The topic that we are discussing is a difficult one because it often generates more heat than clarity. The reason is obvious. It forces us to confront the difficult issue of race and merit in the selection process. The issue is present whenever an appointment is made – in the private and public sectors. It is unavoidably politicised because it also indirectly involves questions of access to power and privilege. Even though this is a difficult terrain to navigate, it must be done openly and honestly so that we can contribute to strengthening the judiciary which remains a vital institution for the protection of our constitutional order. So I hope my observations will shed more light than heat on this vexed topic. I shall advance the following argument: the JSC has, particularly over the last decade, overemphasised race or other factors and paid less attention to skill and competence in the appointment process. This approach does not accord with the proper interpretation of the relevant provisions of the Constitution. The result is that the judiciary has been denuded of skills. This has caused concern in the legal profession and the broader public. It is therefore important that the appointment of judges is once again placed back on a proper constitutional footing.

The relevant provisions that we are talking about, and that I was asked to focus on, are s174(1) and s174(2). In its relevant part s174(1) requires an appropriately qualified man or woman...
to be appointed a judge, who is a fit and proper person. Section 174(2) requires the need for the judiciary to reflect broadly the racial and gender composition of South Africa. Remember what we are dealing with here. It is “reflect broadly” and “racial and gender composition of South Africa”. I will come back to this provision shortly. For now, I need only observe that because those provisions lack elaboration, which is really characteristic of constitutional provisions, they have given rise to much debate and disagreement – especially on how we deal with the broad reflection, and racial and gender composition provision.

In 1998, the JSC at the time adopted the Mahomed Guidelines of Chief Justice Mahomed (who was also the Chairman of the JSC). I am not going to go through all of the guidelines except to say that the important provisions there were that the person had to be competent – both technically and with respect to his/her capacity to give expression to the values of the Constitution. The person had to be experienced technically. The question was whether the appointment would be more symbolic to send a message to the community more broadly. It is a difficult provision to understand and adhere to. I will come back to that. What was important then was that the JSC noted that the candidate must have acted, at least, as a judge for a while; performed satisfactorily with reference to qualitative judgments; and the comments of judges who worked with the candidate must be taken into account. It should also be a consideration whether the judge unduly delayed delivering judgment. In the early days of the JSC it became clear that acting judges and some judges were not performing their job satisfactorily and would sit on judgments for five, six or seven years. The JSC elaborated important criteria. They would look at the judicial needs of the division concerned. It may require a person with a particular skill set. That was the position then.

In September 2010, shortly after Jacob Zuma was elected president, the JSC elaborated another set of criteria and the appointment of Constitutional Court judges were suspended to give President Zuma the opportunity to make further appointments (to the JSC). There was a sea change in the culture of the organisation after those appointments. This was apparent from the interviews of the candidates for the Constitutional Court positions of that year. I was in fact a candidate in those interviews. One of the president’s political appointments, during those interviews, felt the need to point out that his approach to the appointment of judges was to apply the governing policies of the National Democratic Revolution (NDR). What this required of him, he implied, was to advance the interest of what the NDR referred to as “blacks in general and Africans in particular”. I refused to answer his question. Perhaps that is why I was not appointed. That is besides the point. That commissioner’s approach was completely at odds with what the Constitution requires. Interestingly enough, another candidate was asked why he always seemed to accept briefs against the government.

The first set of criteria used by the JSC was the provisions spelt out in the Constitution. Then there were supplementary/additional criteria, which were requirements of competence, technical competence, and experience. Compliance with the criteria set out by the Constitution was initially applied as a box ticking exercise and then the additional criteria were applied. But eventually, the additional criteria became less important because there was a drive to meet the transformation needs of the country (which was viewed to have been insufficiently achieved in the first 10 years of the JSC’s existence). So the idea then of technical competence and experience (which is the heart of what a judge is about) began to be treated as considerably less important.

I would like to give a recent example of how the JSC approaches the formal criteria set out by the Constitution and the need for technical expertise. Recently there were five vacancies in the SCA for which candidates were shortlisted by the JSC. Among the candidates were two white males who were shortlisted. There was a third candidate who had acted in the SCA (very competent) but he was not shortlisted because there was an unwritten policy not to shortlist too many white males. It was almost seen as unfair to shortlist them because it would create an unrealistic expectation of appointment for them. Until then, we had understood the policy to be the following: if you were a competent judge of good standing you would at least be shortlisted unless there was a compelling reason not to do so. There is now a spectacle of legal professionals being asked to “help out” because of a shortage of skills – even at SCA level – who are then not shortlisted for or appointed to permanent positions because of race. The judicial institutions currently have a shortage of skills. The SCA’s president was informed that she would not be able to appoint more than one white male. I make no comment on the qualities of the other candidates, but this policy is applied despite the fact that there is a skills deficit in our courts.

I was recently asked to represent the SCA in the JSC to interview candidates for two positions on the Constitutional Court bench. The reason I participated was because the president of the SCA had to recuse herself for reasons that are not important. Some background first: a few years ago the Constitution was amended to give the Constitutional Court the jurisdiction over arguable points of law of general public importance. Until then it only had the jurisdiction to deal with constitutional disputes. The expanded jurisdiction meant that the Constitutional Court now had to deal with commercial law disputes, tax law, intellectual property law, competition law and the like. So I thought that I should test some of the candidate’s knowledge and experience in commercial law. And I did. Several of my co-commissioners did not appreciate my line of inquiry. There was a suggestion that I was, not so obliquely, trying to undermine the black candidates who did not have commercial experience. This, despite the fact that the criteria explicitly required an investigation into technical expertise. I was also enquiring into whether some of the candidates were aware of trenchant criticisms of some recent Constitutional Court judgements in some of the academic journals. There was one article in a journal which lamented that no follower of the court’s judgments can fail to have noticed a decline in their

“There is now a spectacle of legal professionals being asked to “help out” because of a shortage of skills – even at SCA level – who are then not shortlisted for or appointed to permanent positions because of race.”
recent quality. It argued that over the last few years the court has increasingly grown unaccountable to the legal and academic communities, to the law (including their own precedents), and even to logic and argumentation. To private lawyers, the quote continues, it has long been evident that the court lacks sufficient expertise in their field. But even to public lawyers, academic criticism betrays more than a hint of exasperation. Those are some pretty strong views which reflect a growing unease in the academic community and, I should tell you, in the profession as a whole, as to what is happening even in our top courts. I do not wish to dwell on these interviews much longer except to say that my line of enquiry had less than universal acclaim in the JSC. But I am not too bothered about that. More troubling was that there was more of a hint of anti-intellectualism in the way that at least one of the senior members of the Commission responded to this line of inquiry by suggesting that academic criticism should really not be taken too seriously.

Let me say that these criticisms of the appointment process are not new. As far back as 2011, when the National Development Plan (NDP) was signed off by President Zuma, the NDP warned that there is little or no consensus between the JSC and the legal fraternity about the qualities and attributes needed for the bench. It recommended reforms because, and to quote it, “the composition of the JSC itself … is argued to be too large to function effectively, and … [is] ham-strung by political interests”. President Ramaphosa was the vicechairman of the NDP, so he should be fully aware of the political interests at play. For those of you who watch the proceedings of the JSC, one has the distinct impression that it is not able to assess the merits of applications properly. The results, more often than not, are also a foregone conclusion. Regard being had to it being hamstrung by political interests, there are also other interests at play. So it would not be unusual for a candidate to be asked, “why are you not a member of this particular legal organisation?” The inarticulate premise is that if you have not joined the organisation which represents the interests of its members you are not a suitable candidate. Of course it has not gone unnoticed that there are lawyers who then join one of these organisations in order to find at least one of the pathways to appointment as a judge. The question is: Are those judges then truly independent? Can they be? Or are they beholden to the interests of the institutions and groups that nominated and put them there? So the conclusion is really unavoidable that the way the JSC has approached its task has led to a weakening of the judiciary from top to bottom. As I said, that includes my own court in that it now has fewer judges with skills in areas such as commercial law, income tax law and intellectual property law. There is much anecdotal evidence that commercial disputes are increasingly being diverted from the courts to arbitration, which is a most unsatisfactory state of affairs. And counsel who are asked to advise on the prospects of success in litigation will increasingly say “this is the law, but it really depends on the judge”. This is a sign that the law is becoming more unpredictable and less certain.

So to conclude, let me return to s174(1) and s174(2). In my view – properly understood – they must be read together. The suitable qualification requirement goes beyond the question of whether the person has a formal qualification. It involves all other questions – the skills, expertise – all of that comes into s174(1). Once those matters have been canvassed properly (that applies to all candidates alike) – the question of skills, expertise and experience – then s174(2) kicks in. Here, the issue is how the provision reads. One always has to pay fidelity to the language of a constitutional provision. It’s not simply what one wants it to mean. It’s about what in fact it does mean. How does it read? The provision says consideration must be given to what is broadly representative. This does not mean demographic proportionality, as some would have it. This is a statement that it is important to build the legitimacy of the judiciary by taking into account diversity. Broad representivity means diversity. It does not mean exact proportions of population groups. It can’t mean that. What does it mean to say “consider”. I suggest that when race and gender questions are considered, this must mean “take account of” – which must mean “take account of seriously”. In other words it is not to be ignored. But this does not mean, having taken it into account, an appointment may not be made if it does not advance those goals. Typically, if one has a situation where candidate A will advance the broader goals (the transformation goals), but given the particular needs of a particular court (e.g. the need for an intellectual property lawyer), the appointment should go to a candidate with that particular skill set.

So let me round up. I think the judiciary has played a crucial role in protecting our democracy. It has stood firm against the predations of state capture and has largely maintained its independence despite often being subjected to unreasonable, unfair and sometimes scurrilous criticism. That, we need to protect. But that does not mean that we should close our eyes to the very worrying approach that has been adopted in the methods and considerations that influence judicial appointments. As I have said, there has been a gradual loss of skill, especially in the last decade, and especially in the areas of commercial law and the like. Those are matters that are of public concern. I commend the Foundation for making space for this debate and the trust that others will follow suit.