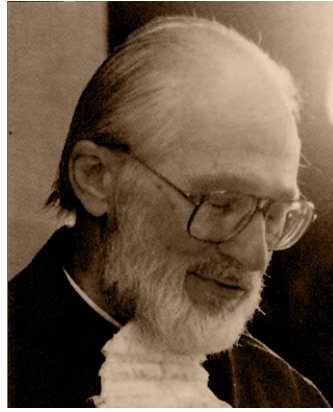
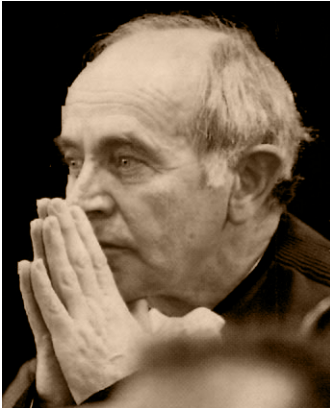




LAW MATTERS

by Franny Rabkin



“INDEPENDENCE, OPEN-MINDEDNESS, INTEGRITY AND COURAGE”: INTERVIEW GUIDELINES AND THE APPOINTMENT OF JUDGES

In October 1994 the Judicial Service Commission gathered, for the first time, to interview candidates for the first bench of the Constitutional Court.

By the time of the interviews, the court already had its leader – the almost universally lauded Arthur Chaskalson – and four members: judges Laurie Ackermann, Richard Goldstone, Tholie Madala and Ismail Mahomed. These initial four were appointed, with no JSC interview, by President Nelson Mandela in terms of s99(3) of the interim Constitution. The section provided that four of the justices of the Constitutional Court were to be appointed from the ranks of judges of the Supreme Court, in consultation with the cabinet and the Chief Justice (the chief justice at the time was Michael Corbett, the leader of the Supreme Court of Appeal).

The remaining six were interviewed by the JSC and were appointed by Mandela, in consultation with Chaskalson. The role of the JSC was to give Mandela a list of ten names from which to choose. There were 25 candidates interviewed – many rank amongst the finest legal minds of their generation. In the end, two of the six appointed came from the Bench, Johann Kriegler and John Didcott, three from the academy, Kate O’Regan, Yvonne Mokgoro and Albie Sachs, and one from the Bar, Pius Langa SC.

The interviews were conducted over four days – Monday to Thursday; Friday was for deliberations. According to contemporaneous media reports, they were held in the Tesson theatre in Braamfontein, under the glare of spotlights so bright that some commissioners wore sunglasses. TV cameras were prohibited. Journalists sat in the theatre audience seats with their notebooks on their laps.

Upon opening the interviews, Corbett CJ told everyone about the interview guidelines that had been developed for the interviews. “The purpose of these guidelines has been to control the questioning of candidates and to protect them against improper questions,” said Corbett, as the historic interviews got underway.

From what I could piece together, the guidelines were simple and very sensible. The interviews were meant “to discover the candidates with the best qualities for the court and not those with the worst”. The JSC was looking for candidates to show the best of themselves, not seeking to expose them or show them up. However, “we cannot ignore serious disqualifying allegations,” said Corbett. If these were made, “and substantiated sufficiently to warrant inquiry”, the commission would need to investigate them fully. Questions also had to be relevant – and this would be enforced by the chair, who had a discretion.

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The first meeting of the Judicial Service Commission in Bloemfontein on 20 July 1994.

From a lengthy excerpt quoted in the Annual Survey, it seems the guidelines also talked about the qualities the JSC was seeking. These included “independence, open-mindedness, integrity and courage”. Judicial independence meant “the judge is required to make up his or her mind on a question, independently of pressure or loyalty or affiliation to some other person or body. The judge must have the courage and the integrity to be able to resist pressure...”. They said a “person of integrity is someone who is faithful to his or her principles. None of this means that the character 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 office”.

They also talked about intellect – “the judges of the Constitutional Court will be responsible for developing, from a text which is in its nature skeletal, a coherent and principled body of interpretive doctrine, a jurisprudence that will put flesh to the national enterprise of building a constitutional democracy”. They talked about fairness, judgment and perceptiveness. About stamina and industry and about “vigorous internal debate”.

When I got to the end of the excerpt, I wanted to stand up and cheer.

Fast forward to 2022. After years of criticism about the way the JSC conducted its interviews, the JSC adopted criteria for the appointment of judges and interview guidelines. In the years preceding, calls for guidelines got louder and more urgent as interviews repeatedly descended into unfair ambushes, personal attacks, irrelevant sideshows and grandstanding by commissioners.

It did not happen all the time, nor even most of the time. But when JSC interviews went off the rails, it damaged the credibility of the institution. There was litigation – also damaging.

The 2022 guidelines say that the JSC had regard to the 1994 guidelines. But my question is what happened to these 1994 interview guidelines in between? Granted they were for a specific and very special round of interviews. But they have relevance much more broadly.

Maybe I missed it, but I am doubtful that they were applied going forward. In my 18 years of reporting the JSC, I certainly heard no mention of the 1994 guidelines (not to be confused with the 2010 selection criteria, which I had heard of; and which the JSC also took into account in 2022). More importantly, what I witnessed over years of reporting the JSC interviews certainly suggests otherwise.

Who could forget, for example, the round of interviews for the Constitutional Court in which candidates were instead questioned at length about bullying and a toxic institutional culture at the Supreme Court of Appeal. It was an important issue, but the interviews were for the Constitutional Court, not the SCA. By the end of the interviews I was none the wiser than I was at the beginning about the relative suitability of the candidates for the ConCourt, which, it hardly needs saying, is altogether different court with a different institutional culture.

Then, remember when (now retired) Deputy Judge President Phineas Mojapelo was hauled over the coals for a *Sunday Times* article he wrote about the selection process for chief justice? The JSC was seemingly deeply miffed that he dared to question its process. What his opinion of the JSC had to do with his qualities as a judge remains unclear to me.

Had the 1994 guidelines been applied, relevance might have been legitimately raised.

There was that round that so happened to occur at the same time the executive was seething about the judiciary over the Al Bashir stand off (when the former Sudanese president was spirited out of South Africa in breach of a court order, bringing the country very close to a constitutional crisis). That round of interviews became a proxy for the two sides to air their beef. The qualities of the candidates seemed like an after-thought.

I could go on. I have always been a defender of the JSC – criticism is often misplaced or racist and sexist, or just churlish and ungenerous (it’s a tough job those commissioners have to do). But there were times when the criticism of the JSC was valid; we had to be outraged. And I wonder if we would have a very different judiciary today if these 1994 guidelines had been stuck to – consistently; and incrementally improved on.

This comment is not about any individual appointment or non-appointment, or even several of them. It is about years of a selection process, which could have been done so much better. It is about how, slowly, this has discouraged our best from coming forward. Fair enough, there are other contributing factors like the workload at the courts, which has been increasing steadily and is getting overwhelming now. Being a judge is not the gig it used to be.

Then, there is what these guidelines had to say about diversity:

"A central criticism of the existing judiciary is that because it is drawn, to an overwhelming extent, from a single small section of the community, it cannot fully understand the experiences and needs of all the citizens over whom it wields power, and that it therefore cannot give proper weight to those needs and experiences. The constitutional instruction to 'have regard to the need to constitute a court which is ... representative in respect of race and gender' is an attempt to correct this deficiency ..."

This "constitutional instruction" is not affirmative action "in the sense in which that term is most commonly used". Affirmative action is primarily to benefit the person being affirmed. But the Constitution wants a diverse judiciary to benefit the law and the administration of justice, said the 1994 guidelines.

Here's how the guidelines put it:

"Affirmative action usually means varying the traditional criteria of qualification – the criteria which govern entrance

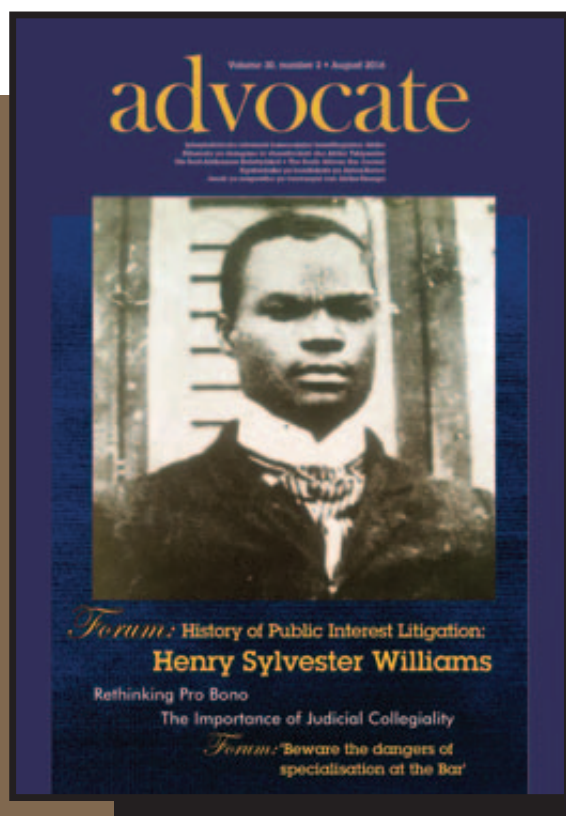
or appointment or promotion – in order to undo the effects of the exclusionary policies of the past. The point of affirmative action, in this sense, is to restore equality of opportunity to those previously denied it. But the constitution-maker is not here concerned with the interests of the individuals, who, by appointment to the Court, might benefit from its instruction. Its concern is with the effectiveness of the Court as an instrument of justice."

Diversity is "not an independent requirement superimposed upon the constitutional requirement of competence; properly understood, it is a component of competence."

If only the wider legal community, back in 1994, had truly absorbed this. Instead, for years, we've been treated to a chorus of "Merit versus Transformation" framing, which to my mind misses the point.

However, that might have been hoping for too much. Even at the time, the tone of the public commentary suggested that the guidelines were way ahead of their time on this score. I am still recovering from discovering a *Sunday Times* article that quoted an anonymous source in the "legal fraternity" who called Justice Madala a "legal non-entity". Not to mention Professor Martin Brassey in *Business Day* calling Justice O'Regan a "good but as yet unspectacular young lawyer".

Imagine if those sentiments had prevailed and there had been no Justice Madala and no Justice O'Regan on the Constitutional Court's first Bench. Now imagine who else we could have lost to the Bench in the years since. **A**



advocate

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