LAW MATTERS

by **Franny Rabkin**

Judges Matter

As I write, the Judicial Service Commission (JSC) is due to meet for a marathon round of interviews. In the weeks running up, there has been a flurry of urgent of litigation about the commission – to determine whether the MK Party's leader John Hlophe should participate in its upcoming proceedings. Since last October – when the JSC was hauled to court after it inexplicably left two vacancies open on the Supreme Court of Appeal – theJSC, and all its flaws and problems, has become the focus of increasing public scrutiny and debate.

During what is now referred to as "the state capture years", it became apparent how important (and how powerful) the judiciary was. As a result, the public is becoming increasingly aware of just how important the JSC is – the institution that interviews and appoints judges.

Gone are the days when the public gallery at the JSC comprised just myself and the Democratic Governance and Rights Unit's Chris Oxtoby. I'm pleased about this. I'm pleased we are all talking about the JSC. But in some debates, I think people are barking up the wrong tree.

One of these is the view that there are too many politicians on the JSC and the composition of the JSC needs to change. I think this is wrong in principle.

First, a reminder of the who comprises the JSC: the chief justice, the president of the SCA, a judge representing the Heads of Court, the minister of justice, two advocates, two attorneys, one teacher of law, six members of the national assembly (at least three must be from opposition parties), four members of the National Council of Provinces, four people designated by the president. Then, when interviewing for a high court division, the judge president of that court and the premier of that province. With specialist courts, there is an additional judge there – the JP of that court.

The most recent expression of the argument to change the JSC's composition came from a think tank, the Centre for Development and Enterprise (CDE). After setting out the composition of the JSC, the CDE says: "It will be apparent, then, that those who can be expected to have the most knowledge of what is required for judicial office, judges themselves, are vastly outnumbered (in almost all cases four members of the judiciary in a body comprising 24 members), in particular by persons designated by the National Assembly and the NCOP."

"To the extent that the judiciary has been weakened that has for the most part been occasioned by decisions of those members. In our view the fault lies with the failure of those members, and the persons who designated them, properly to appreciate their functions and responsibilities," says the CDE report.

The CDE report does not substantiate the basis for coming to its view that the judiciary has been weakened "for the most part" by decisions of the NA and NCOP members. Indeed, it

would be almost impossible to substantiate this statement – JSC deliberations are held in private and votes are by secret ballot. To the extent this claim was based on the authors' observation of interviews, I would on my own observations – having been at almost every round of JSC interviews for 15 years – wholly dispute it. I would say the lawyers on the JSC are as responsible as the politicians for some of its biggest travesties.

Let me give one example – because it was cited by the CDE report. The CDE refers to a recent speech by former SCA Justice Azhar Cachalia where he referred to the 2009 Kliptown interviews and was asked questions by a commissioner who"wanted to settle a personal score he had with a retired justice of the Constitutional Court, who had been critical of the JSC's handling of the complaint against Hlophe". I was at those interviews and the questions, if I recall, were put to every candidate and were about whether they had consulted retired ConCourt Justice Johann Kriegler about whether to proceed with the JSC interviews, given the JSC's handling of the complaint against Hlophe. I agree the questions were inappropriate. But they came from Marumo Moerane SC (a fave of mine in general) – a representative of the advocates' profession, not a politician.

Freedom Under Law has also recommended a change to the composition of the JSC. Its 2022 report is based on primary research and documents years of JSC travesties – it is indeed grim reading.

However, in the incidents cited by FUL, I would argue that the lawyer commissioners were as neck-deep in it all as the politicians. In the infamous 2021 interview of KZN Judge Dhaya Pillay, Chief Justice Mogoeng Mogoeng was, in my view, more inappropriate in his questioning than Julius Malema – the example specifically detailed by FUL in the section of its report dealing with political interference.

"THE QUESTION IS ONE OF PRINCIPLE: WHAT PERSPECTIVE DOES THE CONSTITUTION EXPECT THE PRESIDENTIAL APPOINTEES TO BRING TO THE COMMISSION? AND THE ANSWER IS CLEAR THAT IT IS A NON-POLITICAL ONE."

Last year the Helen Suzman Foundation also argued that the composition of the JSC should change. But the argument is, in my respectful opinion, flawed at the outset because it mischaracterises the split between commissioners in "the non-political sphere" and those in "the political sphere".

It says: "Of the 23 primary members, the non-political sphere is represented by eight members: three from the Judiciary, four from the legal profession, and one from academia. The political sphere, on the other hand, is represented by 11 members: the Minister of Justice, six members of the National Assembly (three of whom are to be from opposition parties), four members from the National Council of Provinces (supported by at least six provinces). This number can increase to 15 as four members are to be designated by the President (at his discretion, provided the leaders of all parties in the National Assembly have been consulted)."

My view is that the four appointed by the president are not in the political sphere and that on a proper conception of the Constitution, they are part of the "non-political sphere". The HSF acknowledges that these four members are intended to "provide a 'perspective for the state in the broad sense of the nation as a whole'". This is a non-political role.

But, says the HSF, "past practice has revealed that even the President's four appointees … have political ties or aspirations". I disagree. The president's appointees have overwhelmingly been senior counsel, sometimes senior attorneys and at one time the veteran labour movement leader Paul Ernstzen. They include George Bizos SC, Kgomotso Moroka SC, Dumisa Ntsebeza SC, Vas Soni SC and Thandi Norman SC.

As authority for the proposition that these appointees had "political ties", the HSF cites a 2017 article by JSC expert Oxtoby, in which he pointed to three presidential appointees who had been members of the legal team representing the SAPS at the Marikana Commission and of the Asset Forfeiture Unit. I think Oxtoby's bigger point was a slightly different one – that the lawyers on the JSC are not immune from political views. But in any event, I think it is a stretch to claim political ties and aspirations based on briefs: one would be hard pressed to find a senior counsel who has never done work for the executive and many do so regularly. Counsel should not be identified with their clients – it's basic cab-rank principles.

The question should be one of principle: what perspective does the Constitution expect the presidential appointees to bring to the commission? And the answer is clear that it is a non-political one.

This means that, using the language of the HSF, but on a proper (in my view) appraisal of the Constitutional scheme, the non-political sphere is represented by 12 members and the political sphere by 11.

This is a good balance. I think so because of the extent of the powers of review our Constitution gives to the judiciary over the other arms of state. The HSF says our system is not in line with international best practice. I readily admit I have not looked at comparative jurisdictions. But I wonder how many other jurisdictions have courts that have found a cabinet reshuffle is open to judicial review; that have told the government which institutions should be exempt from loadshedding; that have set aside reports of commissions of inquiry; that have told parliament it must enact rules for the impeachment of a president; that tell the president that, not only must his or her decisions be rational, but his or her process to arrive at this decision must be rational and it must be rational every step of the way?

In South Africa, judges have done all this – because this is the kind of constitutional democracy we have. But that must cut both ways, lest we run a risk that the judiciary loses credibility and legitimacy.

Bear in mind that the legislature and executive do not have the power to hold judges accountable except at two points – appointment and impeachment. Even at the point of impeachment, a judge may not be removed unless he or she has been found impeachable by the JSC, after an independent tribunal process. So it's really at appointment where parliamentarians get to have a say. They don't even get a majority say. But they do get a proper, substantive say.

It would undermine the legitimacy of the judiciary, and their decisions, if the elected representatives of South Africans had a diminished role to play. When unelected judges take unpopular decisions – which they must do sometimes – the fact that they were appointed by elected representatives shores up the legitimacy of these decisions.

The HSF says: "The high level of political representativity increases the chances of 'endangering the neutrality of the Judiciary', which is essential to the independence of the Judiciary as required by the Constitution. It must also be asked whether this situation reflects the Constitution's intention and, further, whether the composition of the JSC does not conflict with the theory behind the separation of powers."

To respond: I think there are sufficient safeguards of judicial independence elsewhere in the Constitution to mitigate any risk of endangering the neutrality of the judiciary. And empirically, one thing our judiciary cannot be accused of is a lack of independence. I would also respond that the Constitution's intention is crystal clear – that is why these NGOs are seeking an amendment. Finally, as I said, my view is that the current composition of the JSC supports and strengthens our model of the separation of powers.

I also differ with the CDE that more judges are needed on the JSC. Yes, judges know what's needed in their courts. They have a critical perspective. But theirs is a narrow vantage point, albeit a crucial one. And it is not the only important one.

I have one thing to add: The HSF report states that experience has shown that the NCOP appointees have largely been drawn from the ANC and when the CDE's report was being launched, the CDE's Anne Bernstein spoke of a "new threat" in the form the MK Party, which would scrap the Constitution. I would caution against amending the Constitution because of the politics of the day. Politics change. Constitutions also do, but not so quickly nor so easily. More importantly, we cannot legislate our way out of democracy. Nor should we want to. A