.

6.1 Judges in active service

After making the first disclosure, a Judge may at any time disclose to the Registrar or inform the Registrar of such amendments as may be required (Regulation 3(4)).

However, in March of every year, each Judge in active service must inform the Registrar in writing whether the entries in the Register are an accurate reflection of his or her registrable interest and if applicable make such further disclosures or amendments as may be necessary.

By 31 March 2018, there was a grand total of 249 Judges in active service and of this number 247 had disclosed their interests. The two Judges who had not disclosed their registrable interests by 31 March 2018 were incapacitated by serious illnesses.

7. REPORT ON OTHER MATTERS

7.1 Litigation against the Commission

During the 2017/2018 financial year, the following matters

were still in pending in the courts.

7.1.1 Helen Suzman Foundation v Judicial Service Commission

The Helen Suzman Foundation (HSF) is contending that the Commission's decision to advise the President to appoint 5 candidates to the Western Cape Division and not to appoint 3 candidates, during its October 2012 sitting as unlawful and/or irrational and invalid. In the alternative, the HSF seeks an order declaring that the process followed by the Commission before making the aforesaid decision was unlawful and/or irrational and invalid.

The Commission is opposing the matter and Counsel has been appointed to act on behalf of the Commission. Following the filing of the Commission's answering affidavit, the HSF requested that the transcripts of the Commission's deliberations of the interviews held in October 2012 should be made available as part of the record. During its October 2013 sitting, the Commission resolved against including the record and the HSF approached the Western Cape Division of the High Court for an order compelling the Commission to include the transcripts as part of the record. The interlocutory application to compel the Commission was heard by the Western Cape High Court on 8 August 2014.

On 05 September 2014, the Western Cape Division of the High Court as per Le Grange J dismissed the application holding that the knowledge that the full record of the deliberations might include extremely frank remarks and opinions of senior members of the Judiciary and the Executive as to the candidate's competence or otherwise would be made public, could deter potential candidates from accepting nominations for appointment. The Court then concluded that the HSF was not entitled to the full recordings of the deliberations. The HSF launched an application for leave to appeal against the decision by Le Grange J. On 30 October 2014, the application for leave to appeal was dismissed by Le Grange J stating that there were no prospects of success on appeal.

On 21 November 2014, the HSF petitioned the Supreme Court of Appeal seeking leave to appeal against the decision of the Western Cape Division of the High Court. And on 09 February 2015, the Supreme Court of Appeal (SCA) as per Shongwe JA and Gorven AJA granted the applicants leave to appeal.



The application was heard by a panel of 5 Justices on 05 May 2016 and judgment was delivered on 02 November 2016 in which the SCA dismissed the HSF's appeal concluding that the Commission is set apart from other administrative bodies by its unique features which provide sufficient safeguards against arbitrary and irrational decisions. The SCA held that the relief sought by the HSF would undermine the Commission's constitutional and legislative imperatives by, inter alia, stifling the rigour and candour of the deliberations, deterring potential applicants, harming the dignity and privacy of candidates who applied with the expectation of confidentiality of the deliberations and generally hamper effective judicial selection.

The HSF lodged an application for leave to appeal with the Constitutional Court. The appeal was heard by the Constitutional Court on 31 August 2017.

The date of hearing of the merits of HSF's main application will be determined in due course.

7.1.2 Snail v Judicial Service Commission and Others

Mr Snail launched an application in the Gauteng Division of the High Court for an order, amongst others, declaring section 14(2) of the JSC Act, to be inconsistent with the Constitution and also to review and set aside the decisions of the Judicial Conduct Committee dismissing his complaints lodged in terms of section 14 of the JSC Act. The matter was set down for hearing in the Gauteng Division of the High Court but Mr Snail has since requested that the matter be stayed as he was not ready to proceed. A new date will be determined to have the matter finalised.

7.1.3 Limpopo Legal Solutions v Judicial Service Commission and Others

Limpopo Legal Solutions is seeking an order declaring the Commission's decision to advise the President to appoint Judge Makgoba as Judge President of the Limpopo Division of the High Court despite pending complaints that were lodged with the Commission, to be unconstitutional, unlawful or irregular. In the alternative, Limpopo Legal Solutions seeks an order declaring the process followed by the Commission which culminated in the recommendation and appointment of Judge President Makgoba as irrational and unconstitutional.

The Commission is defending this matter and filed its

answering affidavit as well as the record. Limpopo Legal Solutions has taken issue with the record and served the JSC with a notice to compel which is opposed by the Commission.

The Commission has written to the applicant to paginate the documents and file his heads of argument so that the matter could be ripe for hearing. This matter will have to be kept in abeyance pending the finalisation of the interlocutory application launched by Limpopo Legal Solutions.

7.1.4 Limpopo Legal Solutions v Judicial Service Commission and Others

Limpopo Legal Solutions has launched an interlocutory application in the Gauteng Division of the High Court against the Commission seeking an order to compel the Commission to provide, amongst others, records and printouts relating to a conversation that took place between Judge President Makgoba of the Polokwane Division of the High Court and Adv Maluleke. The Commission is opposing this matter and has filed its notice of intention to defend the matter and counsel representing the Commission in the previous matter involving Limpopo Legal Solutions has been briefed.

8. PROCEDURE OF THE COMMISSION

Section 178(6) of the Constitution provides that the Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members. During the period under review, the Commission had occasion to review its procedure so as to be in line with the practice of the Commission. The reviewed procedure was duly adopted and published in the Government Gazette in March 2018 in accordance with the provisions of section 5 of the JSC Act.

9. CONCLUSION

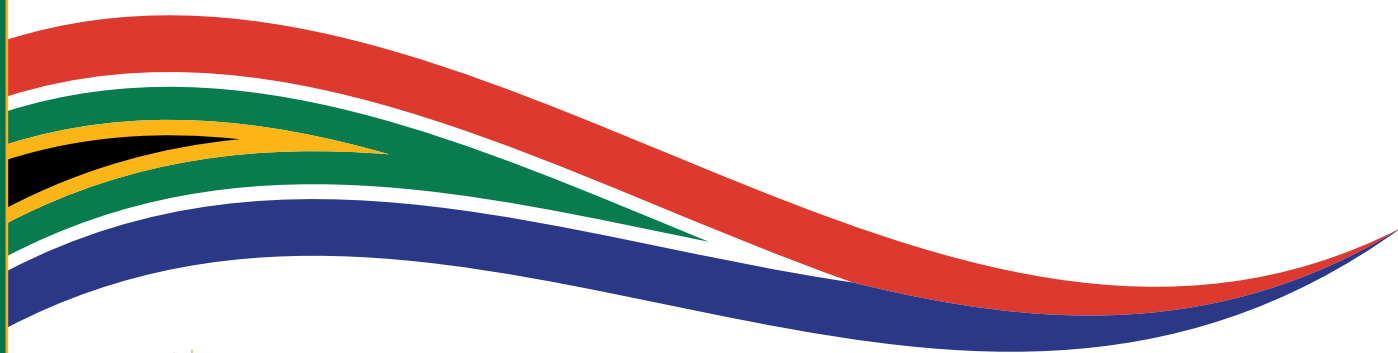
The Commission has continued to discharge its constitutional and statutory mandate to make recommendations on the suitability of candidates for appointment by the President. Transformation of the Judiciary continues to be central to the Commission's role when considering candidates for judicial appointment. Focus on this constitutional imperative will continue until the Judiciary fully reflects the racial and gender composition of the Republic of South Africa.



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