

A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa

MD Moremi



orcid.org 0000-0002-4582-8616

Dissertation accepted in fulfilment of the requirements for the degree
Master of Laws in Public Law and Legal Philosophy at the North-West
University

Supervisor : Dr SJ Sedumedi

Graduation ceremony : April 2019

Student Number : 24635677

DECLARATION BY CANDIDATE

I, Molebatsi Daniel Moremi duly declare that this dissertation for the degree of *Master of Laws* with Public Law and Legal Philosophy at the North West University hereby submitted, has not previously been tendered by me for a degree at this or other University. Furthermore, it is my original work in design, structure and execution, all materials and sources contained herein are duly acknowledged.

Signature:

University number: 24635677

Signed atthis.....day of.....20.....

ACKNOWLEDGEMENTS

Praise to the mighty living **God** for his mercy, strength and wisdom throughout my lifetime, more especially during my academic journey.

I would like to extend my gratitude to the following:

- My family** : for their support, love, care and motivation
- Dr SJ Sedumedi** : through his selfless supervision and guidance that enabled me to complete my dissertation against all odds.
- North-West University** : For giving me financial aid and available resources to pursue the degree in Master of Laws.
- Law Faculty Staff** : For their inspiration and motivation.

LIST OF ABBRIVIATIONS

ANC	African National Congress
ASR	African Security Review
ASSAL	Annual Survey of South African Law
BCLR	Butterworths Constitutional Law Reports
CODESA	Convention for a Democratic South Africa
CCLA	Citation of Constitutional Laws Act
CC	Constitutional Court
DA	Democratic Alliance
HCSCJHR	House of Commons Standing Committee on Justice and Human Rights
ICFAI	Institute of Chartered Financial Analysts of India
JCRDL	Journal of Contemporary Roman-Dutch Law
JLH	Journal of Legal History
JPA	Journal of Psychology in Africa
JSC	Judicial Service Commission
LAC	Labour Appeal Court
MPs	Members of Parliament
NCOP	National Council of Provinces
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
PAC	Pan Africanist Congress

PAJA	Promotion of Administration Justice Act
PELJ	Potchefstroom Electronic Law Journal
SACQ	South African Crime Quarterly
SAJC	Southern African Journal of Criminology
SALJ	South African Law Journal
SA	South African Law Reports
SARFU	South African Rugby Football Union
SAJHR	South African Journal on Human Rights
SCA	Supreme Court of Appeal

TABLE OF CONTENTS

DECLARATION BY CANDIDATE	i
ACKNOWLEDGEMENTS	ii
LIST OF ABBRIVIATIONS	iii
ABSTRACT	xi
CHAPTER 1 INTRODUCTION	1
1.1 Background to the Study	1
1.2 Problem Statement	2
1.3 Scope and Limitations of the Study	4
1.4 Literature Review	4
1.4.1 Introduction	4
1.4.2 The Democratic Constitutional Settlement	5
1.4.3 The Independence of the Judiciary	6
1.4.4 The Implications of Judicial Appointments on Independence of the Judiciary	7
1.4.4.1 The Appointment of Judicial Officers and Judicial Independence	7
1.4.4.2 The Appointment of Acting Judicial Officers and Judicial Independence	8
1.4.4.3 The Composition of the Judicial Service Commission and Judicial Independence	9
1.4.5 Conclusion	11
1.5 Research Aims and Objectives	11

1.6	Research Questions	11
1.7	Study Methodology	12
1.8	Study Framework	12
1.9	Significance of the Study	13
CHAPTER 2	JUDICIAL APPOINTMENTS PROCESS IN SOUTH AFRICA	14
2.1	Introduction	14
2.2	Historical Background	14
2.2.1	The Union of South Africa	14
2.2.2	Judiciary under the 1961 Constitutional Dispensation	15
2.2.3	The 1983 Constitutional Regime	16
2.3	Judicial Appointments under the Democratic Dispensation	17
2.3.1	An Overview	17
2.3.2	1993 Constitutional Dispensation	18
2.3.2.1	Adoption of the Interim Constitution	18
2.3.2.2	1993 Constitution: Judicial Officers Appointment Clause	19
2.3.2.3	Composition of the Judicial Service Commission	21
2.3.3	1996 Constitutional Settlement	22
2.3.3.1	Adoption of the 1996 Constitution	22
2.3.3.2	Supremacy of the Constitution	24
2.3.3.3	The Appointment of Judicial Officers	25
2.3.3.3 (a)	The Chief Justice and Deputy Chief Justice	25

2.3.3.3 (b)	The President and Deputy President of the Supreme Court of Appeal	27
2.3.3.3 (c)	Other Judges of the Constitutional Court	28
2.3.3.3 (d)	Other Judicial Officers	28
2.3.3.3 (e)	Appointment of Acting Judges	29
2.3.3.3 (f)	Oath or Affirmation of Judicial Officers	30
2.4	The Composition and Functions of the Judicial Service Commission	31
2.4.1	The Composition of the Judicial Service Commission	31
2.4.2	The Functions of the Judicial Service Commission	36
2.4.2.1	Consultation with the President of the Republic of South Africa	36
2.4.2.2	Nominate, Select and Recommend Candidates for Judicial Appointment	37
2.4.2.2(a)	Procedures of Nominating Candidates for Appointment as Constitutional Court Judges	38
2.4.2.2(b)	Procedure of Selecting Candidates for Appointment as the Supreme Court of Appeal and the High Court Judges	39
2.5	The Role of the President of the Republic of South Africa on Judicial Appointments	42
2.6	Conclusion	47
CHAPTER 3	THE IMPACT OF JUDICIAL APPOINTMENT PROCESS ON JUDICIAL INDEPENDENCE	49
3.1	Introduction	49
3.2	The Constitutional Transition	49

3.3	The Rule of Law	50
3.4	The Legal Parameters of Judicial Independence in South Africa	51
3.4.1	Origin of Judicial Independence	51
3.4.2	General Scope of Judicial Independence	53
3.4.2.1	Impartiality	53
3.4.2.2	Insularity	54
3.4.2.3	Exclusive competence	54
3.4.2.4	Compliance	54
3.4.3	The Constitutional Framework of the Independence of the Judiciary	55
3.4.3.1	Impartiality	55
3.4.3.2	Application of the law without Fear, Favour or Prejudice	62
3.4.3.3	Non-Interference by other Persons or Organs of State	65
3.5	Conclusion	75
CHAPTER 4	JUDICIAL APPOINTMENTS IN OTHER COUNTRIES	76
4.1	Introduction	76
4.2	Canada	76
4.2.1	General Overview	76
4.2.2	Supreme Court of Canada	77
4.2.3.	Nova Scotia	79
4.2.4	New Brunswick	80
4.2.5	Ontario	81

4.2.5.1	Appointment Process	81
4.2.5.2	Composition of the Judicial Appointments Advisory Committee	82
4.2.6	Independence of the Judiciary	83
4.4	Namibia	85
4.4.1	An Overview	85
4.4.2	Composition of the Judicial Service Commission	85
4.4.3	Functions of the Judicial Service Commission	86
4.4.4	The Process of Recommending Judicial Officers of the Supreme Court	86
4.4.5	The Process of Recommending Judicial Officers of the High Court	88
4.4.6	The President's Duty	88
4.4.7	Oath or Affirmation by Judicial Officers	89
4.4.8	Judicial Independence	89
4.5	Conclusion	90
CHAPTER 5	CONCLUSION AND RECOMMENDATIONS	92
5.1	Conclusion	92
5.2	Recommendations	97
5.2.1	Minimising the Composition of the Judicial Service Commission	97
5.2.2	Restructuring the Judicial Service Commission	97
5.2.2.1	The first possible structure of the JSC comprises the following members:	97
5.2.2.2	The second possible structure of the JSC consists of the following	

	members:	98
5.2.3	Functions of the Judicial Service Commission	100
5.2.3.1	Recommend the Chief Justice, Deputy Chief Justice, President and Deputy President of the Supreme Court of Appeal	100
5.2.3.2	Nominating and Selecting the Constitutional Court, Supreme Court of Appeal and High Court Judges	100
5.2.4	The Role of the President	101
4.2.5	The Role of the Chief Justice	101
5.2.6	Appointment of Acting Judges	102
5.2.7	Judicial Office Oath and Affirmation	102
	Bibliography	103

ABSTRACT

In the democratic era in South Africa, the judiciary is an independent branch of government vested with the administration of justice function. It must perform this function through judicial officers who are impartial and without interference from other persons, including state organs. This study is founded on the view that the current process of appointing judicial officers is politically manipulated and dominated by politicians drawn from the executive and the legislative branches. This political influence jeopardises the independence of the judiciary.

A historical synopsis shows that political influence was always present in judicial appointments since the executive dominated such process. In the democratic era, there was an attempt to move away from politically dominated judicial appointments processes, through the adoption of the *Constitution of the Republic of South Africa, 1996 (Constitution)*. However, this did not materialise because the process in Section 174 involves the President, while section 175 involves the Minister of Justice, who are politicians and the Judicial Service Commission (JSC), an institution that is politically dominated in terms of its composition in section 178.

The JSC is central to the judicial appointments process because it assesses the suitability of aspirant judicial officers and ultimately selects, nominates or recommends them to the President for judicial appointment. The politicians from the governing party, selected from Parliament as well as the commissioners, who see their appointment through the President render the JSC as politically dominated. Those commissioners are perceived as political appointees since a politician, being the President, appoints them.

The President appoints judicial officers and acting judges. The Minister of Justice also has the power to appoint the latter. The roles of these two politicians and of those in the JSC establishes political influence on the judicial appointments process which jeopardises the independence of the judiciary. This is because they interfere with the functioning of the courts and judicial officers who see their appointment through this process may not be impartial, when they adjudicate legal disputes where these or other politicians are involved.

The independence of the judiciary is at the heart of the rule of law, because “without an independent judiciary there can be no rule of law.” Section 165 of the *Constitution* guarantees the independence of the judiciary. However, the latter is still jeopardised by the judicial appointments process that is susceptible to political pressures. Since most countries employ different judicial appointments processes, not all are politically manipulated since politicians play a minimum role within such process. Thus, they strive to protect the independence of the judiciary. This study examined Canada and Namibia, to draw lessons that South Africa could learn from the judicial appointments in these two countries that are not politically dominated. In conclusion, the study proposes recommendations through the judicial appointments process in Canada and Namibia, to ameliorate the current process in South Africa.

Key Words: Constitution; Judicial appointments process; judicial officers; Judicial Service Commission; Independence of the Judiciary; Politicians; President

CHAPTER 1

INTRODUCTION

1.2 *Background to the Study*

Independence of the judiciary is a constitutional requirement for the courts to apply the law impartially and without fear, favour or prejudice as well as dispelling any interference by a person or state organs.¹ The courts of law in the Republic of South Africa function through judicial officers,² who preside over legal disputes brought before them by litigants, believing that such disputes would be adjudicated commendably. It is therefore essential that the pertinent authorities, on the basis that they satisfy all the legally outlined prerequisites, should appoint judicial officers. The rationale behind this appointments process is to ensure that judicial officers are suitable, well-skilled and appropriate persons who strive to ensure that justice prevails.

Prior to 1994, South Africa had three constitutions that provided for the process to appoint judicial officers.³ However, if the constitution was silent pertaining to such process, legislation would then be enacted to set out the process of appointing judicial officers in South Africa.⁴ The judicial appointment processes were exclusively politically based, as the executive was vested with the power to make such appointments. In the democratic constitutional dispensation, the President appoints judges through processes provided for in section 174 of the *Constitution of the Republic of South Africa, 1996* (hereinafter referred to as the Constitution).⁵ These processes involve active participation by a greater number of politicians, especially in the Judicial Service Commission (JSC/Commission), being eleven out of twenty-

¹ Section 165 of the *Constitution of the Republic of South Africa, 1996*.

² The twofold concept "judicial officer" is used interchangeably in this research study to refer to to all judges of the Constitutional Court including; the Chief Justice and the Deputy Chief Justice. Supreme Court of Appeal judges including the President and the Deputy President. High Court judges including the Judge President and Deputy Judge President as well as judges of other courts. Acting judges are also included in this concept. Reference will be made to a specific judicial officer if necessary.

³ The Constitutions of the South Africa since 1909 until 1993 are: the *Union of South Africa Act, 1909*; the *Republic of South Africa Constitution Act, 32 of 1961* and the *Republic of South Africa Constitution Act, 110 of 1983*.

⁴ The 1961 and 1983 Constitutions did not contain a clause outlining the legal criteria of judicial appointments. However, the judicial officers were appointed through the *Supreme Courts Act 59 of 1959*.

⁵ Section 174 of the *Constitution of the Republic of South Africa, 1996*.

three and twelve out of twenty-five members as stated below.⁶ This Constitution also affords the President and Minister of Justice the power to appoint acting judicial officers.⁷

The judicial appointments process by the President and Minister of Justice implies political dominance, especially of members from other branches of government such as the legislature. This could have a negative impact on judicial independence. The latter requires the South African judiciary to be impartial, apply the law without any fear, favour or prejudice and freedom from any private persons, government or political influence. For this to materialise, a legal process that safeguards the independence of the judiciary in South Africa is crucial. It is against this background that this study critiques the legal process set for the appointment of judicial officers and strives to ameliorate the inherent challenges.

1.2 Problem Statement

Political dominance within the JSC as well as the powers afforded to the President of South Africa and the Minister of Justice present a problem regarding the appointment of judicial officers in South Africa, as these could be detrimental to social justice. Section 174 of the Constitution provides that the President should appoint judicial officers in his or her capacity as head of the national executive.⁸ He or she appoints the Chief Justice and the Deputy Chief Justice after consulting the JSC and the leader of parties represented in the National Assembly and appoints the President and Deputy President of the Supreme Court of Appeal after consulting the JSC.⁹

Furthermore, the President appoints other Constitutional Court Judges after consulting the Chief Justice and leaders of parties represented in the National Assembly based on a nominations list prepared by the JSC.¹⁰ The latter also advises the President to appoint judges for all other courts.¹¹ Section 175 of the Constitution gives the President the discretion to appoint acting judges from the

⁶ See para 1.2 below.

⁷ Section 175 of the *Constitution of the Republic of South Africa, 1996*.

⁸ Section 174 of the *Constitution of the Republic of South Africa, 1996*.

⁹ Section 174(3) of the *Constitution of the Republic of South Africa, 1996*.

¹⁰ Section 174(4) of the *Constitution of the Republic of South Africa, 1996*.

¹¹ Section 174(6) of the *Constitution of the Republic of South Africa, 1996*.

recommendations of the Minister of Justice with the concurrence of the Chief Justice.¹² Moreover, the Minister of Justice is vested with the power to appoint acting judges. He or she must do so after consulting the senior judge of the court on which the acting judge will serve.¹³

As contained in section 178 of the Constitution,¹⁴ the JSC consists of twenty-three to twenty-five members, depending on whether a judicial appointment should be made to a specific court. A total number of eleven to twelve of its members are politicians appointed to or employed in other branches of government. Six are members of parliament (MPs) from the National Assembly; four are from the National Council of Provinces (NCOP) and one who is the Minister of Justice from the national executive.¹⁵ The Premier also forms part of this Commission if a judicial appointment is made to the High Court Division within his or her province.¹⁶ Other four commissioners who see their appointment through the President,¹⁷ may be viewed as political appointees, thus increasing political support in the JSC.¹⁸ Therefore, there is evident political dominance instead of legal dominance within this institution.

The fact that the President acts as head of the executive when he or she appoints judicial officers and that the JSC comprises of a great number of politicians drawn from the legislature, could negatively affect the independence of the judiciary.¹⁹ Similarly, the appointment of acting judges by the Minister of Justice might have an adverse effect on judicial independence, in the sense that he or she is also a politician and a member of the national executive. The likelihood is that favouritism, any form of relationship or political loyalty above competence, can be the basis of judicial appointments.²⁰

In such instances some, if not all, of politically biased judicial officers may be partial when they preside over cases in which politicians, friends or relatives are involved.

¹² Section 175 of the *Constitution of the Republic of South Africa*, 1996.

¹³ 175 (2) of the *Constitution of the Republic of South Africa*, 1996.

¹⁴ Section 178 (1) of the *Constitution of the Republic of South Africa*, 1996.

¹⁵ Section 178 (1)(d), (h) and (i) of the *Constitution of the Republic of South Africa*, 1996.

¹⁶ Section 178 (1)(k) of the *Constitution of the Republic of South Africa*, 1996.

¹⁷ Section 178 (1)(j) of the *Constitution of the Republic of South Africa*, 1996.

¹⁸ Hoexter "The Judicial Service Commission: Lessons from South Africa" 94-5.

¹⁹ Deegan *South Africa Reborn: Building A New Democracy* 35; Gravett 2017 *JCRDL* 268.

²⁰ Malan 2014 *PELJ* 2020, 2022; Olivier M "The Selection and Appointment of Judges" 152
Olivier M and Hoexter C "The Judicial Service Commission" 169. Misra-Dexter and February
Testing Democracy: Which Way is South Africa Going? 206;

Since the courts function through judicial officers, any judicial appointment made by the President or Minister of Justice based solely on political dominance, is perceived as a direct interference with the effective functioning of the courts. The persistent threat is that such appointments could ultimately serve as a hindrance to judicial independence, thereby impeding justice to prevail.²¹ The premise of this contention emanates from section 165(3) of the Constitution, which provides that no person or organ of state may interfere with the functioning of the courts.

1.3 Scope and Limitations of the Study

This study analyses the appointment of judicial officers in South Africa during the democratic constitutional dispensation, with reference to the Constitution. Focus is on the processes used to appoint judges of the courts as enshrined in section 174 and acting judges in section 175 as well as the composition of the JSC in section 178 of the Constitution. However, the study omits the appointment of other judicial officers such as the magistrates for any district, sub-district or regional division in South Africa. This study further discusses the independence of the judiciary and the way that a great number of politicians participating in the judicial appointment process may affect it. In this regard, the discussion of the judicial independence principle is primarily confined to features such as impartiality, application of the law without fear, favour or prejudice and interfering with the functioning of the courts, in terms of the Constitution.

1.4 Literature Review

1.4.1 Introduction

The literature reviewed in this research comprises academic books as well as journal articles by legal scholars. The contribution made by various authors highlights their views about the appointment of judicial officers to the courts of law and judicial independence in the Republic of South Africa. The following review of literature analyses the processes of appointing judicial officers in the country within the democratic constitutional epoch. This review of literature confirms that such processes present problems that go beyond political dominance within the

²¹ Olivier M “The Selection and Appointment of Judges” 151.

institutions responsible for judicial appointments. It further discusses the negative impact that such a process presents to the judicial independence and concludes that the judiciary is not independent.

1.4.2 *The Democratic Constitutional Settlement*

Magoon indicates that the Convention for a Democratic South Africa (CODESA) was established to negotiate all issues that would ultimately lead to peace in South Africa,²² as well as to the adoption of the Interim Constitution.²³ This means that the latter was drafted as an engine that would engender democracy in the Republic of South Africa. The Interim Constitution was adopted as an Act of parliament, by a then “tricameral” parliament on 27 April 1994.²⁴

The Interim Constitution was transitional in nature in that one of its prime objectives was to set out the procedures which would eventually lead to the drafting of the final Constitution.²⁵ The latter had to be consistent with the thirty-four Constitutional Principles set out in schedule four of the Interim Constitution, in order for it to become law.²⁶ Furthermore, the Constitutional Court had to certify a text of the adopted Constitution, subsequent to a confirmation that it complied with the abovementioned Constitutional Principles.²⁷ As a result of such compliance, the Constitutional Assembly adopted the Constitution of the Republic of South Africa, 1996 on 8 May 1996.²⁸

The Constitution entrenches a clause providing for the appointment of judicial officers.²⁹ It affords the President of the Republic of South Africa, in his capacity as head of the national executive, the power to appoint judicial officers in section 174.³⁰ The President should appoint the Chief Justice and the Deputy Chief Justice after consulting with the JSC and leaders of parties represented in the National Assembly.

²² Magoon *Nelson Mandela: A Leader for Freedom* 81.

²³ *Constitution of the Republic of South Africa Act 200 of 1993*.

²⁴ Heyns *Human Rights Law in Africa* 248.

²⁵ Currie and De Waal *The New Constitutional and Administrative Law* 63.

²⁶ Klug “South Africa’s Experience in Constitution-Building” 68.

²⁷ De Visser *Developmental Local Government: A Case Study of South Africa* 53.

²⁸ De Visser *Developmental Local Government: A Case Study of South Africa* 53.

²⁹ Section 174 of the *Constitution of the Republic of South Africa, 1996*.

³⁰ Section 174 (1) of the *Constitution of the Republic of South Africa, 1996*.

However, Olivier argues that the views and opinions of the JSC and the leader of parties represented in the National Assembly do not oblige the President to follow, but only consider them.³¹ This means that the President cannot be compelled to appoint judicial officers in accordance with the sentiments expressed by the parties that he or she is mandated to consult. Nevertheless, it can be inferred that the President is prohibited from making irrational appointments of judicial officers, as he or she must consider the views and opinions of those parties.

1.4.3 *The Independence of the Judiciary*

Cameron points out that the phrase 'judicial independence' emerges from the separation of powers doctrine.³² Mojapelo succinctly explain that this doctrine requires the executive, the legislature and the judiciary to perform separate functions through different persons, subject to checks and balances, to guard against the abuse of power.³³ However, since the independence of the judiciary is central to this study, it is beyond its scope to discuss the separation of powers in detail.

Independence of the judiciary is guaranteed in section 165 of the 1996 Constitution.³⁴ This section provides that the judiciary is independent and only affected by the Constitution and the law, which its members must apply impartially and without fear, favour or prejudice.³⁵ State organs, or any other person, are also prohibited from interfering with the judicial functions.³⁶ Cameron unpacks this constitutional provision to define judicial independence as involving two things: the institutional independence and the decisional independence.³⁷ The former refers to the judiciary as a branch of government that functions independently from other branches of government, while the latter calls for an individual presiding officer to adjudicate legal disputes free from any compulsion or interference.³⁸

³¹ Olivier M "The Selection and Appointment of Judges" 129.

³² Cameron 2010 *Advocate* 24.

³³ Mojapelo 2013 *Advocate* 38.

³⁴ Section 165 of the Constitution of the Republic of South Africa, 1996.

³⁵ Section 165(2) of the Constitution of the Republic of South Africa, 1996.

³⁶ Section 165(23) of the Constitution of the Republic of South Africa, 1996.

³⁷ Cameron 2010 *Advocate* 24.

³⁸ Cameron 2010 *Advocate* 24.

Smith correctly submits that judicial independence is fundamental to the rule of law,³⁹ a principle that requires all persons and institutions to account through the law that is objectively applied and enforced.⁴⁰ Smith also submits that “without an independent judiciary there can be no rule of law”.⁴¹ In light of this submission, rule of law can only materialise if the judiciary is independent, because courts are custodians of the law. Thus, if the judicial appointment process is politically contaminated to the extent of jeopardising the independence of the judiciary, such process does not promote the rule of law.

Siyo and Mubangizi regard judicial independence as an important factor to democracy.⁴² That is to say the autonomous and equitable judicial system harmonises the lives of persons within a country. This is because the laws that govern them are construed and applied by persons who are members of an institution that functions without anyone meddling in its affairs. An independent judiciary safeguards the interests of people in government to ensure that civil servants are accountable and conduct themselves within legal parameters. A person, who alleges that a government official or any other person has contravened the law, enjoys the opportunity to apply to a court of law, trusting that an independent judicial officer shall remedy such contravention commendably.

1.4.4 The Implications of Judicial Appointments on Independence of the Judiciary

1.4.4.1 The Appointment of Judicial Officers and Judicial Independence

According to Smith, active political participation in the appointment of judicial officers compromises the independence of the judiciary and makes judicial officers fragile to political pressures.⁴³ His perspective is based on the powers afforded to politicians, such as members of the executive.⁴⁴ The President of the Republic of South Africa, in his or her capacity as head of the national executive, and the Minister of Justice are authorised to appoint judicial officers, especially judges and acting judges. Seeing that both serve on other branches of government as politicians, such

³⁹ Smith *Judges and Democratization: Judicial Independence in Democracies* 1.

⁴⁰ Mathews *Law Order and Liberty in South Africa* 3.

⁴¹ Smith *Judges and Democratization: Judicial Independence in Democracies* 1.

⁴² Siyo and Mubangizi 2015 *PELJ* 817.

⁴³ Smith *Judges and Democratization* 53.

⁴⁴ Smith *Judges and Democratization* 53.

authority has the potential of threatening the impartiality and independence of judicial officers.

Olivier is disquieted about the processes of appointing judicial officers in South Africa. He argues that such processes are politically dominated, with the effect of turning a blind eye on persons who are sufficiently qualified to be appointed as judicial officers.⁴⁵ It means that there are more politicians than legal minds involved during the process of appointing judicial officers in South Africa. There is a possibility that judicial officers might be appointed on the basis of political loyalty or preference above competence. Therefore, persons who possess sufficient qualifications and attributes of being judicial officers could be disregarded and side-lined in the process of judicial appointments.

According to Olivier, the processes of appointing judicial officers pose a threat to the quality of the judiciary.⁴⁶ The premise of his argument is based on the quality of judgments delivered by lower courts and subsequently set aside or overturned by the Supreme Court of Appeal. Moreover, there is a palpable lack of success on the administration of justice by the lower courts.⁴⁷ This argument is self-explanatory in the sense that there is a likelihood that the current processes for judicial appointments do not produce all competent judicial officers for the administration of justice and adjudication of legal disputes in the Republic of South Africa.

1.4.4.2 The Appointment of Acting Judicial Officers and Judicial Independence

Olivier also criticises the appointment of acting judges in that it has adverse effects on judicial independence and separation of powers.⁴⁸ His criticism is premised on the then Minister of Justice Jeff Radebe's appointment of Mokotedi Mpshe as an acting judge for the North West High Court for six months in February 2010, while he was an acting National Director of Public Prosecutions (NDPP).⁴⁹ To aggravate this problem, Olivier states that Mr Mpshe, in his capacity as an acting NDPP, withdrew

⁴⁵ Olivier M "The Selection and Appointment of Judges" 152.

⁴⁶ Olivier M "The Selection and Appointment of Judges" 152.

⁴⁷ Olivier M "The Selection and Appointment of Judges" 152.

⁴⁸ Olivier M "The Selection and Appointment of Judges" 151.

⁴⁹ Olivier M "The Selection and Appointment of Judges" 151.

corruption charges against Jacob Zuma so that he could become the President of the Republic of South Africa.⁵⁰

In light of Olivier's criticism highlighted above, clearly the appointment of acting judicial officers could imperil the independence of the judiciary. It is noteworthy that the National Prosecuting Authority is an institution that is supposed to function independently from other government institutions or branches. Having said that, it is surprising to learn that a person acting as head of an independent office was appointed to act as head of another independent office.

It should be borne in mind that Jeff Radebe appointed Mpshe as an acting judge while he was the Minister of Justice under President Jacob Zuma's cabinet. By inference, the latter instructed the Minister of Justice to appoint Mpshe as an acting judge, because Mr Mpshe had withdrawn the charges of corruption against him. Therefore, the then Minister of Justice, Jeff Radebe, appointed Mr Mpshe based on favouritism instead of competency. This means that there is a likelihood that the President of South Africa or the Minister of Justice may appoint acting judges based on political loyalty, favouritism or any form of relationship above competence.

1.4.4.3 The Composition of the Judicial Service Commission and Judicial Independence

Malan states that the JSC does not form part of the national executive.⁵¹ As such, this institution does not exercise the powers nor perform the functions of the cabinet but exists independently of it. However, he argues that the manner in which the JSC is constituted provides more positions for members of the governing political party than impartial judicial members.⁵² This allows the governing party to always have undue influence on the decision-making of the JSC through its members, thus permitting the governing party to exercise an indirect control over the JSC. By inference, members of the governing party execute the mandate of their political party when they perform the functions of the JSC.

⁵⁰ Olivier M "The Selection and Appointment of Judges" 151.

⁵¹ Malan 2014 *PELJ* 1968.

⁵² Malan 2014 *PELJ* 1968.

According to Deegan, the number of politicians within the JSC amounts to politicising this institution.⁵³ This means that the greater number of politicians within the JSC could render this institution as a political institution instead of a body that is responsible for nominating and recommending members of the judiciary. It is worth mentioning that most, if not all, of those politicians are not legal scholars, nor practitioners. Therefore, political dominance within the JSC is another negative factor impaling judicial independence.

Hoexter and Olivier also share these sentiments that the greater number of politicians and political appointees in the JSC certainly makes it more likely that political considerations will play a role in the process of judicial appointments.⁵⁴ They further hold that the danger herein imperils the judicial status and autonomy of the JSC.⁵⁵ Their sentiments are reasonable in that most of the politicians in this institution are frequently drawn from the governing party, as Hoexter has also noted elsewhere.⁵⁶

Hoexter further observed that the four JSC commissioners subject to appointment by the President are occasionally regarded as lay men, but argues that the President has drawn them largely from the legal profession, merely because he prefers them.⁵⁷ She opines that their impartiality may be doubtful.⁵⁸ The fact that the President appoints the four commissioners increases the risk of them being perceived as his loyalists, who might recommend or nominate favourable candidates to the President for judicial appointment.

Hoexter and Olivier submit that the composition of the JSC gives most of its members the opportunity to vote for judicial candidates who are devoted to the majority party instead of those suitably qualified.⁵⁹ That is to say the previously mentioned JSC members may give preference to candidates who have had some form of relationship with the governing political party or its officials. In a nutshell, this bears the possibility of recommending or nominating candidates for judicial

⁵³ Deegan *South Africa Reborn: Building A New Democracy* 35.

⁵⁴ Olivier M and Hoexter C "The Judicial Service Commission" 175.

⁵⁵ Olivier M and Hoexter C "The Judicial Service Commission" 175.

⁵⁶ Hoexter "The Judicial Service Commission: Lessons from South Africa" 94-95.

⁵⁷ Hoexter "The Judicial Service Commission: Lessons from South Africa" 94.

⁵⁸ Hoexter "The Judicial Service Commission: Lessons from South Africa" 94.

⁵⁹ Olivier M and Hoexter C "The Judicial Service Commission" 169.

appointments based on political loyalty above competence. A threat is presented to the independence of the judiciary in this regard, with the effect that, some, if not all of those referred candidates might not adjudicate the legal disputes involving politicians or government officials impartially after their appointments as judicial officers.

1.4.5 Conclusion

Considering the literature reviewed in this study, it is evident that there is political dominance in the judicial appointment processes, as the President and the Minister of Justice play an active role. This is further compromised by the composition of the JSC. The discussions and opinions reviewed in this literature highlight that the current processes of appointing judicial officers in South Africa imperils the independence of the judiciary enshrined in the Constitution. Thus, the present research delves into the challenges that those judicial appointment processes present to judicial independence in South Africa. Moreover, it is necessary for the study to recommend possible solutions that seek to remedy the challenges identified herein.

1.5 Research Aims and Objectives

The aim and objectives of this study are set to:

- Determine the potential political manipulation in the judicial appointments and its threats to the independence of the judiciary; and
- Highlight the lessons that South Africa could learn from other countries such as Canada and Namibia, regarding the judicial appointments process that are not politically manipulated.

1.6 Research Questions

The study questions are as follows:

- Are the current judicial appointments processes politically contaminated and jeopardising judicial independence? and
- Is the process of appointing judicial officers in South Africa more exposed to political influence than in other countries?

1.7 Study Methodology

The study is desktop based and qualitative interrogation carried out through the analysis of data identified in a variety of existing primary as well as secondary sources. The primary sources include South African constitutions which were adopted since the formation of the Union of South Africa to date. However, the focus of the study is on the *Constitution of the Republic of South Africa, 1996*. Legislation and reported judgments of the South African courts of law that impact directly or indirectly on judicial appointments are also analysed. The secondary sources consist of the literature reviewed. Internet sources were consulted to augment current judgments and case studies. This study complies with the referencing style of Potchefstroom Electronic Law Journal approved on 23 August 2016.

1.8 Study Framework

This study is structured and framed by the following chapters:

Chapter 1: Introduction

This initial chapter serves as a preface of this study. It outlines the problem statement, the study aims and objectives, research questions, scope and limitations, rationale and justification, a brief review of literature, research methodology, as well as the significance of this study.

Chapter 2: Judicial Appointments in South Africa

The chapter analyses the new constitutional dispensation leading to a democratic South Africa. It also outlines the processes of appointing judicial officers in South Africa, during the 1993 and 1996 constitutional settlements. The primary aim of this chapter is to highlight the political influence on judicial appointments.

Chapter 3: The Impact of Judicial Appointment Process on Judicial Independence

The chapter defines the parameters of judicial independence and unpacks its meanings and connotations in terms of the Constitution of the Republic of South

Africa, 1996. The aim is to highlight the negative impact that the judicial appointment process in South Africa presents to the independence of the judiciary.

Chapter 4: Judicial Appointments in other Countries

This chapter discusses the judicial appointments processes in other countries such as Canada and Namibia. The objective is to highlight the good lessons that South Africa could learn from these countries pertaining to the judicial appointment processes that are not politically dominated and where such processes protect and uphold judicial independence.

Chapter 5: Conclusion and Recommendations

The aim of this chapter is to give a concise summary of salient aspects highlighted in the study. It also recommends possible solutions concerning the challenges and problems pertaining to the process of judicial appointments on judicial independence in South Africa.

1.9 *Significance of the Study*

This study anticipates benefiting legal scholars and practitioners by enabling them to comprehend the present challenges to judicial independence regarding the process of appointing judicial officers. It also benefits academics and society to understand the legal parameters of the independence of the judiciary. The outcome of this study could subsequently lead to a modification of the current processes of appointing judicial officers in South Africa. It could ultimately influence the amendment of the constitutional and legislative provisions dealing with such processes.

CHAPTER 2

JUDICIAL APPOINTMENTS PROCESS IN SOUTH AFRICA

2.1 Introduction

The state needs a judicial body to administer justice and give effect to the legal rules within its territory. Such a judicial body is usually known as the judiciary, an umbrella of members tasked with judicial functions in different courts of law. Members of the judiciary see their appointment through various lenses that involve persons from the legal profession, executive and legislative organs of state. The principal aim of this chapter is to analyse the process used to appoint judicial officers in South Africa during the post-1994 constitutional dispensation. The significant point of departure in this study is a historical synopsis of the judicial appointments process in South Africa before 1994, to highlight the developments that transpired in that process until the present.

The chapter also provides a concise summary of the events that led to the adoption of the interim and 1996 constitutions of the Republic of South Africa, as well as an analysis of the judicial appointments provisions under these Constitutions. It further highlights the manner in which political influence persists in the judicial appointments process, with a focus on the composition and functions of the JSC. The roles of the President (as head of the national executive) and the Minister of Justice within this process of appointing judicial officers is also discussed in this chapter. At this point, the study gives a short historical background to the judicial appointments process in South Africa.

2.2 Historical Background

2.2.1 The Union of South Africa

The adoption of the Constitution by parliament of this epoch led to the formation of the Union of South Africa in 1909, through the amalgamation of the British colonies such as the Cape of Good Hope, Natal, Orange River Colony and Transvaal. This era marks the establishment of the Supreme Court of South Africa in 1910.⁶⁰ The

⁶⁰ Van Niekerk 2013 *Fundamin* –JLH 110; Van der Merwe and Du Plessis *Introduction to the*

Constitution of the Union of South Africa afforded the Governor General in council the power to appoint judicial officers. It provided that the Governor General shall appoint the Chief Justice, ordinary judges of appeal, and all other judges of the Supreme Court of the Union of South Africa.⁶¹

2.2.2 *Judiciary under the 1961 Constitutional Dispensation*

In 1961, the political landscape of the country changed slightly, especially within the government. The Constitution of the Republic of South Africa,⁶² repealed the Constitution of the Union of South Africa.⁶³ In addition, the country was no longer called the Union of South Africa but the Republic of South Africa.⁶⁴ Furthermore, the office of the State President substituted the Governor General and the state president was then vested with the power to appoint judicial officers.⁶⁵ However, the Constitution of the Republic of South Africa did not contain the provisions which provided for the appointment of judicial officers. Instead, they were appointed under the *Supreme Courts Act*.⁶⁶ In terms of this legislation, the State President appropriated the power to appoint the Chief Justice, all other judges of the Supreme Court and the deputy judge president of a provincial divisions.⁶⁷

Unlike the Constitution of the Union of South Africa, which provided for the appointment of judicial officers only without outlining the prerequisites for such appointments, the *Supreme Courts Act* required a prospective judicial officer to be a fit and proper person in order to qualify for the appointment. However, the words “fit and proper” were not qualified to ascertain the qualities of such a person appointed as a judicial officer. Consequently, this ambivalence saw the appointment of judicial

Law of South Africa 433; Van Niekerk 2013 *Fundamina-JLH* 118.

⁶¹ Section 100 of the *Union of South Africa Act*, 1909.

⁶² The Republic of South Africa Constitution Act 32 of 1961 was an Act which was enacted by the Parliament of South Africa to establish the Republic of South Africa and to provide for matters incidental thereto. See the long title of the Act.

⁶³ The Union of South Africa Act, 1909.

⁶⁴ See section 1 of the *Republic of South Africa Constitution Act* 32 of 1961, which provided that the Union of South Africa consisting of the provinces of the Cape of Good Hope, Natal, the Transvaal and the Orange Free State as they existed immediately prior to the commencement of this Act, shall as from the thirty-first day of May 1961, be a republic under the name of the Republic of South Africa.

⁶⁵ Section 3 (b) of the *Republic of South Africa Constitution Act* 32 of 1961.

⁶⁶ *Supreme Courts Act* 59 of 1959.

⁶⁷ Section 10 (1) (a) of the *Supreme Courts Act* 59 of 1959.

officers being made from the ranks of only white male senior advocates,⁶⁸ except Judge Leonora van den Heever, a single, female, white person to be appointed to the Northern Cape Provincial Division in 1969.⁶⁹ The Minister of Justice also had the power to appoint a 'fit and proper' person to act as a judge, subject to the condition that the latter did not exceed a period of one month acting as a judge.⁷⁰

2.2.3 *The 1983 Constitutional Regime*

The 1961 Constitution was repealed in 1983 and replaced by the 1983 Constitution, which was adopted in the very same year.⁷¹ This Constitution also did not incorporate provisions that provided for the process of appointing judicial officers. These judicial officers were also appointed under the *Supreme Court Act*,⁷² through the same process as the one discussed above.⁷³ Only white male persons were appointed as judicial officers in South Africa, except Mr Hassan Mall, an Indian, who was appointed as an acting judge to the Natal Supreme Court for only one month of February 1987.⁷⁴ Ismail Mahomed became the first non-white person to be appointed as a judicial officer of the Supreme Court of South Africa in 1991.⁷⁵

It is evident from the historical brief discussed above that judicial officers were appointed through a process that was politically stained. This is because the head of the national executive always executed those appointments out of his own accord. The Minister of Justice also had the power to appoint acting judges. This research now shifts focus to the judicial appointments process in the democratic era, to ascertain whether or not South Africa has significantly moved away from the form of politically contaminated judicial appointment process highlighted above.

⁶⁸ Mokgatle 1987 SAJHR 45; Dugard *Human Rights and the South African Legal Order* 10-11; Ahmed An-Na'im *Human Rights under African Constitutions-Realizing the Promise for Ourselves* 311. ; Albertyn "Judicial Diversity" 246. Oxtoby 2017 SLR 540;

⁶⁹ Olivier "The Selection and Appointment of Judges" 119; Green *Around and About: Memoirs of A South African Newspaperman* 150.

⁷⁰ Section 10(4) of the *Supreme Courts Act* 59 of 1959.

⁷¹ The *Republic of South Africa Constitution Act* 110 of 1983.

⁷² *Supreme Courts Act* 59 of 1959.

⁷³ See para 2.2.2 above.

⁷⁴ Green *Around and About: Memoirs of A South African Newspaperman* 158; Mokgatle 1987 SAJHR 46.

⁷⁵ Cummings *The Paradox of Professionalism: Lawyers and the Possibility of Justice* 207; Olivier "The Selection and Appointment of Judges" 119.

2.3 *Judicial Appointments under the Democratic Dispensation*

2.3.1 *An Overview*

The journey towards democracy in South Africa was strenuous and arduous. It required courageous men and women to contend and compromise during the negotiations. These negotiations were set to determine the future of South Africa. One of the men who proffered sterling contributions was activist and ANC leader Nelson Mandela, who held secret meetings with the officials of the apartheid government prior to his release from prison in 1990.⁷⁶ The motive behind his release was to engender peace and determine the political the future of South Africa through negotiations.⁷⁷

The Convention for a Democratic South Africa (CODESA) came into existence on 20 December 1991,⁷⁸ negotiating matters of national importance that would ultimately culminate in peace and stability in South Africa.⁷⁹ Some of the parties present at CODESA had different opinions, regarding some critical issues raised by the attendees and delegates from various political parties and liberation movements at that time.⁸⁰ These contesting opinions eventually led to a stalemate during CODESA negotiations.⁸¹ Therefore, CODESA failed to fulfil its mandate in as much as it failed to draft the new constitution.

However, talks resumed through a multi-party negotiation process held at the World Trade Centre near Johannesburg on 05 March 1993.⁸² Among the attendees were

⁷⁶ McCulloch *Charisma and Patronage: Reasoning with Max Webber* 160. Nelson Mandela was released from Victor Vester Prison by Frederik Willem de Klerk on 11 February 1990. See also Amarteifio *Humanity and the Nature of Man* 108.

⁷⁷ Magoon *Nelson Mandela: A Leader for Freedom* 81.

⁷⁸ CODESA was a symposium which was convened on 20 December 1991 at the World Trade Centre in Kempton Park. It was attended by delegates from various political parties including the National Party, African National Congress and the Inkatha Freedom Party. See Giliomee and Mbenga *New History of South Africa* 403; De Visser *Developmental Local Government: A Case Study of South Africa* 52.

⁷⁹ Magoon *Nelson Mandela: A Leader for Freedom* 81. Ndlovu-Gatsheni *The Decolonial Mandela: Peace, Justice and the Politics of Life* 103.

⁸⁰ Currie and De Waal *The New Constitutional and Administrative Law* 60. Ndlovu-Gatsheni *The Decolonial Mandela: Peace, Justice and the Politics of Life* 102;

⁸¹ Currie and De Waal *The New Constitutional and Administrative Law* 61; Giliomee and Mbenga *New History of South Africa* 403.

⁸² Spitz and Chaskalson *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* 35; Currie and De Waal *The New Constitutional and Administrative Law* 61.

delegates from various political parties, the legal fraternity and academia.⁸³ Despite the complications emanating from the disputes among the participants who held various views pertaining to some matters, concessions were made to overcome such teething troubles. This culminated in the drafting of the Interim Constitution by the Constitutional Assembly that was ultimately adopted by the tricameral Parliament on 27 April 1994.⁸⁴

2.3.2 1993 Constitutional Dispensation

2.3.2.1 Adoption of the Interim Constitution

The Interim Constitution outlined the process of appointing judicial officers in South Africa during the 1993 constitutional dispensation.⁸⁵ The tricameral Parliament adopted this Constitution as an Act of Parliament on 27 April 1994.⁸⁶ The Interim Constitution served as a legal tool produced during the negotiations referred to above.⁸⁷ It aimed at establishing a government of national unity and transforming the Republic of South Africa from parliamentary sovereignty to constitutional democracy.⁸⁸ It is beyond the scope of this study to define and delve into the parameters of parliamentary sovereignty and constitutional supremacy.⁸⁹

It should be borne in mind that the Interim Constitution was transitional in nature, in that its prime objective was to set out the procedures, which would eventually lead to the drafting of the “final Constitution”.⁹⁰ This Constitution stipulated that the Constitutional Assembly must enact the “final Constitution.” The Constitutional Assembly was obliged to enact it within two years from the date of the first sitting of

⁸³ Currie and De Waal *The New Constitutional and Administrative Law* 61.

⁸⁴ Currie and De Waal *The New Constitutional and Administrative Law* 63-64.

⁸⁵ *Constitution of the Republic of South Africa, Act 200 of 1993.*

⁸⁶ Van der Merwe and Du Plessis *Introduction to the Law of South Africa* 63-65; Heyns *Human Rights Law in Africa* 248.

⁸⁷ See para 2.3.1 above.

⁸⁸ Fessha *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* 86; Klug *The Constitution of South Africa: A Contextual Analysis* 4.

⁸⁹ According to Humby, parliamentary sovereignty is the supreme controlling power to make and enforce decisions in the form of legislation which exclusively vest in an elected parliament. She also explained constitutional sovereignty (supremacy) by making reference to the Constitution, that it means the Constitution is supreme and any law or conduct that is inconsistent with it is invalid. See Humby *Introduction to Law and Legal Skill in South Africa* 24-26.

⁹⁰ De Waal “Constitutional Law” 63; Morris, Boston and Butler *Reconstituting the Constitution* 60-63.

the National Assembly under this Interim Constitution.⁹¹ The Interim Constitution also enshrined thirty-four constitutional principles in schedule four. This constitution mandated the Constitutional Assembly to ensure that the “final Constitution” was in accordance with the previously mentioned principles.⁹²

It is pertinent at this juncture to emphasise that the Interim Constitution provided for the establishment of the Constitutional Court of the Republic of South Africa.⁹³ Thus, the latter came into existence under this constitutional dispensation.⁹⁴ Consequently, the Constitutional Court became the highest court of the land in the Republic of South Africa.⁹⁵ It should also be noted that the official opening of this court took place on 14 February 1995,⁹⁶ through a ceremony conducted by Nelson Mandela, then President of the Republic of South Africa.⁹⁷

2.3.2.2 1993 Constitution: Judicial Officers Appointment Clause

As already stated above,⁹⁸ the Interim Constitution outlined the process for judicial appointments. It incorporated a clause on the appointment of the Chief Justice of the Supreme Court as well as the President of the Constitutional Court of the Republic of South Africa in section 97, which provided:

(1) There shall be a Chief Justice of the Supreme Court of South Africa, who shall, subject to section 104, be appointed by the President in consultation with the Cabinet and after consultation with the Judicial Service Commission.

(2) (a) There shall be a President of the Constitutional Court, who shall, subject to section 99, be appointed by the President in consultation with the Cabinet and after consultation with the Chief Justice.⁹⁹

Considering the constitutional provision set out above, it is evident that the Interim Constitution lucidly stated the way judicial officers should be appointed. The President of the Republic of South Africa was vested with the power to appoint the

⁹¹ Section 73 of *the Constitution of the Republic of South Africa Act 200 of 1993*.

⁹² Klug “South Africa’s Experience in Constitution-Building” 68-72; Joubert *Applied Law for Police Officials* 5. McLean *Constitutional Deference, Courts and Socio-economic Rights in South Africa* 12;

⁹³ S 98(1) of the *Constitution of the Republic of South Africa Act 200 of 1993*.

⁹⁴ Roux *The Politics of Principle: The First South African Constitutional Court, 1995-2005* 2.

⁹⁵ Section 98(2) of the *Constitution of the Republic of South Africa Act 200 of 1993*.

⁹⁶ Rautenbach “South Africa: Teaching an ‘Old Dog’ New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995-2010)” 357.

⁹⁷ Roux *The Politics of Principle: The First South African Constitutional Court, 1995-2005* 2.

⁹⁸ See para 3.3.1

⁹⁹ Section 97 of the *Constitution of the Republic of South Africa Act 200 of 1993*.

Chief Justice of the Supreme Court of South Africa.¹⁰⁰ It is worth mentioning that the President was a head of the executive which is another branch of government. Moreover, he was a politician affiliated to a political party.

However, the President did not make judicial appointments out of his sole discretion, as there were parties that he or she ought to consult prior to the appointment of the Chief Justice of the Supreme Court of South Africa.¹⁰¹ Those parties are the JSC,¹⁰² and subsequently the cabinet, which is the national executive. The then President of the Republic of South Africa, Mr Nelson Mandela, appointed Ismail Mahomed as the first Chief Justice of the Supreme Court of a democratic South Africa in 1997.¹⁰³ Nonetheless, Mr Mahomed assumed this office of the Chief Justice in 1998.

Furthermore, the President of the Republic of South Africa was also vested with the prerogative to appoint the President of the Constitutional Court.¹⁰⁴ It is not necessary at this juncture to discuss the process that was used to appoint the President of the Constitutional Court, since it is almost the same as the one followed in appointing the Chief Justice of the Supreme Court of South Africa. Nevertheless, the President of the Republic of South Africa had to consult the latter instead of the JSC.¹⁰⁵ In addition to this procedure, the appointments were to be made exclusively from persons recommended by the JSC, which was then obliged to furnish reasons for such recommendations.¹⁰⁶

¹⁰⁰ The Supreme Court of South Africa comprised of Appellate Division and different provincial divisions. See Erasmus "The Law of Civil Procedure" 433.

¹⁰¹ S 97(1) of the *Constitution of the Republic of South Africa Act 200 of 1993*

¹⁰² S 105(1) of the *Constitution of the Republic of South Africa Act 200 of 1993* provided that the Judicial Service Commission consist of the Chief Justice, who shall preside at the meetings of the Commission, President of the Constitutional Court, one Judge President designated by the judges President, the Minister responsible for the administration of justice or his or her nominee, two practising advocates designated by the advocates' profession two practicing attorneys designated by the attorneys' profession, one professor of law designated by the deans of all the law faculties at South African universities, four senators designated en bloc by the Senate by resolution adopted by a majority of at least two-thirds of all its members, four persons, two of whom shall be practising attorneys or advocates, who shall be designated by the President in consultation with the Cabinet, the Judge President of the relevant division and the Premier of the relevant province on the occasion of the consideration of matters specifically relating to a provincial division of the Supreme Court. S 88 (1) provided that the Cabinet shall consist of the President, the Executive Deputy Presidents and not more than 27 Ministers appointed by the President in accordance with this section.

¹⁰³ Dawson *Justice as Atonement: Transforming Constitutions in Law, Literature, Economics and the Rest of Life* 146.

¹⁰⁴ Section 97(2) of the *Constitution of the Republic of South Africa Act 200 of 1993*.

¹⁰⁵ Section 97(2) of the *Constitution of the Republic of South Africa Act 200 of 1993*.

¹⁰⁶ Section 99 (5) (a) of the *Constitution of the Republic of South Africa Act 200 of 1993*.

Nelson Mandela, the then President of the Republic of South Africa, appointed Arthur Chaskalson as the first President of the Constitutional Court in June 1994.¹⁰⁷ The interim constitution also afforded the President of South Africa the power to appoint judges of the Constitutional Court,¹⁰⁸ and required that four of those judges be appointed from among judges of the Supreme Court.¹⁰⁹ The President of the Republic of South Africa must execute such judicial appointments, after the latter has consulted with the cabinet and the Chief Justice of the Supreme Court.¹¹⁰ The JSC also had to prepare a list of ten nominees and submit this to the President so that he could appoint six judges of the Constitutional Court from such list.¹¹¹

2.3.2.3 Composition of the Judicial Service Commission

The JSC comprised of seventeen to nineteen members.¹¹² Seventeen members were sitting for judicial appointments to the Constitutional Court and the Supreme Court while nineteen members were set for the appointment of judicial officers to the provincial division of the Supreme Court. Ten out of seventeen of its members were legal minds; the Chief Justice who chairs the meetings, President of the Constitutional Court, Judge President, two practising advocates, two practising

¹⁰⁷ Mwakikagile *South Africa in Contemporary Times* 76; Roux *The Politics of Principle: The First South African Constitutional Court, 1995-2005* 2; Cort and Segal *One Law, One Nation: The Making of the South African Constitution* 200; Shimoni *Community and Conscience: The Jews in Apartheid South Africa* 191.

¹⁰⁸ Section 99 (1) of the *Constitution of the Republic of South Africa Act* 200 of 1993.

¹⁰⁹ Section 99 (3) of the *Constitution of the Republic of South Africa Act* 200 of 1993.

¹¹⁰ Section 99 (3) of the *Constitution of the Republic of South Africa Act* 200 of 1993.

¹¹¹ Section 99 (5) (a) of the *Constitution of the Republic of South Africa Act* 200 of 1993.

¹¹² Section 105 of the *Constitution of the Republic of South Africa Act* 200 of 1993 provides:
105 Judicial Service Commission

(1) There shall be a Judicial Service Commission, which shall, subject to subsection (3), consist of:

(a) the Chief Justice, who shall preside at meetings of the Commission;
(b) the President of the Constitutional Court;
(c) one Judge President designated by the Judges President;
(d) the Minister responsible for the administration of justice or his or her nominee;
(e) two practising advocates designated by the advocates' profession;
(f) two practising attorneys designated by the attorneys' profession;
(g) one professor of law designated by the deans of all the law faculties at South African universities;
(h) four senators designated en bloc by the Senate by resolution adopted by a majority of at least two-thirds of all its members;
(i) four persons, two of whom shall be practising attorneys or advocates, who shall be designated by the President in consultation with the Cabinet;
(j) on the occasion of the consideration of matters specifically relating to a provincial division of the Supreme Court, the Judge President of the relevant division and the Premier of the relevant province.

attorneys, one professor of law, Judge President of the relevant division and two persons who were practising attorneys or advocates. However, the appointment of the latter two persons could have been politically motivated, because the President of South Africa appointed them after consulting his cabinet.¹¹³⁻

In this regard, their independence in the JSC was questionable in the sense that the President could have appointed them from his political party or they were his loyalists. Thus, the number of independent legal minds was reduced to eight for the judicial appointments of the Supreme Court and Constitutional Court, leaving nine for the Supreme Court provincial division bench. Consequently, this left the composition of the JSC tainted with political dominance of eleven members for the judicial appointments of the Supreme Court and Constitutional Court, leaving only ten for the appointment of judicial officers to the Supreme Court provincial division. It is in this context that the researcher submits that there was political influence on the judicial appointments under the Interim Constitution.

As stated above,¹¹⁴ the Interim Constitution was transitional, in the sense that it mandated for the drafting of the “final Constitution”, in accordance with its Constitutional Principles. Put differently, the primary aim of the Interim Constitution was to pave way for the adoption of the 1996 Constitution.

2.3.3 1996 Constitutional Settlement

2.3.3.1 Adoption of the 1996 Constitution

The 1996 constitutional settlement heralds the democratic era in which the Constitutional Assembly adopted the *Constitution of the Republic of South Africa, 1996*, on 8 May 1996.¹¹⁵ This Constitution had to conform to the thirty-four

¹¹³ Hoexter “The Judicial Service Commission: Lessons from South Africa” 86.

¹¹⁴ See para 2.3.2.1 above.

¹¹⁵ Although the primary objective of the 1993 Constitution was to set out the procedures which will eventually lead to drafting of the “final Constitution”, the researcher decided not to make reference to the *Constitution of the Republic of South Africa, 1996* as the “final Constitution”. The researcher is of the view that due to the historical and current state of politics in the Republic of South Africa, there might be other constitutions that might be adopted after this one. Therefore, the *Constitution of the Republic of South Africa, 1996*, will be hereinafter referred to as the Constitution. See De Visser *Developmental Local Government: A Case Study of South Africa* 53. Fassbender *The United Nations Charter as the Constitution of the International Community* 57. Oomen *Chiefs in South Africa: Law, Culture, and Power in the Post-Apartheid Era* 52. Kleyn and Viljoen *Beginners Guide for Law Students* 218.

Constitutional Principles stipulated in schedule four of the Interim Constitution, for it to be valid and become the supreme law of the land.¹¹⁶ Among those thirty-four Constitutional Principles, the Interim Constitution incorporated a Constitutional Principle VII, which provided for the appointment of judicial officers as well as guaranteeing the independence of the judiciary.¹¹⁷

The Constitutional Court was tasked to certify a text of the adopted 1996 Constitution, subject that it complied with the abovementioned Constitutional Principles.¹¹⁸ However, the Constitutional Court found that such adopted text did not meet the standard of compliance required by the Interim Constitution. In the light of such constitutional non-compliance, it was unfortunate for the Constitutional Assembly to learn that a text of the 1996 Constitution could not be certified by the Constitutional Court.¹¹⁹ The latter returned the adopted text of the 1996 Constitution to the Constitutional Assembly for careful consideration and amendment to ensure that it conformed to the thirty-four Constitutional Principles.¹²⁰

The Constitutional Assembly gathered to amend the adopted 1996 constitution text within four weeks of the Constitutional Court judgment.¹²¹ The Assembly then made numerous amendments on the returned constitution text and subsequently adopted such amended text on 11 October 1996.¹²² The Constitutional Assembly further submitted the amended constitution text to the Constitutional Court for purposes of certification.¹²³ The court approved and certified the amended constitution text on 4 December 1996.¹²⁴ President Nelson Mandela ultimately signed the Constitution into

¹¹⁶ Kleyn and Viljoen *Beginners Guide for Law Students* 218; Klug Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* 16; “South Africa’s Experience in Constitution-Building” 68.

¹¹⁷ A Constitutional Principle VII provided that The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

¹¹⁸ Botha *Statutory Interpretation: An Introduction for Students* 57; De Visser *Developmental Local Government: A Case Study of South Africa* 53.

¹¹⁹ *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of The Republic of South Africa, 1996* 1996 (4) SA 744 (CC). This was the first certification judgement.

¹²⁰ Liebenberg “Adjudicating Social Rights Under a Transformative Constitution” 75.

¹²¹ De Visser *Developmental Local Government: A Case Study of South Africa* 53.

¹²² Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* 16.

¹²³ *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of The Republic of South Africa, 1996* 1997 (2) SA 97 (CC). This was the second certification judgement.

¹²⁴ *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC).

law on 10 December 1996 and it came into effect on 4 February 1997 as the supreme of the country.¹²⁵

2.3.3.2 Supremacy of the Constitution

Section 2 of the 1996 Constitution provides that:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and obligations imposed by it must be fulfilled.¹²⁶

This constitutional provision stresses the fact that the Constitution is the highest law of the land and it is above any other law in the Republic. By virtue of its supremacy, all persons must conduct themselves within the confines of the Constitution. Furthermore, all events that unfold within the territories of the Republic of South Africa must conform to the provisions of this constitution. In the absence of such conformity, an event or conduct is deemed illegal or unconstitutional. This means that it can be declared invalid by the courts of law within the Republic. The last part of this constitutional provision mandates any concerned persons to discharge their duties as required by and enshrined in the Constitution.

¹²⁵ Turner *The Statesman's Yearbook 2008: The Politics, Cultures and Economies of the World* 1126; Currie and De Waal *The Bill of Rights Handbook* 7; Freedman *Understanding the Constitution of the Republic of South Africa* V; Andrews and Ellmann *The post-apartheid constitutions: perspectives on South Africa's basic law* 185; Lind "Politics, Partnership Rights and the Constitution in South Africa...(and the Problem of Sexual Identity)" 279; Ebrahim *The Soul of a Nation: Constitution-Making in South Africa* 670; South Africa Department of Education *The Age of Hope: Century of Struggle to Freedom 1906-2006* 85. Joubert and Prinsloo *The Law of Education in South Africa* 31. Human Rights Watch *South Africa: Violence against Women and the Medico-legal System* 8. This Constitution, entitled the *Constitution of the Republic of South Africa Act* 108 of 1996, became the supreme law of the country. However, the Constitutional Assembly was a legitimate body that adopted this Constitution, not Parliament nor the National Assembly. Therefore, it is quite disturbing to learn that it was referred to as an "Act" and a number being affixed to its name, to reflect it as an Act of Parliament. This study lends academic support to Van Heerden's perspective, that such was an administrative error to affix a number to the Constitution of the Republic of South Africa. see Van Heerden 2007 *Politeia* 33. It is plausible that Parliament enacted a piece of legislation called the *Citation of Constitutional Laws Act (CCLA)* 05 of 2005, to rectify the previously mentioned administrative error. The primary objective of the CCLA is to ameliorate a method for referring to the Constitution of the Republic of South Africa, without attaching any number to its title. See Section 1 of the *Citation of Constitutional Laws Act* 5 of 2005 providing that no Act number to be associated with the *Constitution of the Republic of South Africa*, 1996. The basis of this modification emanates from the fact that it is only the legislature that enacts legislation. Be that as it may, it has already been indicated above that the Constitutional Assembly adopted this Constitution. Thus, the latter must be distinguished from a legislation and there should not be a number affixed to it like other ordinary Acts of parliament, as it is the supreme law of the land. See a Preamble of the *Citation of Constitutional Laws Act* 5 of 2005.

¹²⁶ Section 1 of the *Constitution of the Republic of South Africa*, 1996.

It is worth noting that judicial appointments must be executed in line with the Constitution. Moreover, the process used to appoint judicial officers should reflect the supremacy of the Constitution. Differently put, judicial appointments must protect and preserve judicial independence required by the supreme law of the land. Persons who appoint judicial officers and the appointed officers must ensure that they conduct themselves within the confines of the constitutional obligations. It is pertinent to highlight the current processes of appointing judicial officers in terms of the Constitution as the supreme law of the land.

2.3.3.3 The Appointment of Judicial Officers

Since the adoption of the 1996 Constitution, judicial officers have been appointed under the Constitution. This Constitution incorporates the appointment of judicial officers' clause in section 174 which provides for the appointment of the Chief Justice, Deputy Chief Justice, President and Deputy President of the Supreme Court of Appeal. It further states the process of appointing other judges of the Constitutional Court and all other courts. Moreover, it dictates that other judicial officers should be appointed in terms of an Act of Parliament.

2.3.3.3 (a) The Chief Justice and Deputy Chief Justice

The President of the Republic of South Africa is vested with the power to appoint the Chief Justice and the Deputy Chief Justice of the Constitutional Court.¹²⁷ The President exercises such power in his capacity as head of the national executive and the cabinet. There is a need for consultation to take place prior to the appointment of judicial officers by the President. The latter should appoint judicial officers after consulting the JSC and the leaders of the political parties represented in the National Assembly. However, the views and opinions of the parties consulted by the president do not oblige him or her to follow but to consider them.¹²⁸ The required consultation means that the President could merely inform the JSC and the National Assembly about his or her intention to appoint a particular person as a judicial officer.¹²⁹

¹²⁷ Section 174 (3) of the *Constitution of the Republic of South Africa*, 1996.

¹²⁸ Olivier "The Selection and Appointment of Judges 129. ; Misra-Dexter and February *Testing Democracy: Which Way is South Africa Going?* 107.

¹²⁹ *President of South Africa and Others v Reinecke* 2014 2 All SA 376 (SCA) para 9; *McDonald & others v Minister of Minerals and Energy & others* 2007 (5) SA 642 (C) para 17.

Under the Interim Constitution, the Chief Justice was appointed to the Supreme Court of South Africa, not to the Constitutional Court as provided by the 1996 Constitution.¹³⁰ A person who was appointed as head of the Constitutional Court was called the President of the Constitutional Court.¹³¹ This conversion was brought by the *Constitution Sixth Amendment Act*.¹³² The provisions of the aforementioned legislation dealing with such conversion are contained in schedule six of the 1996 Constitution. The latter provides that the President of the Constitutional Court becomes the Chief Justice while the Deputy President becomes the Deputy Chief Justice of this court.¹³³

In 1994, the then President of the Republic of South Africa Nelson Mandela appointed Arthur Chaskalson as the President of the Constitutional Court, and later as the Chief Justice of the very same court in 2001.¹³⁴ Chaskalson became the first person to be the Chief Justice of the Constitutional Court until he retired in 2005.¹³⁵ His successor is Nkomo Pius Langa, the first black person to be appointed as the Chief Justice of the Constitutional Court under the presidency of Thabo Mbeki in 2005.¹³⁶ Langa CJ occupied this office until 2009 following his retirement that left this office vacant.¹³⁷

President Jacob Zuma appointed Sandile Ngcobo in October 2009, to fill the Chief Justice vacancy.¹³⁸ Ngcobo CJ did not enjoy much time in this office as he retired two years after his appointment in 2011.¹³⁹ Be that as it may, President Jacob Zuma executed another judicial appointment in September 2011, Mogoeng Thomas

¹³⁰ Section 97 (1) of the *Constitution of the Republic of South Africa Act 200 of 1993*.

¹³¹ Section 97 (2) of the *Constitution of the Republic of South Africa Act 200 of 1993*.

¹³² 34 of 2001.

¹³³ Section 16 (7) (i) and (ii) of Schedule 6 of the *Constitution of the Republic of South Africa, 1996*.

¹³⁴ Brickhill *et al* 2013 ASSAL 1; Mwakikagile *Africa in the Sixties* 296; Cort and Segal *One Law, One Nation: The Making of the South African Constitution* 200; Mwakikagile *Africa 1960-1970 : Chronicle and Analysis* 300; Mwakikagile *South Africa in Contemporary Times* 76; Roux *The Politics of Principle: The First South African Constitutional Court* 2; Mwakikagile *The African Liberation Struggle: Reflections* 510.

¹³⁵ Broun *Saving Nelson Mandela: The Rivonia Trial and the Fate of South Africa* 160; Brickhill *et al* 2013 ASSAL 1; Roux *The Politics of Principle: The First South African Constitutional Court* 188.

¹³⁶ Basimba and Peter *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal* 20; South African Institute of Race Relations *South Africa Survey* 542; Manyathi-Jele 2013 *De Rebus* 6.

¹³⁷ Manyathi-Jele 2013 *De Rebus* 6.

¹³⁸ Cummings *The Paradox of Professionalism: Lawyers and the Possibility of Justice* 203; Olivier "The Selection and Appointment of Judges" 129.

¹³⁹ Olivier "The Selection and Appointment of Judges" 129.

Reetsang Mogoeng as the fourth Chief Justice of the Republic of South Africa.¹⁴⁰ He is the current Chief Justice of South Africa as at 2018.

2.3.3.3 (b) The President and Deputy President of the Supreme Court of Appeal

The President of the Republic of South Africa is also conferred with the powers to appoint the President and Deputy President of the Supreme Court of Appeal.¹⁴¹ He or she acts as head of the national executive just as in the appointment of Chief Justice or Deputy Chief Justice. Similarly, consultation must take place prior to a decision to appoint is taken. Unlike in the appointment of the Chief Justice or Deputy Chief Justice, the President of the Republic must only consult the JSC in this regard. This means that a consultation with the leader of the parties represented in the National Assembly is not required for the President of the Republic of South Africa to make an appointment.

Schedule six of the 1996 Constitution also incorporates a provision which substitutes the name of Supreme Court of South Africa with the Supreme Court of Appeal.¹⁴² It should be borne in mind that a person appointed as head of the former court was called the Chief Justice. However, the title of such a person has been altered to become the President of the Supreme Court of Appeal.¹⁴³ Craig Howie was the first person to become the President of the Supreme Court of Appeal, after being appointed by then President Thabo Mbeki in 2003 until he retired in 2008.¹⁴⁴

Lex Mpati succeeded Howie to become the first black President of the Supreme Court of Appeal,¹⁴⁵ appointed by then President of the Republic of South Africa Thabo Mbeki in August 2008. President Jacob Zuma appointed the current President of the Supreme Court of Appeal Mandisa Maya to succeed Lex Mpati.¹⁴⁶ It is

¹⁴⁰ Oxtoby 2013 SALJ 219.

¹⁴¹ Section 174 (3) of the *Constitution of the Republic of South Africa*, 1996.

¹⁴² Section 16 (5) (b) of Schedule 6 of the *Constitution of the Republic of South Africa*, 1996.

¹⁴³ Section 16 (7) (a) (iii) of schedule 6 of the *Constitution of the Republic of South Africa*, 1996 provides that The Chief Justice of the Supreme Court of Appeal, (iv) provides that the Deputy Chief Justice, becomes the Deputy President of the Supreme Court of Appeal.

¹⁴⁴ Jones 2008 <http://www.sabar.co.za>.

¹⁴⁵ Olivier "The Selection and Appointment of Judges" 130.

¹⁴⁶ Eyewitness News 2017 <http://ewn.co.za>.

important to note that Mandisa Maya is the first female president of this court with effect from May 2017.¹⁴⁷

2.3.3.3 (c) Other Judges of the Constitutional Court

The 1996 Constitution affords the President of the Republic of South Africa, in his or her capacity as head of the national executive, the authority to appoint other judges of the Constitutional Court.¹⁴⁸ The President does so after consulting the Chief Justice and leaders of the parties represented in the National Assembly.¹⁴⁹ Moreover, the JSC is obliged to prepare a list of nominees with three names more than the number of appointments to be made and submit such a list to the President.¹⁵⁰

Subject that he give reasons, it is legally and practicably possible that the President can decide not to appoint any candidate from the list of names prepared by the JSC.¹⁵¹ In this regard, the latter must amend the list by adding further names of aspirant judicial officers.¹⁵² Therefore, the President would no longer have the discretion, but would be obliged to make judicial appointments from that amended list.¹⁵³ It is mandatory that the Constitutional Court must be composed of four or more judicial officers who were judges at the time they were appointed to this court.¹⁵⁴

2.3.3.3 (d) Other Judicial Officers

The President of the Republic of South Africa also has an obligation to appoint the judges of all other courts in the Republic.¹⁵⁵ The appointments must be implemented based on the advice of the JSC. Furthermore, other judicial officers must be appointed according to national legislation.¹⁵⁶ The latter must incorporate the provisions ensuring that the appointment, promotion, transfer or dismissal of, or

¹⁴⁷ Eyewitness News 2017 <http://ewn.co.za>.

¹⁴⁸ Section 174 (4) of the *Constitution of the Republic of South Africa*, 1996.

¹⁴⁹ Section 174 (4) of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁰ Section 174 (4)(a) of the *Constitution of the Republic of South Africa*, 1996.

¹⁵¹ Section 174 (4) (b) of the *Constitution of the Republic of South Africa*, 1996.

¹⁵² Section 174 (4) (c) of the *Constitution of the Republic of South Africa*, 1996.

¹⁵³ Section 174 (4) (c) of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁴ Section 174(5) of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁵ Section 174(6) of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁶ Section 174(7) of the *Constitution of the Republic of South Africa*, 1996.

disciplinary steps against these judicial officers take place without favour or prejudice.¹⁵⁷ However, these judicial appointments are not discussed in this study, due to its scope and limitations as indicated from the above.¹⁵⁸

2.3.3.3 (e) *Appointment of Acting Judges*

Section 175 of the 1996 Constitution provides for the appointment of acting judges. According to the aforesaid section, the president of the Republic of South Africa is vested with the discretion to appoint a woman or a man to be an acting judge of the Constitutional Court.¹⁵⁹ The appointment is subject to the availability of a vacancy or absence of a judge of the Constitutional Court. However, the president does not exercise such power alone, but this is subject to the recommendations of the Minister of Justice with the full concurrence of the Chief Justice of the Republic of South Africa.¹⁶⁰

Moreover, section 175 also affords the Minister of Justice authority to appoint the acting judges to other courts, after consulting the senior judge of the court on which the acting judge will serve.¹⁶¹ Considering this section, it is apparent that the Minister of Justice can appoint an acting judge for the Supreme Court of Appeal or any High Court, including its divisions in the Republic of South Africa, subject that he or she consulted with the senior judge of those courts.

In 2010, the then Minister of Justice Jeff Radebe appointed Mokotedi Mpshe as an acting judge of the North West High Court for a six month period in February 2010, while the latter was still an acting National Director of Public Prosecutions (NDPP).¹⁶² It is significant to recognise that Mr Mpshe, in his capacity as an acting NDPP, withdrew corruption charges against Jacob Zuma, paving way for the latter to become President of the Republic of South Africa.¹⁶³ Jeff Radebe appointed Mpshe

¹⁵⁷ Section 174(7) of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁸ See para 1.3 above.

¹⁵⁹ Section 175(1) *Constitution of the Republic of South Africa*, 1996.

¹⁶⁰ Section 175(2) *Constitution of the Republic of South Africa*, 1996.

¹⁶¹ Section 175(2) *Constitution of the Republic of South Africa*, 1996.

¹⁶² Corder "Appointment, discipline and removal of judges in South Africa" 106; Olivier "The Selection and Appointment of Judges" 151. Siyo and Mubangizi 2015 *PELJ* 837.

¹⁶³ Myburgh "Did Mpshe Plagiarise a Hong Kong Judge?" 51; Ferree *Framing the Race in South Africa: The Political Origins of Racial Census Elections* 212; Olivier "The Selection and Appointment of Judges" 151; Mason and Curtis *Don't Joke: The Year in Cartoons* 8; Masson *What's so Funny?: Under the Skin of South African Cartooning* 219; Quarcoo 2009 *ASR* 42;

as an acting judge while he was the Minister of Justice under the cabinet of President Jacob Zuma.¹⁶⁴

By inference, the latter instructed the Minister of Justice to appoint Mpshe as an acting judge, because Mr Mpshe had withdrawn the charges of corruption against him. Therefore, it is possible that the then Minister of Justice, Jeff Radebe, appointed Mr Mpshe based on favouritism above competence. This means that there is a likelihood that the President of South Africa, or the Minister of Justice, could appoint acting judges based on political loyalty, favouritism or relationships of some kind above competence.

2.3.3.3 (f) Oath or Affirmation of Judicial Officers

In terms of the Constitution, the judicial appointment process ends with an oath or affirmation of a judicial office. The appointed judicial officers are required to take an oath or affirm before that they shall uphold and protect the Constitution.¹⁶⁵ This essentially means that an appointed judicial officer cannot occupy, discharge or execute judicial office functions without taking an oath or affirmation first. Judges take an oath or affirmation before the Chief Justice or a judge delegated by him or her.¹⁶⁶ The Chief justice must take an oath or affirmation before the sitting Deputy Chief Justice or a senior judge of the Constitutional Court.¹⁶⁷ It is pertinent at this juncture for this study to analyse the composition and functions of the judicial service commission.

Montesh and Berning 2012 *SAJC* 124; Ndletyana and Nomarwayi 2016 *JPA* 577; Du Plessis and Maunganidze 2016 *SACQ* 64.

¹⁶⁴ Johnson *How Long Will South Africa Survive: The Looming Crisis* 53.

¹⁶⁵ Section 174(8) of the *Constitution of the Republic of South Africa*, 1996. An oath or affirmation in terms of schedule 2 of the *Constitution of the Republic of South Africa*, 1996 is as follows:

6 Oath or solemn affirmation of Judicial Officers

- (1) Each judge or acting judge, before the Chief Justice or another judge designated by the Chief Justice, must swear or affirm as follows:

I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/ E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.

(In the case of an oath: So help me God.)

¹⁶⁶ Section 6(1) of schedule 2 of the *Constitution of the Republic of South Africa*, 1996.

¹⁶⁷ Section 6(2) of schedule 2 of the *Constitution of the Republic of South Africa*, 1996.

2.4 The Composition and Functions of the Judicial Service Commission

2.4.1 The Composition of the Judicial Service Commission

The JSC is an institution that derives its existence from section 178 of the Constitution.¹⁶⁸ The JSC is independent from the judiciary, the legislature, the executive and any other organ of state.¹⁶⁹ This institution is responsible for the recommendation, selection and nomination of suitable candidates to the President of the Republic of South Africa, to enable the latter to make judicial appointments.¹⁷⁰ It comprises a number of persons drawn from branches of government such as the judiciary, executive and legislature as well as others from the legal fraternity.¹⁷¹ In a nutshell, members of this institution are politicians and non-politicians. Section 178 of the Constitution explicitly outlines the structure of this institution as follows:

- (1) There is a Judicial Service Commission consisting of—
 - (a) the Chief Justice, who presides at meetings of the Commission;
 - (b) the President of the Supreme Court of Appeal;
 - (c) one Judge President designated by the Judge President;
 - (d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
 - (e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
 - (f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
 - (g) one teacher of law designated by teachers of law at South African universities;
 - (h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
 - (i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
 - (j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
 - (k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that Division and the Premier of the province concerned, or an alternate designated by each of them.¹⁷²

¹⁶⁸ *The Constitution of the Republic of South Africa*, 1996.

¹⁶⁹ Malan 2014 *PELJ* 1968.

¹⁷⁰ Radebe 2014 *PELJ* 1202; Malan 2014 *PELJ* 1968.

¹⁷¹ Roux *The Politics of Principle: The First South African Constitutional Court, 1995-2005* 169; Hoexter "The Judicial Service Commission: Lessons from South Africa" 94-95.

¹⁷² Section 178 of the *Constitution of the Republic of South Africa*, 1996.

Considering this constitutional provision, the JSC consists of twenty-three to twenty-five members, depending on the type of judicial appointment that should be made to a specific court. A total number of eleven to twelve of its members are politicians appointed to or employed in other branches of government. Six are members of parliament (MPs) from the National Assembly; four are from the National Council of Provinces (NCOP) and one who is the Minister of Justice from the national executive.¹⁷³ The Premier also forms part of this Commission if a judicial appointment is made to the High Court Division within his or her province.¹⁷⁴ It is surprising and equally disturbing to learn that there is a greater number of politicians with the JSC. It is clearly evident from this composition that there is political dominance instead of legal dominance within this institution.

The JSC composition must reflect its legal strength with the capacity to select or recommend 'fit and proper' legal minds to the President of the Republic of South Africa for judicial appointments.¹⁷⁵ A decision supported by the majority of the JSC members is sufficient to execute such nominations or recommendation.¹⁷⁶ By inference, it is possible that politicians frequently dominate the decisions of this institution. In the light of this contention, the likelihood is that the JSC might end up nominating or recommending persons who are not sufficiently fit and proper for judicial appointment.¹⁷⁷

Experience has taught some politicians appointed to the JSC ever since its foundation are neither legal scholars, practitioners nor adequately inclined to law. The question is: do those politicians possess sufficient skills and attributes to determine whether a candidate is suitable for appointment to the judicial office? It does not surprise to learn that they sometimes ask candidates irrelevant questions to determine such a candidate's suitability.¹⁷⁸ The other likelihood is that the JSC might recommend or nominate persons for judicial appointment based on political loyalty or favouritism above competence. This premise is based on the fact that politicians

¹⁷³ See Section 178 (1)(d), (h) and (i) of the *Constitution of the Republic of South Africa*, 1996.

¹⁷⁴ See Section 178 (1)(k) of the *Constitution of the Republic of South Africa*, 1996.

¹⁷⁵ Van Gend *Judicial Selection in South Africa* 18.

¹⁷⁶ Section 178 (6) of the *Constitution of the Republic of South Africa*, 1996, provides that the Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.

¹⁷⁷ Gravett 2017 *JCRDL* 286.

¹⁷⁸ Olivier M and Hoexter C "The Judicial Service Commission" 180.

whose majority are from the ANC, instead of legal professionals, dominate this institution.¹⁷⁹ The ANC stated in its discussion documents that its members within the JSC should examine the process of appointing judicial officers.¹⁸⁰ This governing political party's stance is that the party:

Must influence the development of the process for the appointment of judicial officers with progressive credentials and transformative judicial philosophy and expertise as required by the NDP.¹⁸¹

It is disconcerting to learn that a political party can influence the process of appointing members of the judiciary. It is therefore reasonable to infer that this political party also influences its members within the JSC to recommend particular judicial officers. This justifies the perception that judicial appointments are based on political loyalty preferences.

The way the Commission is constituted secures more positions for members of the governing political party than impartial judicial members.¹⁸² This affords the commissioners from the governing party to advance their party political agendas within this institution, especially in the process of appointing judicial officers.¹⁸³ Moreover, the likelihood is that the governing political party's commissioners may follow party lines and ultimately recommend or nominate candidates to the President for judicial appointment who have had a cosy relationship with their political party, who is also a member of the governing party.¹⁸⁴ This has the effect of turning a blind eye on the most suitable candidates for judicial appointment, resulting in judicial appointments that are based on political loyalty above competence.¹⁸⁵

To a certain extent, the composition of this Commission limits the prospect of success for a lower court judicial officer who aspires to be appointed to the higher court bench. For instance, such a presiding officer may pass a judgment against an influential senior member of the majority party, its member in the JSC, the President or any member of the governing party. The latter could mandate its member in the

¹⁷⁹ Gravett 2017 *JCRDL* 268-269; Van Gend *Judicial Selection in South Africa* 18.

¹⁸⁰ Judges Matter 08 March 2017 <http://www.judgesmatter.co.za>

¹⁸¹ African National Congress "Transformation of the Judiciary and Legal Sector" 17.

¹⁸² Malan 2014 *PELJ* 1968; Fombad *Constitutional Adjudication in Africa* 167; Gravett 2017 *JCRDL* 268-269.

¹⁸³ Olivier and Hoexter "The Judicial Service Commission" 175. Gravett 2017 *JCRDL* 268-269.

¹⁸⁴ Olivier and Hoexter "The Judicial Service Commission" 169.

¹⁸⁵ Olivier and Hoexter "The Judicial Service Commission" 169.

JSC and the President not to recommend, nominate or appoint such aspirant judicial officer. This could compromise the quality of the judiciary in that more suitable candidates for judicial appointment could be overlooked for those who are less appropriate.

Since a majority of the politicians are drawn from Parliament,¹⁸⁶ it is worth noting that Members of Parliament (MPs) do not represent the interests of their respective political parties but of everyone within the Republic of South Africa, notwithstanding their political affiliations.¹⁸⁷ In this regard, ANC MPs do not represent the interests of this political organisation within the JSC but those of the people of South Africa. By inference, the ANC mandates its MPs to choose a person with certain characteristics for judicial appointment. Therefore, it is legally wrong for the ANC to stipulate in its discussion documents that it must influence its members within the JSC to examine the process of appointing judicial officers.

The Constitution also affords the President of the Republic of South Africa more powers to designate two attorneys and two advocates as well as other four persons to the JSC.¹⁸⁸ Regarding the latter persons, there are no prerequisites that they must meet and it is not clear from which profession they ought to have been. The President merely appoints them after consulting leaders of all the parties represented in the National Assembly.¹⁸⁹ This shows that the President is at liberty to appoint any person that he or she favours, likes or deems fit, if only he consulted leaders of the parties in the National Assembly.

Hoexter correctly observes that these four commissioners are sometimes referred to as lay persons, in as much as the President appoints his favourite persons predominantly from the legal profession.¹⁹⁰ The commissioners might not be

¹⁸⁶ Roux *The Politics of Principle: The First South African Constitutional Court, 1995-2005* 169.

¹⁸⁷ Section 42 of the *Constitution of the Republic of South Africa*, 1996 states that:

(3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution.

¹⁸⁸ Section 178 (1) (e) and (f) of the *Constitution of the Republic of South Africa*, 1996. Galland opines that it is also possible that at least one of the attorneys or advocates may increase a political influence in the JSC, because they are also appointed by the President, although they see their nomination through their respective professions. See Galland *Anatomy of South Africa: Who holds the Power* 218.

¹⁸⁹ Section 178 (1) (j) of the *Constitution of the Republic of South Africa*, 1996.

¹⁹⁰ Hoexter "The Judicial Service Commission: Lessons from South Africa" 94.

impartial,¹⁹¹ as the President may influence them to act according to his or her instructions, when they recommend or nominate candidates for judicial appointment. In a nutshell, these are political appointees since a politician, the President, has the prerogative of appointing them.

To afford the President this absolute discretion without any guiding principles and benchmarks might open a floodgate of complaints and objections directed towards the credibility of those four appointees.¹⁹² Differently put, other persons or political parties might question the suitability of the aforesaid appointees and the process employed by the President in appointing them. It does not surprise to learn that in 2009 the Democratic Alliance (DA) did not hesitate to object to the appointment of two of the four Presidential Appointees.¹⁹³ The DA questioned the credibility of advocate Vas Soni SC and Ms Andiswa Ndoni.¹⁹⁴

This political party alleged that Advocate Vas Soni was too executive-minded in the sense that she had appeared on behalf of government in numerous court cases.¹⁹⁵ The study lends academic support to the DA's allegation that it is jurisprudentially wrong to appoint an executive-minded person to the JSC. This is because the JSC is not an institution under the umbrella of the executive, but an independent commission that must consist of independent legal minds. Those individuals must be of appreciable legal assistance to the JSC to render it effective. It is unfortunate that Advocate Soni cannot be recognised as having the perquisites of the aforesaid individuals, due to a sound allegation raised by the DA.

The DA also levelled a thought-provoking criticism against Ms Ndoni's appointment to the JSC. They contended that she would not be impartial, but her role within the JSC would be nothing less than the furtherance of a political agenda.¹⁹⁶ The DA premised their objection on Ms Ndoni's newspaper comments that:

¹⁹¹ Hoexter "The Judicial Service Commission: Lessons from South Africa" 94.

¹⁹² Hoexter "The Judicial Service Commission: Lessons from South Africa" 94-95.

¹⁹³ Trollip 2009 <http://www.politicsweb.co.za> .

¹⁹⁴ The other two persons who were appointed by the President but their appointments were not objected are Advocate Ismail Semanya SC and Advocate Dumisa Ntsebeza SC.

¹⁹⁵ Trollip 2009 <http://www.politicsweb.co.za>.

¹⁹⁶ Trollip 2009 <http://www.politicsweb.co.za>.

It means now we have to stop being a voice from outside the process, but implement the things we have been advocating for - a clear transformation stance.¹⁹⁷

Considering these comments, it cannot be simply concluded that they justify the DA's criticism to cast aspersions on the impartiality of Ms Ndoni. However, there is a need to unpacking her words to ascertain whether or not they bear any element of proving the likelihood of her pursuing a political agenda. Objectively speaking, a reasonable inference attracts the conclusion that indeed the likelihood is that Ms Ndoni might pursue a political agenda. This is because her comments demonstrate that she must advocate for the implementation of political resolutions. It is apparent from this discussion that the President of the Republic of South Africa indeed appointed persons who may not have been objective or impartial when they nominated or recommended presiding officers.

The appointment of Advocate Daluxolo (Dali) Mpofo SC is also a disappointment in the composition of the JSC. President Jacob Zuma announced this appointment on 29 September 2017, in terms of section 178 (1) (e) of the Constitution.¹⁹⁸ Despite him being a lawyer of high note, Advocate Dali Mpofo is the current national chairperson of the Economic Freedom Fighters, a political party under the leadership of Sello Julius Malema. Be that as it may, Advocate Mpofo is also a politician who could pursue his political party's principles in the JSC. Furthermore, his appointment increases the existing number of politicians within this institution.

2.4.2 The Functions of the Judicial Service Commission

2.4.2.1 Consultation with the President of the Republic of South Africa

The JSC derives its powers and functions from the Constitution and national legislation.¹⁹⁹ The President of South Africa consults with this Commission before he or she appoints the Chief Justice, the Deputy Chief Justice, the President and

¹⁹⁷ Trollip 2009 <http://www.politicsweb.co.za> states that Ms Ndoni's comments were made in The Sunday Times Newspaper on 12 July 2009. The researcher made reasonable attempts to access this newspaper without any prospects of success. It is for this reason that the researcher cites this internet source and omits a reference of the previously mentioned newspaper.

¹⁹⁸ Times Live 2017 <https://www.timeslive.co.za>.

¹⁹⁹ Section 178(4) of the *Constitution of the Republic of South Africa*, 1996. The relevant piece of legislation is the *Judicial Service Commission Act 9 of 1994*.

Deputy President of the Supreme Court of Appeal.²⁰⁰ However, the Constitution does not define the scope of consultation that must materialise in this process. It is common cause that the President nominates a preferred candidate to the Commission and the latter conducts an interview to ascertain the appropriateness of such a candidate for judicial appointment as the Chief Justice, Deputy Chief Justice, President and Deputy President of the Supreme Court of Appeal.²⁰¹

The JSC would ultimately recommend such a candidate to the President for judicial appointment.²⁰² From this process, it appears that the function of the Commission is merely to confirm that the person nominated by the President should be appointed as the judicial officer. Although it has never happened, it has been said that the JSC may choose not to recommend the President's preferred candidate or request him to appoint another person.²⁰³ However, there is no legal basis that compels the President of the Republic to act in accordance with the views of the Commission during this consultation stage in the process of judicial appointments.²⁰⁴

2.4.2.2 Nominate, Select and Recommend Candidates for Judicial Appointment

The JSC is also vested with the power to nominate and recommend candidates to the President of South Africa for judicial appointment.²⁰⁵ In doing so, the Constitution affords the JSC the powers to develop its own procedures.²⁰⁶ In 2003, the Minister of Justice published such procedures of the Commission in the government gazette, which it shall follow in terms of the nomination and selection of candidates for judicial appointment to the Constitutional Court, the Supreme Court of Appeal as well as any provincial or local division of the High Court.²⁰⁷

²⁰⁰ Section 174(3) of the *Constitution of the Republic of South Africa*, 1996.

²⁰¹ Olivier "The Selection and Appointment of Judges" 129-131; Oxtoby and Masengu 2017 *SLR* 544.

²⁰² Olivier "The Selection and Appointment of Judges" 129-131.

²⁰³ Olivier "The Selection and Appointment of Judges" 129.

²⁰⁴ Olivier "The Selection and Appointment of Judges" 129; . Misra-Dexter and February *Testing Democracy: Which Way is South Africa Going?* 107.

²⁰⁵ Section 174 of the *Constitution of the Republic of South Africa*, 1996.

²⁰⁶ Section 178(6) of the *Constitution of the Republic of South Africa*, 1996.

²⁰⁷ GN R423 in GG 24596 of 27 March 2003.

2.4.2.2(a) Procedures of Nominating Candidates for Appointment as Constitutional Court Judges

The Chief Justice is bound to notify the JSC about any vacant judicial position in the Constitutional Court and this Commission must advertise such vacancy in public, calling for nominations of aspirant judges until the stipulated closing date.²⁰⁸ After this date, the Commission must furnish all its members with a list of the nominated candidates,²⁰⁹ giving them the discretion to make additional nominations.²¹⁰ The JSC screening committee may subsequently make a shortlist of candidates who qualify for judicial appointment to be interviewed and submit this list to the members of the Commission.²¹¹ However, a member of the Commission may appeal to the secretary in writing, to include a candidate who a member contemplates as deserving inclusion in a short list of interviewees.²¹²

The JSC must issue a short list to the pertinent institutions and make it accessible to the public for comments until the stipulated date,²¹³ and subsequently returned to the members of the Commission with all its contents.²¹⁴ The Commission should interview all shortlisted candidates in a public platform and deliberate their views pertaining to the recommendation of a suitable candidate behind closed doors.²¹⁵ Therefore, transparency lacks in this regard, as members of the public and the media are excluded from witnessing or recording such deliberations.²¹⁶

It is also during these deliberations that the members of the JSC nominate candidates for recommendation, draft a list containing their names and reasons justifying their recommendations, and submitting it to the President for judicial appointment.²¹⁷ Although the JSC furnishes reasons for its decisions, the fact that

²⁰⁸ Reg 2 (a) - (b) in GN R423 in GG 24596 of 27 March 2003. See also reg 2(c) for the contents of each nomination.

²⁰⁹ Reg 2 (d) in GN R423 in GG 24596 of 27 March 2003.

²¹⁰ Reg 2 (d) (i) in GN R423 in GG 24596 of 27 March 2003.

²¹¹ Reg 2 (e) - (f) (i) in GN R423 in GG 24596 of 27 March 2003.

²¹² Reg 2 (f) (ii) in GN R423 in GG 24596 of 27 March 2003.

²¹³ Reg 2 (g) in GN R423 in GG 24596 of 27 March 2003.

²¹⁴ Reg 2 (h) in GN R423 in GG 24596 of 27 March 2003.

²¹⁵ Reg 2 (i) (j) (k) in GN R423 in GG 24596 of 27 March 2003.

²¹⁶ Gravett 2017 *JCRDL* 268-269.

²¹⁷ Reg 2 (m) in GN R423 in GG 24596 of 27 March 2003:Section 174 (4) (a) of the *Constitution of the Republic of South Africa*, 1996. Reg 2 (n) in GN R423 in GG 24596 of 27 March 2003 also provides that the Commission shall announce publicly the names of the candidates recommended for appointment.

the members deliberate in secret excludes other persons from knowing the roots and justifications of such decisions. The President is vested with the power to appoint the Constitutional Court judges from the list as discussed.²¹⁸

In 2009, judge Nugent applied for a judicial vacancy in the Constitutional Court and subsequently withdrew his application.²¹⁹ The basis of his withdrawal was premised on a lack of trustworthiness on the part of the JSC, that he generated from the way this institution conducted itself in the complaint against John Hlophe discussed in the next chapter.²²⁰ He did not trust that the JSC would fulfil its constitutional duty of nominating and recommending a suitable candidate to the President for judicial appointment. It is for this reason that candidates are reluctant to apply for the Constitutional Court vacancies in their numbers.²²¹

Considering the concerns of judge Nugent which influenced him to withdraw his application for the Constitutional Court vacancy, there is open room for improvement in respect of the functions of the JSC. The Commission must discharge its constitutional obligations decisively, to ensure that it earns confidence from members of the public including the candidates aspiring for judicial appointment.²²² Failure to do that might open floodgates of criticism levelled against the legitimacy of this Commission.

2.4.2.2(b) Procedure of Selecting Candidates for Appointment as the Supreme Court of Appeal and the High Court Judges

The Constitution also states that the duty of the JSC is to advise the President regarding the appointment of all other courts judges.²²³ This advice is equivalent to the process of recommending or nominating candidates to the President for judicial appointment as judges of the Constitutional Court, discussed in the preceding subparagraph.²²⁴ However, there are minor differences that persist within these two procedures. In the current procedure, the President of the Supreme Court of Appeal bears the responsibility of notifying the JSC about a vacant judicial position in this

²¹⁸ See Para 2.3.3.3 (c) above.

²¹⁹ Hawker 2012 <https://www.iol.co.za>.

²²⁰ Hawker 2012 <https://www.iol.co.za>. See chapter 4.

²²¹ Hawker 2012 <https://www.iol.co.za>.

²²² Siyo and Mubangizi 2015 *PELJ* 837.

²²³ Section 174 (6) of the *Constitution of the Republic of South Africa*, 1996.

²²⁴ See para 2.4.2.1 above.

court, while the Judge President does the same with respect to a provincial or local division of the High Court.²²⁵

The above process will then unfold until the stage of completing interviews of candidates, deliberations and subsequently the selection of candidates for judicial appointment through a general agreement or majority vote of the Commission members.²²⁶ In contrast to the above-discussed procedure,²²⁷ the current one only requires members of the Commission to advise the President of South Africa about a candidate they have selected for each judicial vacancy for appointment.²²⁸ The JSC must also make a public announcement regarding the selected candidate.²²⁹

However, it becomes a challenge when, after conducting the interviews of aspirant judicial officers, the JSC decides not to make any recommendations to the President, for judicial appointments. Differently put, a miscarriage in the process of appointing judicial officers is manifest, if the JSC does not recommend any candidate to the President for a judicial appointment. Moreover, if the Commission does not furnish any reasons for the previously mentioned decision the same miscarriage of justice is evident.

The same challenge manifested in *Judicial Service Commission v Cape Bar Council*,²³⁰ In this case, the JSC advertised three vacancies for judicial appointments to the High Court of South Africa Western Cape Division.²³¹ The JSC received a plethora of applications for these vacancies. From those applications, the JSC shortlisted only seven candidates for a formal interview.²³² Five of those candidates were white males and the remaining was one white female, and one black male.²³³ The JSC interviewed all the candidates and subsequently recommended only the black male applicant for judicial appointment.²³⁴

²²⁵ Reg 3 (a) in GN R423 in GG 24596 of 27 March 2003.

²²⁶ Reg 3 (k) in GN R423 in GG 24596 of 27 March 2003.

²²⁷ See para 2.4.2.1 above.

²²⁸ Reg 3 (l) in GN R423 in GG 24596 of 27 March 2003.

²²⁹ Reg 3 (m) in GN R423 in GG 24596 of 27 March 2003.

²³⁰ *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA).

²³¹ *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA) para 2.

²³² *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA) para 2.

²³³ *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA) para 2.

²³⁴ *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA) para 2.

It is disturbing that the JSC did not provide any reasons for its decision to recommend only one person from seven candidates.²³⁵ Nevertheless, the JSC justified its decision by stating that it is not legally duty bound to provide reasons for its decisions.²³⁶ Furthermore, that it did not recommend those candidates because they did not obtain a majority of votes from members of the JSC.²³⁷ It is incorrect for the JSC to state that it is not obliged to give reasons for its decision. A decision does not exist in a vacuum, because various factors considered influence it. Furthermore, their procedure for selecting candidates for judicial appointments to the Constitutional Court bench requires the Commission to give reasons for such decision but exclude the current process in this regard.²³⁸ Therefore, this institution did not discharge its constitutional mandate objectively.

It does not surprising to learn that the court found the decision of the JSC to be irrational and unlawful.²³⁹ The court correctly pointed out that it is impossible for the JSC to decide excluding other candidates for judicial appointment without providing any reasons.²⁴⁰

This case displays a lack of transparency within the JSC regarding the nominations and recommendations of aspirant judicial officers to the President for judicial appointment.²⁴¹ It is evident also that the JSC does not use or follow some certain processes to recommend or nominate candidates to the president for judicial appointment. Conceivably, the JSC employs a subjective test instead of an objective one in recommending candidates who they think are fit and proper for judicial appointment. Moreover, a decision by the JSC not to make any recommendations or nominations of candidates to the President for judicial appointments could delay the functioning of the courts, subject to vacant judicial positions.

Another persistent problem regarding the duties and functions of the JSC is that its decisions do not amount to an administrative action, since the *Promotion of*

²³⁵ *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA) para 43.

²³⁶ *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA) para 42.

²³⁷ *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 para 42.

²³⁸ Reg 2 (m) in GN R423 in GG 24596 of 27 March 2003

²³⁹ *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA) para 42.

²⁴⁰ *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA) para 44.

²⁴¹ Radebe 2014 PELJ 1201.

*Administration Justice Act (PAJA)*²⁴² excludes such decisions. Section 1 of this legislation defines an administrative action as follows:

- In this Act, unless the context indicates otherwise –
- “**administrative action**” means any decision taken, or any failure to take a decision, by –
- (a) an organ of state, when –
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
 - (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
- which adversely affects the rights of any person and which has a direct, external legal effect, but does not include –
- (gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law.²⁴³

According to this provision the functions of the JSC with respect to the process of judicial appointments are not administrative actions. This bars everyone to challenge such decisions either in a court of law or tribunal, by invoking *PAJA* as well as section 33 of the Constitution which gives effect to the previously mentioned legislation.²⁴⁴ However, the court may review the decisions of the JSC based on the principle of legality.²⁴⁵

2.5 The Role of the President of the Republic of South Africa on Judicial Appointments

The President has the discretion to appoint any candidate through the nominations and recommendations of the JSC or after having consulted with this Commission. It is not clear which factors the President takes into consideration when he or she exercises this discretion. The likelihood is that various factors such as favouritism, any kind of the current or previous relationship with the aspirant judicial officer might influence the President in arriving at such decisions. It is a common practice in South Africa that the President is a politician who, in most cases, does not have sufficient

²⁴² 3 of 2000.

²⁴³ Section 1 of the *Promotion of Administration Justice Act* 3 of 2000.

²⁴⁴ Section 33 of the *Constitution of the Republic of South Africa*, 1996 defines the parameters of a just administrative action.

²⁴⁵ *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA) para 20.

skills or experience about the legal profession. Furthermore, the President is someone who has never been a member of the judiciary.

Conceivably, a person of such calibre cannot be entrusted with the power to constitute the judiciary, the most sensitive branch of government. Experience has indicated that some judicial officers are sufficiently qualified and suitable to execute their constitutional mandate despite being appointed by the President.²⁴⁶ However, the latter can still appoint other judicial officers based on political loyalty above competence. Furthermore, he or she might also execute judicial appointments through the influence of factors such a direct or indirect relationship with a candidate or any other factor that could render his or her impartiality questionable.

It has been highlighted from the above discussion that Nelson Mandela, the then President of the Republic of South Africa, appointed the first President of the Constitutional Court, Arthur Chaskalson, in 1994.²⁴⁷ It is worth noting that Mr Chaskalson formed part of the legal team which represented Nelson Mandela at the Rivonia trial in 1963 and 1964.²⁴⁸ Conceivably, the relationship that Chaskalson had with the then President Mandela influenced the latter to appoint the former to head the Constitutional Court bench.²⁴⁹

President Jacob Zuma appointed Sandile Ngcobo as the Chief Justice of the Constitutional Court of South Africa in 2009.²⁵⁰ His judicial appointment can also be perceived as having been based on favouritism from President Zuma. The premise of this contention emanates from the Constitutional Court judgment delivered in *Zuma v National Director of Public Prosecutions*,²⁵¹ a legal dispute concerning Jacob Zuma in 2008, prior to his election as the President of the Republic of South Africa. In this case, the court had to determine the legality of warrants issued to search Mr Zuma's premises.

Majority of the bench held that those warrants indeed satisfied the legal basis. However, the then Constitutional Court judge, Sandile Ngcobo, appeared to be the

²⁴⁶ Fombad *Constitutional Adjudication in Africa* 167.

²⁴⁷ See para 2.3.3.3 (a) above

²⁴⁸ Du Preez Bezdrob *Winnie Mandela: A Life* 152.

²⁴⁹ *President of the Republic of South Africa and others v SARFU* 1999 (4) SA 147 (CC) para 11.

²⁵⁰ Misra-Dexter and February *Testing Democracy: Which Way is South Africa Going?* 206.

²⁵¹ *Zuma v National Director of Public Prosecutions* (1) All SA 54 (N).

only one from the bench holding a dissenting view. He held that the search warrants were illegal. It is philosophically and academically disturbing that the year following this judgment, Jacob Zuma after being elected as the President of the Republic of South Africa, subsequently appointed Sandile Ngcobo as the Chief Justice of the Constitutional Court. The likelihood is that President Zuma preferred Sandile Ngcobo for judicial appointment in the light of the aforesaid judgment.

Political influence can also cloud judgment of the President in appointing the judicial officers. For example, Dikgang Ernest Moseneke is one of the greatest Deputy Chief Justices that the Republic of South Africa ever had. His stature can be appreciated through a plethora of court judgments that he wrote during his judicial office tenure, especially in the Constitutional Court. Dikgang Moseneke has been a member of the legal profession for approximately forty years.²⁵² The then President Thabo Mbeki appointed Dikgang Moseneke to the Constitutional Court in 2002, and the latter occupied a judicial office in this court for a period of fourteen years.²⁵³

At the time of this study, Moseneke is the only Deputy Chief Justice who had served for a long period of time, in contrast to any other Deputy Chief Justice in the new democratic South Africa.²⁵⁴ It is appropriate for a man of his calibre to be appointed as the Chief Justice of South Africa. Be that as it may, it is a disappointing miscarriage to the judiciary that the President of South Africa overlooked Dikgang Moseneke on three occasions, for judicial appointment as the Chief Justice of South Africa.²⁵⁵ It is doubtful that the President could provide sufficient and objective reasons as to why he did not appoint Dikgang Moseneke as the Chief Justice, leaving again the spectre of favouritism and subjective preference as factors that contaminate judicial appointments by the President.

This research deems it pertinent at this juncture to answer the above question through inferential reasoning. Dikgang Moseneke is a former member of the Pan Africanist Congress (PAC), a political party consisting of Africanist persons formed under the leadership of Robert Mangaliso Sobukwe.²⁵⁶ This is a group of persons

²⁵² Calland *Anatomy of South Africa: Who holds the Power* 239.

²⁵³ Calland *Anatomy of South Africa: Who holds the Power* 239.

²⁵⁴ ENCA 2016 <https://www.enca.com>.

²⁵⁵ ENCA 2016 <https://www.enca.com>.

²⁵⁶ Mitchell *Native vs Settler: Ethnic Conflict in Israel/Palestine, Northern Ireland and South Africa*

who split from the African National Congress (ANC).²⁵⁷ Be that as it may, the ANC has been a governing party ever since the dawn of democracy in South Africa. Thus, the President of the country has always been a member of this political party.

By extension, a member of the ANC executed judicial appointments in his capacity as the President of South Africa. By inference, it is for this reason that the President did not appoint Dikgang Moseneke as the Chief Justice of the Republic of South Africa since he belonged differently. This inference emanates from the fact that Dikgang Moseneke is a former member of the PAC, a political party formed by members who split from the ANC. Therefore, it is unlikely for the President to appoint a former political rival to lead the judiciary over which he is the President from a contesting party. Conceivably, the President deemed the appointment of Dikgang Moseneke as a threat to the governing party.

There are possibilities that the President of the Republic of South Africa might also appoint persons who are from his political party as judicial officers. For example, the appointment of Judge Kgomo NF. The JSC interviewed Judge Kgomo in 2016 for the vacant post of Limpopo Deputy Judge President.²⁵⁸ This study levels a constructive criticism against the judicial suitability of Judge Kgomo NF. The way he responded to the questions posed to him by members of JSC is sufficient to cast aspersions about his suitability as an appointment on the bench. It can be inferred that he might have also been appointed as a judge of the South Gauteng High Court based on his political loyalty, because he said he is a retired member of the ANC during the interview.²⁵⁹ He tried to justify this contention by stating that:

When I was still in the profession I had been a member but the moment I was appointed to the judiciary, I had to let that membership lapse because I had to be seen to be impartial.²⁶⁰

In view of the above words, it is evident that Judge Kgomo is still a member of the ANC at heart. This is because firstly he contended that he is a retired member of this political party. Meaning that he did not leave the ANC, but he retired from playing an

190.
²⁵⁷ Mitchell *Native vs Settler: Ethnic Conflict in Israel/Palestine, Northern Ireland and South Africa* 190.
²⁵⁸ Judges Matter 2016 <https://www.youtube.com>.
²⁵⁹ Judges Matter 2016 <https://www.youtube.com>.
²⁶⁰ Judges Matter 2016 <https://www.youtube.com>.

active role within this organisation. Simply put, Kgomo J is a veteran of the ANC. By inference, his line of reasoning is poor compared to that of a reasonable competent judicial officer. He stated that “he let his ANC membership to lapse because he wanted to be seen impartial.” This means that Kgomo J did not terminate his membership with the ANC but let it expire so that he could be seen as impartial. This line of reasoning does not imply that the man shows disinterest in politics, especially of the ANC.

The appointment of Judge Leona Valerie Theron to the Constitutional Court also does invite some criticism. President Jacob Zuma appointed Theron J to the Constitutional Court bench in June 2017, in line with section 174 of the Constitution.²⁶¹ Justice Theron’s appointment followed a vacancy left unfilled after the departure of Van der Westhuizen on 31 January 2016.²⁶² Theron occupied the Constitutional Court judicial office on 01 July 2017. Two months in office, there were serious allegations questioning her judicial appointment, specifically that she had an indirect relationship with President Zuma.²⁶³

Forensics for Justice, a non-profit organisation, alleged that Leona Theron had been in a business with two of President Zuma’s lawyers Jerome Brauns as well as Michael Hulley, the latter also worked closely with the President’s son and nephew.²⁶⁴ Judge Theron indeed confirmed the aforesaid relationship, especially with Michael Hulley, that they were both involved in a close corporation.²⁶⁵ Furthermore, Leona Theron presided over the Jacob Zuma’s corruption case in 2009, while she was still a judge in the KwaZulu-Natal High Court.²⁶⁶ That was prior to the national elections won by the ANC which ultimately led to the election of Jacob Zuma in the National Assembly as the President of the Republic of South Africa. Judge Theron then postponed this corruption case against Zuma for almost seven months, based on an agreement between the prosecution and defence lawyers.²⁶⁷

²⁶¹ Herman 2017 <http://www.news24.com>. Oxtoby and Masengu 2017 *SLR* 562.

²⁶² Herman 2017 <http://www.news24.com>.

²⁶³ Dolley and Serrao 2017 <http://www.msn.com>.

²⁶⁴ Dolley and Serrao 2017 <http://www.msn.com>.

²⁶⁵ Dolley and Serrao 2017 <http://www.msn.com>.

²⁶⁶ Dolley and Serrao 2017 <http://www.msn.com>.

²⁶⁷ Dolley and Serrao 2017 <http://www.msn.com>.

This period ended after Zuma was already elected and inaugurated as President of the Republic.²⁶⁸

In light of the above discussion pertaining the relationship between Theron J and President Zuma, the likelihood is that such a relationship influenced President Jacob Zuma in appointing her to the Constitutional Court bench. Moreover, Theron J's decision to postpone the corruption case against Jacob Zuma for such a long period of time until the latter became the President is sufficient reason to seriously question the impartiality of her judicial appointment. These include when President Zuma appointed Leona Theron as a judge to the Supreme Court of Appeal in 2010, as well as an acting judge to the Constitutional Court in 2015.²⁶⁹

In a nutshell, the likelihood is that President Zuma appointed Justice Theron based on favouritism or loyalty rather than her competence. Therefore, it does not surprise to learn that the Forensics for Justice requested the JSC to investigate the abovementioned alleged relationship and provide sufficient reasons as to why a person of such dubious ethics had been endorsed for judicial appointment. This study extends its support to the organisation's proposal that the appointment of Justice Theron must be reviewed.²⁷⁰

2.6 Conclusion

The Republic of South Africa became a democratic country since the adoption of the 1996 Constitution through the aid of the Interim one. Nevertheless, both constitutions incorporate judicial appointment clauses. It is apparent that the President of the Republic of South Africa and the Minister of Justice are still vested with the power to appoint judicial officers from the recommendations, nominations and consultations of the JSC. This chapter has proven that the current legal process of judicial appointments is politically contaminated, due to the role of the President of South Africa, the Minister of Justice and composition of the JSC.

Some judicial appointments highlighted in this chapter are controversial as they exhibit some of the factors that influence the President and the Minister of Justice,

²⁶⁸ Dolley and Serrao 2017 <http://www.msn.com>.

²⁶⁹ Dolley and Serrao 2017 <http://www.msn.com>.

²⁷⁰ Dolley and Serrao 2017 <http://www.msn.com>.

and the JSC members who are from other branches of government in the judicial appointment process. The chapter has also examined and justified the likelihood that judicial appointments are made through an entrenched patronage system, political loyalty, favouritism, different kinds of relationships between the potential candidates and those with the power to appoint them. By inference, the process of appointing judicial officers has the substantively potential effect of jeopardising the independence of the judiciary in the Republic of South, as discussed in the next chapter.

CHAPTER 3

THE IMPACT OF JUDICIAL APPOINTMENT PROCESS ON JUDICIAL INDEPENDENCE

3.1 *Introduction*

The government of the democratic Republic of South Africa adopted a Constitution that attempts to move away from parliamentary supremacy to constitutional supremacy. This constitution introduced the separation of powers doctrine (*trias politica*), to divide government power into three branches: the legislature, executive and judiciary. Each branch is required to consist of different members and conduct its own functions independent from the other, subject that they oversee one another to guard against the abuse of power. Therefore, it is essential that the judiciary must be independent so that the society earns its confidence and for the sake of proper administration of justice through the rule of law in the democratic South Africa.

The rule of law calls for a judiciary that is independent from other branches of government or any other person, either natural or juristic. Judicial independence is a significant marker of legal and democratic principles. In terms of Section 165 of the Constitution, there are various features that must be present for the judiciary to be independent, such as impartiality, application of the law without fear, favour or prejudice as well as non-interference by other persons or organs of state. This chapter scrutinises these features and highlights the way these are threatened by the current process of appointing judicial officers in South Africa. It highlights the constitutional transition of the Republic, defines the rule of law and the parameters of judicial independence.

3.2 *The Constitutional Transition*

The Constitution embraces a transition of the Republic of South Africa from the apartheid regime to the democratic government era.²⁷¹ It recognises the unfairness that occurred in the past and strives to build a unified and democratic South Africa.²⁷² The foundation of the new democratic South Africa is underpinned in

²⁷¹ See the Preamble of the *Constitution of the Republic of South Africa*, 1996.

²⁷² See the Preamble of the *Constitution of the Republic of South Africa*, 1996.

section 1 of the Constitution of the Republic of South Africa, 1996, which provides that:

The Republic of South Africa is one, sovereign, democratic state founded on:
(c) Supremacy of the Constitution and the rule of law.²⁷³

The above constitutional provision outlines the components that establish the Republic of South Africa. It is worth noting that there is only a single existing and recognised country or state named the Republic of South Africa. This state has the liberty to control its own affairs without interference from any other state. Furthermore, the Republic is based on democracy in the sense that persons are afforded various freedoms, including contesting government power to represent the society through policy drafting and implementation.²⁷⁴ The Chief Justice Mogoeng has noted that the constitutional democracy of South Africa will demolish if the judiciary is not trustworthy.²⁷⁵ Clearly the judiciary is one of the fundamental institutions that give life to democracy, through the Constitution. An independent judiciary is crucial to democracy,²⁷⁶ because the courts apply the law and protect human rights to maintain the rule of law.²⁷⁷

3.3 The Rule of Law

The rule of law is a broad topic that needs to be discussed on its own elsewhere and it is beyond the scope of this study to delve into it. However, it is pertinent to define its parameters relating to judicial independence. The latter requires the judiciary to be an autonomous branch of government.²⁷⁸ In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,²⁷⁹ the Constitutional Court held that the rule of law restricts government and all persons from exercising power

²⁷³ Section 1 of the *Constitution of the Republic of South Africa*, 1996.

²⁷⁴ Currie and De Waal *The New Constitutional and Administrative Law* 82; Etzioni-Halevy *Fragile Democracy* 27;

²⁷⁵ Constitutionally Speaking 2013 <https://constitutionallyspeaking.co.za>.

²⁷⁶ Siyo and Mubangizi 2015 *PELJ* 817.

²⁷⁷ Barak "On Judging" 33.

²⁷⁸ Section 165 of the *Constitution of the Republic of South Africa*, 1996; V 1.3 of the Bangalore Principles of Judicial Conduct (2002), a treaty between the Republic of South Africa and other member states to regulate the independence of the judiciary at the international level.

²⁷⁹ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (2) SA 374 (CC).

that is not conferred upon them by the law.²⁸⁰ The rule of law requires all persons including government officials to conduct themselves within the confines of the law.

The Constitution as the supreme law of the land prescribes the roles and functions of the executive, the legislature and the judiciary distinctly, which they must exercise or perform independent from one another.²⁸¹ Therefore, an independent judiciary is a fundamental principle to the rule of law,²⁸² which calls for, among others, tranquillity, clean good governance, protection of human rights and sustainable economic growth with the state.²⁸³ Thus, “without an independent judiciary there can be no rule of law”.²⁸⁴ This is because the judiciary is vested with the ultimate authority to decide in all legal matters within the Republic.²⁸⁵ Therefore, the rule of law cannot be maintained if the judiciary is not autonomous in South Africa.

3.4 The Legal Parameters of Judicial Independence in South Africa

3.4.1 Origin of Judicial Independence

The expression judicial independence finds its presence because of the separation of powers doctrine (also known as *trias politica*).²⁸⁶ The latter calls for the executive, legislative and judicial branches of government to discharge their duties independent of one another, through various personnel, however, subject to checks and balances

²⁸⁰ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (2) SA 374 (CC) para 58.

²⁸¹ Section 43, 85 and 165 of the *Constitution of the Republic of South Africa*, 1996.

²⁸² V 1 of the Bangalore Principles of Judicial Conduct (2002); Mathews *Law, Order and Liberty in South Africa* 45; Vittal *More Musings on Governance, Governing, and Corruption* 214; Kmezic *EU Rule of Law Promotion: Judiciary Reform in the Western Balkans* 65; Smith *Judges and Democratization: Judicial Independence in Democracies* 1; Perišin and Rodin *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union* 127; Lone “Rule of Law: A Tort Law Perspective” 183; Little “The Reform of the Scottish Judiciary” 185; Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* 31.

²⁸³ Constitutionally Speaking 2013 <https://constitutionallyspeaking.co.za>; A 10 of the *Universal Declaration of Human Rights* (1948).

²⁸⁴ Smith *Judges and Democratization: Judicial Independence in Democracies* 1.

²⁸⁵ In terms of the *Constitution of the Republic of South Africa*, 1996, Section 167:

(3) The Constitutional Court—

(c) makes the final decision whether a matter is within its jurisdiction.

(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.

²⁸⁶ Cameron 2010 *Advocate* 24; Malan 2014 *PELJ* 1984; Stephan and Klimentenko *International Law and International Security: Military and Political Dimensions* 285; Backhaus *The Elgar Companion to Law and Economic* 407.

to guard against the abuse of power.²⁸⁷ It is beyond the scope of this present study to discuss *trias politica*, because its primary focus is on the independence of the judiciary. However, it is pertinent to accentuate the way *trias politica* is enshrined in the Constitution to generate judicial independence.

The absence of a specific constitutional provision expressing the separation of powers doctrine does not necessarily preclude recognition of this doctrine in the democratic South Africa. The Constitutional Principle VI of the Interim Constitution mandated that the separation of powers should be enshrined in the 1996 Constitution.²⁸⁸ Considering the previously mentioned Constitutional Principle, the separation of powers doctrine must be a subject of proper checks and balances to safeguard accountability, responsiveness and openness among the three branches of government, the legislature, executive and judiciary.²⁸⁹

Mindful of the fact that the 1996 Constitution had to conform to the Constitutional Principles of the Interim Constitution,²⁹⁰ it is imperative to determine whether or not such conformity persisted regarding the separation of powers doctrine. A purposive interpretation of the 1996 Constitution structure captures this doctrine, in the sense that the three government branches are separated from one another, to perform the specific duties assigned to each of them. Section 43 of the previously mentioned Constitution outlines a composition of the legislature,²⁹¹ section 85 the executive,²⁹²

²⁸⁷ V 1.3 of the Bangalore Principles of Judicial Conduct (2002); Humby *et al* *Introduction to Law and Legal Skills in South Africa* 30-31 ; Malan 2014 *PELJ* 1984; Currie and De Waal *The New Constitutional and Administrative Law* 95: 299 ; Mojapelo 2013 *Advocate* 38; Masterman *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* 10; Pikiš *Constitutionalism-Human Rights-Separation of Powers: The Cyprus Precedent* 93; Hargrove *Judicial Branch of Government* 8. Backhaus *The Elgar Companion to Law and Economic* 407.

²⁸⁸ *Constitution of the Republic of South Africa Act 200 of 1993* Constitutional Principle VI: There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

²⁸⁹ *Constitution of the Republic of South Africa Act 200 of 1993* Constitutional Principle VI.

²⁹⁰ Klug "South Africa's Experience in Constitution-Building" 68; De Visser *Developmental Local Government: A Case Study of South Africa* 53; Mostert *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private and Landownership in South Africa and Germany: A Comparative Analysis* 69; Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* 121; Botha *Statutory Interpretation: An Introduction for Students* 57; Holomisa *A Double-Edged Sword: A Quest for a Place in the African Sun* 104; Rabe *Equality, Affirmative Action and Justice* 283; Basson *South Africa's Interim Constitution: Text and Notes* 104.

²⁹¹ Section 43 of the Constitution of the Republic of South Africa, 1996.

²⁹² Section 85 of the Constitution of the Republic of South Africa, 1996.

while section 165 provides for the judiciary.²⁹³ The scope of this study is confined to the latter constitutional provision which provides for the independence of the judiciary, with a point of departure that outlines a general scope of the features that form part of judicial independence.

3.4.2 General Scope of Judicial Independence

Many features contribute to the formation of an independent judiciary. Smith states that those features entail impartiality, insularity, exclusive competence, and compliance.²⁹⁴

3.4.2.1 Impartiality

Impartiality requires the judicial officers to be unbiased in adjudicating the legal disputes brought before them in a court by the litigants.²⁹⁵ This feature aims at eliminating the possibilities of influencing the judicial officers in an improper manner or through any form of pressure.²⁹⁶ The presiding officer must apply the law objectively to facts in depute, without prejudicing any person with any direct or

²⁹³ Section 165 of the Constitution of the Republic of South Africa, 1996. See also a Preamble of the Bangalore Principles of Judicial Conduct (2002) which provides the principles that are:
...intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.

²⁹⁴ Smith *Judges and Democratization: Judicial Independence in Democracies* 32. See Ebrahim "Governance and Administration of the Judicial System" 102, stating that "the principle of judicial independence demands at least personal, substantive, institutional and administrative separation and autonomy from the other two branches of government. Personal independence commonly covers the conditions of services of judges, including their tenure and security of office. It links with financial security too, in an adequate remuneration for judges ought to be ensured. Substantive independence, on the other hand, demands that individual judges be free from influence of any other person or institution when they perform their judicial functions. The essence of institutional independence is the protection of the judiciary as a collective."

²⁹⁵ V 1.2, V 5.2 of the Bangalore Principles of Judicial Conduct (2002); Smith *Judges and Democratization : Judicial Independence in Democracies* 33.

²⁹⁶ V 1.1 of the Bangalore Principles of Judicial Conduct (2002); Backhaus *The Elgar Companion to Law and Economic* 407; Smith *Judges and Democratization: Judicial Independence in Democracies* 33;

indirect interest thereof.²⁹⁷ A partial judicial officer cannot administer justice commendably and this cast aspersion to the judicial body.

3.4.2.2 Insularity

Insularity refers to a political influence on the establishment of courts, security of tenure, remuneration and the process of appointing judicial officers.²⁹⁸ Insularity prevents politicians from playing a dominant role in the formation of courts.²⁹⁹ It should be borne in mind that the courts cannot function without judicial officers, thus, it is fundamental to appoint them to execute judicial functions. However, a judicial appointment process that is politically contaminated affects insularity. Because such process embraces a political influence that this feature of judicial independence prohibits.

3.4.2.3 Exclusive competence

Exclusive competence prohibits the executive and legislative organs of state to discharge the obligations that are within the ambit of the judiciary.³⁰⁰ The separation of powers doctrine is a source of this feature, proscribing other branches of government from usurping the role of courts to administer justice.³⁰¹ The judiciary could be a useless branch of government if the legislature and the executive took over its power. Therefore, exclusive competence seeks to protect the judiciary from interference of the executive and legislative branches of government.

3.4.2.4 Compliance

Compliance means that court decisions must be respected and executed to ensure that the public have confidence in the judiciary.³⁰² It is impossible for the rule of law to prevail in a state where pertinent authorities or concerned parties defy the courts judgements, this diminishes democracy. Failure to enforce court judgements could also lead to lawlessness in a state, where the importance of the rule of law does not

²⁹⁷ V 1.1 of the Bangalore Principles of Judicial Conduct (2002); Backhaus *The Elgar Companion to Law and Economic* 407.

²⁹⁸ Smith *Judges and Democratization: Judicial Independence in Democracies* 39.

²⁹⁹ Un "The Judicial System and Democratization in Post-Conflict Cambodia" 72.

³⁰⁰ Smith *Judges and Democratization: Judicial Independence in Democracies* 43; Seibert-Fohr *Judicial Independence in Transition* 349.

³⁰¹ Seibert-Fohr *Judicial Independence in Transition* 349.

³⁰² Smith *Judges and Democratization: Judicial Independence in Democracies* 45-46; Casarin "Non-Market Strategies in Legal Arenas" 154.

reign supreme. Thus, it is imperative that the state must have a Constitution that safeguards the independence of the judiciary, for example, the South African Constitution.³⁰³

3.4.3 *The Constitutional Framework of the Independence of the Judiciary*

In terms of Section 165 of the Constitution the courts have a mandate to exercise the exclusive judicial power in the Republic of South Africa.³⁰⁴ This constitutional provision requires the judiciary to be independent from other branches of government or state organs and the latter must ensure that such independence materialise through legislation and any other feasible means.³⁰⁵ Independence in this context refers to various components such as impartiality,³⁰⁶ application of the law without fear, favour or prejudice,³⁰⁷ and also the prohibition of any other person from meddling with the functioning of the courts.³⁰⁸ These components are best described as two categories, institutional independence and decisional independence.³⁰⁹ However, this study will discuss each component and highlight the way the judicial appointment process impacts thereto.

3.4.3.1 Impartiality

Impartiality is a cardinal feature that all judicial officers must have when they adjudicate legal disputes. This feature prohibits presiding officers from being partial or biased towards the parties to a dispute but must treat them equally.³¹⁰ Impartiality requires the critical assessment of a human mind. Thus, the application of such mind to a legal situation is an overriding quality in determining the independence of judicial officers.³¹¹ This means that the way a judicial officer applies his or her mind to a set of facts serves as a yardstick of determining the impartiality of such judicial officer.³¹²

³⁰³ *The Constitution of the Republic of South Africa*, 1996.

³⁰⁴ Section 165(1) *the Constitution of the Republic of South Africa*, 1996.

³⁰⁵ Section 165(4) *the Constitution of the Republic of South Africa*, 1996.

³⁰⁶ Section 165(2) *the Constitution of the Republic of South Africa*, 1996.

³⁰⁷ Section 165(2) *the Constitution of the Republic of South Africa*, 1996.

³⁰⁸ Section 165(3) *the Constitution of the Republic of South Africa*, 1996.

³⁰⁹ Cameron 2010 *Advocate* 24; Edlin *Common Law Judging: Subjectivity, Impartiality and the Making of Law* 104; Tarr *Without Fear or Favour: Judicial Independence and Judicial Accountability in the states* 93.

³¹⁰ Edlin *Common Law Judging: Subjectivity, Impartiality and the Making of Law* 104.

³¹¹ Tarr *Without Fear or Favour: Judicial Independence and Judicial Accountability in the states* 94; Casarin "Non-Market Strategies in Legal Arenas" 154.

³¹² Edlin *Common Law Judging: Subjectivity, Impartiality and the Making of Law* 104.

Case law is of appreciable assistance to define the legal parameters of impartiality in the judicial independence context.

In the *President of the Republic of South Africa and others v South African Rugby Football Union (SARFU)*,³¹³ the respondents casted aspersions on the independence of the Constitutional Court presiding officers based on impartiality.³¹⁴ They brought an application for the recusal of the Constitutional Court President Arthur Chaskalson and other four members of this Court.³¹⁵ It appears that *SARFU* believed it would not be in the interest of justice for these judicial officers to preside over a case involving then President Nelson Mandela as a party to litigation. This is because *SARFU* raised a relationship between the applicant and those judicial officers as a hindering factor to their impartiality.³¹⁶ *SARFU* contended that President Mandela and the judicial officers concerned were members of the same political party being the African National Congress (ANC).³¹⁷

SARFU also contended that some of the judicial officers were legal representatives of the appellant.³¹⁸ Chaskalson was in a legal defence team for Nelson Mandela at the Rivonia trial in 1963 and 1964.³¹⁹ By inference, his impartiality might be questionable in this regard. Conceivably, the relationship that Chaskalson and other judges concerned had with Nelson Mandela could influence such judicial officers, not to adjudicate the legal dispute before the court impartially.³²⁰ Debatably, a human being cannot easily be neutral on adjudicating a dispute between the parties, especially if he or she have had a relationship with either of them. This is because a natural person is always influenced by his or her conscience as well as personal

³¹³ *President of the Republic of South Africa and others v SARFU* 1999 (4) SA 147 (CC). The study will not delve into the details of this case, but is confined to aspects deemed pertinent by the researcher to discuss.

³¹⁴ *President of the Republic of South Africa and others v SARFU* 1999 (4) SA 147 (CC) para 6.

³¹⁵ *President of the Republic of South Africa and others v SARFU* 1999 (4) SA 147 (CC) para 6. Other four judicial officers include Deputy President Langa, Sachs J, Kriegler J and Yacoob J. *President of the Republic of South Africa and others v SARFU* 1999 (4) SA 147 (CC) para 11.

³¹⁶ *President of the Republic of South Africa and others v SARFU* 1999 (4) SA 147 (CC) para 17.

³¹⁷ *President of the Republic of South Africa and others v SARFU* 1999 (4) SA 147 (CC) para 23.

³¹⁸ *Winnie Mandela: A Life* 152; Broun *Saving Nelson Mandela: The Rivonia Trial and The Fate of South Africa* 18; Davids and Le Roux *Precedent and Possibility: The (ab)use of Law in South Africa* 39; Ventura *From Your Gods to Our Gods: A History of Religion in India, South Africa and British Courts* 276; Goldberg *A Life for Freedom: The Mission to End Racial Injustice in South Africa* 102. Ndlovu *A Balancing Act: A History of the Legal Resources Foundation in Zimbabwe 1985-2015* 6.

³²⁰ *President of the Republic of South Africa and others v SARFU* 1999 (4) SA 147 (CC) para 11.

experience. Similarly, many factors influence the decisions of presiding officers.³²¹ Therefore, the contention of the respondents is plausible regarding their recusal application against Chaskalson and other four judicial officers.

The respondent also raised questions about the judicial appointment of the previously mentioned judicial officers as the basis of another factor that cast doubt on their impartiality. *SARFU* submitted that Nelson Mandela, in his capacity as President of the Republic of South Africa, appointed all the presiding officers then present in the Constitutional Court.³²² Thus, those judicial officers would not be objective and impartial on deciding a dispute presented in this case.³²³ The respondent held that this could result in being denied a fair trial.³²⁴ It is sufficient to note that the Constitution affords everyone the right to have his or her legal dispute adjudicated by the impartial and independent body.³²⁵ Therefore a judicial officer is disqualified from presiding in a legal issue if, objectively speaking, there is a reason that he or she might be biased and this would be inconsistent with the right to a fair hearing.³²⁶

Bearing in mind that impartiality refers to the judicial officers' unbiased treatment against litigants,³²⁷ the court held that the test for determining perceived bias is objective and that the alleging party bears the onus of establishing such bias treatment.³²⁸ The court further held that:

The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of counsel. The reasonableness of the apprehension

³²¹ Factors such as psychological, social and political influence the court decisions see Danziger, Levav and Avnaim Pessó 2011 *PNAS* 6889. See also Schauer "Is There a Psychology of Judging?" 104; Hammond, Bonneau and Sheehan *Strategic Behavior and Policy Choice on the U. S Supreme Court* 9; Paul *The Legal Realism of Jerome N. Franck: A Study of Fact-Skepticism and the Judicial Process* 25.

President of the Republic of South Africa and others v SARFU 1999 SA (4) 147 (CC) para 11;16.

³²³ *President of the Republic of South Africa and others v SARFU* 1999 (4) SA 147 (CC) para 11.

³²⁴ *President of the Republic of South Africa and others v SARFU* 1999 (4) SA 147 (CC) para 11.

³²⁵ Section 34 of the Constitution of the Republic of South Africa, 1996 states:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

³²⁶ *President of the Republic of South Africa and others v SARFU* 1999 (4) SA 147 (CC) para 30.

³²⁷ <https://www.merriam-webster.com>.

³²⁸ *President of the Republic of South Africa and others v SARFU* 1999 (4) SA 147 (CC) para 45.

must be assessed in the light of the oath of office taken by Judges to administer justice without fear or favour.³²⁹

Considering the court reasoning cited above, a judge cannot merely recuse himself or herself, simply because other persons allege that he or she is biased, therefore, not impartial. A person who alleges such bias must prove it through a reasonable man test which requires an individual to be objective. Be that as it may, this controversial court case demonstrates the negative effect that the current judicial appointment process presents to the independence of the judiciary, which calls for impartial judicial officers, including those presiding over this matter.

Although the judicial officers promise to be unbiased,³³⁰ it is conceded from the above that various factors might influence the decisions of judicial officers.³³¹ Therefore, the allegations of *SARFU* that attack the impartiality of concerned presiding officers are justifiable and plausible in this regard as they identify an element of bias from the constitutional court members. These court members might have attempted to defend their bias when they promised to be impartial. However, by inference, some of them knew that they would not be impartial on adjudicating this case. It is beyond the scope of this study to delve into the merits and demerits of this argument. However, there are some other court judgments that determined the impartiality of judicial officers.

In *South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd*,³³² the court dealt with an application for recusal of two judicial officers on grounds of appearance of bias.³³³ In this case the applicants had two

³²⁹ *President of the Republic of South Africa and others v SARFU* 1999 (4) SA 147 (CC) para 48.

³³⁰ Judicial officers take an oath or affirmation in terms of Section 174(8) of the *Constitution of the Republic of South Africa*, 1996. Such oath or affirmation is incorporated in of schedule 2 of the *Constitution* and it reads:

6 Oath or solemn affirmation of Judicial Officers

(2) Each judge or acting judge, before the Chief Justice or another judge designated by the Chief Justice, must swear or affirm as follows:

I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/ E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.

(In the case of an oath: So help me God.)

³³¹ See footnote 43 above.

³³² *South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC).

³³³ *South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 1.

matters and referred the second matter to be heard first in the Labour Appeal Court (LAC).³³⁴ The LAC decided in favour of the respondent, with the court reciting evidence which was undisputed in that case, but was in issue in the first matter. The applicant brought the first matter in the Industrial Court and the latter did not grant them the relief that they sought.³³⁵

As a result, they appealed to the LAC hoping that it would overturn the industrial court decision and grant them the relief which they believed to be granted.³³⁶ When this first matter came before the LAC, two of the Judges who had heard the second matter were due to preside over the appeal.³³⁷ The applicants reasonably believed that those two judicial officers of the LAC would not be impartial, when adjudicating their appeal. Therefore, it does not surprise to learn that they brought an application for the recusal of those LAC judges in the Constitutional Court on the basis of their impartiality in this instance.³³⁸

The Constitutional Court stated that in order to consider the application for recusal, the court should begin by presuming that judicial officers are impartial in adjudicating disputes.³³⁹ This means that all judicial officers should be deemed to be unbiased when they preside over a matter brought before them by the litigants. The premise of this statement is on the view that a person who allege bias on part of a judicial officer must prove it through a recusal application. In a nutshell, he who doubt impartiality that the judicial officer is presumed to have, must rebut such presumption to prove perceivable bias from a judicial officer concerned. The court also held that:

Impartiality requires, in short, a mind open to persuasion by the evidence and the submissions of counsel; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding.³⁴⁰

³³⁴ *South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) headnote.

³³⁵ *South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 8.

³³⁶ *South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 9 and 10.

³³⁷ *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 3 (3) SA 705 (CC) para 10.

³³⁸ *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 1.

³³⁹ *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 12.

³⁴⁰ Para 13.

The study subscribes to this seeming self-explanatory remark and reluctant to delve into more detail. In a nutshell, a judicial officer should confine himself or herself to the evidence and submissions brought before him or her in court. That judicial officer should apply the pertinent law to such evidence as well as submissions and ultimately reach an informed decision. The court correctly stated that absolute neutrality is something impossible in the judicial context, because judges are human.³⁴¹ They are influenced by their own life experience and perspective in discharging their judicial duties.³⁴² Therefore, it is conceivable that neutrality is not a measure of a judicial officer's impartiality.

In *Sager v Smith*,³⁴³ the court also laid down a test for recusal based on the grounds of appearance of bias. It stated that the test to determine impartiality is an objective one, requiring not only that the person apprehending the bias must be a reasonable person but also that the complaint must be reasonable.³⁴⁴ The test is not different from the one discussed in the cases above, save for the reasonableness of the complaint part. The latter means that the statement made by the applicant alleging that a judicial officer is biased should be rational. It should attract a reasonable conclusion that a judicial officer is or would not be impartial in adjudicating a dispute brought before him by the litigants.

In *Take & Save Trading CC and others v The Standard Bank of SA Limited*,³⁴⁵ the Supreme Court of Appeal dealt with an application for recusal brought by the defendant during the course of the proceedings.³⁴⁶ The application was based on a reasonable apprehension of bias, that it would infringe their right to a fair trial which included the right to a hearing before an impartial adjudicator.³⁴⁷ The court stated that a judicial officer is obliged to recuse him or herself if a reasonable apprehension

³⁴¹ *South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 13.

³⁴² *South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 13.

³⁴³ *Sager v Smith* 2001 (3) SA 1004 (SCA).

³⁴⁴ *Sager v Smith* 2001 (3) SA 1004 (SCA) para 17.

³⁴⁵ *Take & Save Trading CC and others v The Standard Bank of SA Limited* 2004 (4) SA 1 (SCA).

³⁴⁶ *Take & Save Trading CC and others v The Standard Bank of SA Limited* 2004 (4) SA 1 (SCA) para 1.

³⁴⁷ *Take & Save Trading CC and others v The Standard Bank of SA Limited* 2004 (4) SA 1 (SCA) para 2.

of bias persists.³⁴⁸ In this case the court also adopted the test laid down in *SARFU* case as discussed above.

In a criminal case *S v Basson*,³⁴⁹ the court indicated that in cases of this nature the requirement of impartiality is linked to the right to a fair trial afforded to the accused person.³⁵⁰ It stated that this right is of paramount importance to the administration of the justice.³⁵¹ The court further stated that:

When considering the issue of bias in a trial court, the following must be borne in mind. There is a difference between grounding a complaint of bias on the conduct of the judge in hearing the case and grounding such a complaint on the relationship between the judge and one of the parties or witnesses.³⁵²

That is to say that there is a need to strike a balance between the way in which a judicial officer conducts himself or herself during a trial and his or her relationship with a party or witness, to ascertain that judicial officer's impartiality. The court followed the same test adopted in the preceding case law, especially *SARFU* and *South African Commercial Catering and Allied Workers Union and Others* cases. Although the matter and wording vary, the difference, as well as the message conveyed, remains the same.

It appears that *SARFU* case is a precedent to be followed in deciding the impartiality of judicial officers. This is because all the preceding case law highlights that a test for bias is objective. A person alleging bias must have a reasonable apprehension that such judicial officer would not be impartial on adjudicating the dispute before him or her. In this regard, that person can apply to a competent court for the recusal of a judge or acting judge who appears not to be impartial.

Olivier convincingly states that the acting judges may adjudicate legal disputes in a manner that would not jeopardise the possibility of being appointed on permanent basis.³⁵³ This view goes to the heart of judicial independence in the sense it challenges the impartiality of acting judges. The latter may not administer justice

³⁴⁸ *Take & Save Trading CC and others v The Standard Bank of SA Limited* 2004 (4) SA 1 (SCA) para 2.

³⁴⁹ *S v Basson* 2005 (1) SA 171 (CC).

³⁵⁰ *S v Basson* 2005 (1) SA 171 (CC) para 26; See S 35(3) of the *Constitution of the Republic of South Africa*, 1996.

³⁵¹ *S v Basson* 2005 (1) SA 171 (CC) para 27.

³⁵² *S v Basson* 2005 (1) SA 171 (CC) para 28.

³⁵³ Olivier "The Selection and Appointment of Judges" 151.

commendably, if a politician who plays a decisive role in the appointment process of permanent judicial officers is a party to the legal dispute before them.

For example, an acting judge who aspires for a permanent judicial appointment may preside over a civil claim brought against President Cyril Ramaphosa in his personal capacity, in the Supreme Court of Appeal full bench on 25 May 2018. After making the fact finding, all presiding officers, except the previously mentioned acting judge, may be convinced that there is enough evidence that strengthens the plaintiff case and weakens the defence of Mr Ramaphosa on a balance of probabilities. In this regard, such acting judge can hold a dissenting view that absolves President Ramaphosa from the instance. The primary reason that might have influenced the acting judge to hold this view is not because the plaintiff does not have a strong case, but an attempt to be in good terms with the President so that he could eventually appoint him as a permanent judge. Therefore, the impartiality of acting judges can be doubted and this would affect the independence of the judiciary.

It should be borne in mind that the impartiality of judicial officers is not a sole yardstick of judicial independence. Therefore, this study explores “application of the law without fear, favour or prejudice” as another prerequisite for constituting an independent judiciary.

3.4.3.2 Application of the law without Fear, Favour or Prejudice

Fear means “to be frighten or afraid of something or someone”.³⁵⁴ In light of this definition, a presiding officer must discharge his or her judicial obligations without being afraid of anything or the consequences that might subsequently unfold. It takes men and women with a lot of grit to give life to the law and administer justice commendably. Judicial officers must be bold enough to the construe law, apply it to set of facts and make an informed objective decision. It does not matter that if such decision is not in favour of a party who is deemed to be dangerous, reputable to the society or a government functionary.

Judicial officers should also be intrepid to adjudicate disputes that involve the authorities that participated in the process that resulted in their judicial appointment.

³⁵⁴ Merriam Webster date unknown <https://www.merriam-webster.com>.

Loss of a judicial office should not instil fear if such adjudication brings a negative result to those authorities. The attacks directed to the judiciary and criticisms levelled against the judgement or remarks, either by the ordinary citizens or politicians must not derail the judicial officers to discharge their obligation as the law demands.³⁵⁵ Thus, judicial officers should not hesitate to adjudicate a legal dispute and apply the law without agitation.

Favour refers to a “treatment that is generous to one person or group in a way that seems unfair to others.”³⁵⁶ Members of the judiciary must perform their duties without giving one party better treatment in contrast to another. Judicial independence requires an objective application of the law to a set of facts or facts in dispute. The parties involved in a legal dispute must present their case before a presiding officer and the latter must apply the law for its purpose. Judicial officers should strive to avoid influential factors that fall outside the scope of the facts before them when they decide the issues or the merits of such case, to the extent that such factors ultimately produce a decision that bears an element of favouritism emanating from a judicial officer.

This judicial independence feature was challenged during the appointment of Chief Justice Mogoeng Mogoeng. Various non-governmental organisations and some political parties saw his appointment as being politically motivated, that Mogoeng would favour the executive branch of the ANC led government.³⁵⁷ The premise of

³⁵⁵ The President and the Secretary General of the Economic Freedom Fighters Mr Julius Malema and Godrich Gardee criticised Chief Justice Mogoeng Mogoeng for disturbing Justice Jafta while he was reading a majority judgement that instructed the National Assembly to design the rules regarding the procedure to remove the President of the Republic of South Africa in terms of section 89 of the Constitution. Gardee stated that “it is unprecedented for those who have been in courts throughout their existence...for such an invitation to be displayed by the holder of the highest office of the courts—who was actually trying to impose his own judgement into the record. We really have to look at the decorum and the conduct of the Chief Justice. He cannot just be over celebrated. He must be called into order when he conducts himself in a manner not expected of the leader of the Judiciary” Malema said “ CJ can disagree anyhow he want but to show disrespect to a fellow Justice on the bench especially during the reading of judgement is unacceptable. The independence of Judges include that no one can tell them how to write their judgements, but we saw the opposite today” See Child 2017 <https://www.timeslive.co.za>.

³⁵⁶ Hornby *et al Oxford Advanced Learner's Dictionary* 540.

³⁵⁷ Krotoszynski, *Privacy Revisited: A Global Perspective on the Right to be Left Alone* 236.

their criticism emanates from the support that he received from the ANC members for a judicial appointment.³⁵⁸

Furthermore, the appointment of Judge Leona Theron to the Constitutional Court has not been without controversy. It has been pointed from the above that Leona Theron postponed a corruption case against Jacob Zuma for seven months, a period that ended after the election and inauguration of Mr Zuma as the President of the Republic.³⁵⁹ This deferment can be perceived as favouritism by Judge Theron to Jacob Zuma because it has been alleged that the two had a relationship through Zuma's lawyers, son and nephew.³⁶⁰ Therefore, a miscarriage of judicial independence persists if a judicial officer's conduct displays overt or covert favouritism to one party over the other, instead of striving to administer justice through the facts that speak for themselves.

It is pertinent to borrow the provisions of section 9 of the Constitution in order to qualify the parameters of favour.³⁶¹ This constitutional provision affords everyone within the Republic of South Africa the right to equality before the law, which is also extended to legal protection and benefit.³⁶² A judicial officer must ensure that everyone has an advantage of the law, which does not compromise any other person.³⁶³ All judicial officers should be guided by the principle of law and conscience instead of personal favouritism.³⁶⁴ Therefore, the judicial officer must not give persons a generous treatment according to their wealth, professional position or status of a party to a legal dispute in the process of adjudicating that dispute.

Political loyalty may also influence a decision of a judicial officer or the manner in which he or she performs the administration of justice. The President, Minister of Justice and members of the JSC drawn from parliament are politicians who play an

³⁵⁸ Krotoszynski, *Privacy Revisited: A Global Perspective on the Right to be Left Alone* 236.

³⁵⁹ See para 2.5 above.

³⁶⁰ In their request to the Judicial Service Commission to review the judicial appointment of judge Leona Theron to the Constitutional Court by President Jacob Zuma, A non-profit organisation called the Forensics for Justice alleged that Leona Theron had been in a business with the two of President Zuma's lawyers Jerome Brauns as well as Michael Hulley, the latter also worked tightly with the President's son and nephew. Judge Theron indeed confirmed the aforesaid relationship especially with Michael Hulley, that they were both involved in a close corporation. See Dolley and Serrao 2017 <http://www.msn.com>.

³⁶¹ *Constitution of the Republic of South Africa*, 1996.

³⁶² Section 9 (1) of the *Constitution of the Republic of South Africa*, 1996.

³⁶³ V 2.1 of the Bangalore Principles of Judicial Conduct (2002).

³⁶⁴ *S v Mamabolo* 2001 (5) BCLR 449 (CC) para 22.

active and ultimate role in the appointment of judicial officers.³⁶⁵ Some of those judicial officers might be lenient or generous towards those politicians in the process of adjudicating their legal disputes. This renders members of the judiciary not to perform their duties in a manner that promotes justice and also poses a potential threat to judicial independence.

Prejudice is an unreasonable dislike of or preference for a person, group, custom, etc, especially when it is based on their race, religion, sex, etc.³⁶⁶ Prejudice is in contrast of favour in the sense that the latter refers to the beneficiary of a generous treatment, while the former is about a person who suffers from such generous treatment afforded another party. Section 9 of the Constitution also forbids a direct or indirect unfair discrimination by the state or any person against anyone on various grounds.³⁶⁷ This prohibition of discrimination is also extended to the judicial officers when adjudicating legal dispute as well as performing the administration of justice.³⁶⁸ Differently put, members of the judiciary must refrain from being influenced by factors that may prejudice one of the parties to a dispute in an unreasonable unjustifiable manner.

3.4.3.3 *Non-Interference by other Persons or Organs of State*

The Constitution proscribes state organs and other persons from meddling with the operation of the courts.³⁶⁹ The institutional independence of the judiciary demands that this branch of government should be given protection that would hinder any form of interference, by the executive and legislative branches of government. It is worth pointing that the courts function through judicial officers, especially in the process of administering justice. However, it is a challenge to the independence of the judiciary when members of the previously mentioned branches of government play an active role and dominate the process of judicial appointments. By inference, this is an indirect interference with the functioning of the courts.

³⁶⁵ See para 1.2 above.

³⁶⁶ Hornby *et al Oxford Advanced Learner's Dictionary* 1153.

³⁶⁷ Section 9 (3) and (4) of the *Constitution of the Republic of South Africa*, 1996 those grounds includes including gender, race, sex, marital status, pregnancy, ethnic or social origin, age, disability, religion, conscience, colour, sexual orientation, belief, culture, language and birth

³⁶⁸ V 5 of the Bangalore Principles of Judicial Conduct (2002);

³⁶⁹ Section 165 (3) of the *Constitution of the Republic of South Africa*, 1996.

As indicated in the previous chapter,³⁷⁰ the President of the Republic of South Africa appoints the judicial officers in his capacity as head of the national executive which is another branch of government.³⁷¹ It is common cause that the President of the Republic of South Africa is a member of a political party which enjoys majority of seats in the National Assembly. On the other hand, the Minister of Justice also appoints acting judges for the Supreme Court of Appeal or any High Court of the Republic of South Africa as it has already been stated above.³⁷² The Minister of Justice is a politician and also a member of cabinet which is the national executive. Moreover, the JSC as a body that select and recommend candidates for judicial appointments to the President is dominated by politicians drawn from the legislative arm of government.³⁷³

Making a deduction on the role of the President of the Republic, the Minister of justice as well as composition of the JSC, it is sufficiently clear that politicians from other government branches dominate the process of appointing judicial members in South Africa.³⁷⁴ By inference, these judicial appointment processes show that the politicians drawn from the executive and legislative organs of state interfere with the independence of the judiciary.³⁷⁵ It is in the sense that those politicians have a greater influence on the determination and constitution of the judiciary, through their dominance in the process of appointing the court functionaries, who administer justice.³⁷⁶ Therefore, it is against this context that the independence of the judiciary is in jeopardy.³⁷⁷

Members of the legal profession are in the minority within the judicial appointment process, while the legislative and executive arms of state are a majority, both in the previously mentioned process and on appointment of cabinet and parliamentary committee members. Judicial officers play no active role in the latter appointments. For example, the constitutional procedure of appointing members of the legislature

³⁷⁰ See chapter 2 above.

³⁷¹ See para 1.2; 2.3.3.3 (a); 2.3.3.3 (b); 2.3.3.3 (c); Section 174 (3) of the *Constitution of the Republic of South Africa*, 1996.

³⁷² See para 2.3.3.3 (e) above.

³⁷³ See para 2.4.1 above.

³⁷⁴ Van Gend *Judicial Selection in South Africa* 18.

³⁷⁵ Gravett 2017 *JCRDL* 268.

³⁷⁶ Du Toit, Swart and Teuteberg *South Africa and the Case for Renegotiating the Peace* 74; Roux *The Politics of Principle: The First South African Constitutional Court, 1995-2005* 168.

³⁷⁷ Gravett 2017 *JCRDL* 268; Van Gend *Judicial Selection in South Africa* 23; Du Toit, Swart and Teuteberg *South Africa and the Case for Renegotiating the Peace* 74.

apparently protects the independence of this governmental branch, owing to the fact that the citizens with the right to vote, elect members of the legislature, the latter's independence remains firm from interference of members of other state organs.³⁷⁸

The right to vote for the legislative body is also extended to the judicial officers because they are frequently South African citizens.³⁷⁹ However, judicial officers participate in the legislative appointment process in their personal interest not judicial capacity. Although the Chief Justice preside over the election of a speaker of the National Assembly and can appoint a judge to do the same at the provincial legislature, these two members of the judiciary do not elect the Speakers of the legislature.³⁸⁰ In this regard, the role of the Chief Justice and a judge is merely to facilitate the process of appointing the Speakers of the legislature. Therefore, the judiciary does not participate in the process of appointing members of the legislature.

The process of constituting the executive also assures independence of this branch of government. The President of the Republic is free to appoint the Deputy President, Ministers and Deputy Ministers to his cabinet as the national executive.³⁸¹ The President enjoys an absolute and he or she need not to consult persons from other branches of government during the national executive members' appointment process. This demonstrates the independence of the executive from the judiciary and legislature. The executive remains independent even though the President appoints most of his or her cabinet members from the National Assembly.³⁸² However, its independence is not absolute but subject to checks and balances, as all

³⁷⁸ Section 19 (3) of the *Constitution of the Republic of South Africa*, 1996 provides:

(3) Every adult citizen has the right—

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret.

Section 46 Composition and election

(1) Subject to Schedule 6A, the National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system.

³⁷⁹ Section 174 Appointment of judicial officers :

(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.

³⁸⁰ Section 52 (2) and section 111 (1) of the *Constitution of the Republic of South Africa*, 1996.

³⁸¹ Section 91 (2) of the *Constitution of the Republic of South Africa*, 1996.

³⁸² Section 91 (3) of the *Constitution of the Republic of South Africa*, 1996.

members of the executive are collectively and individually accountable to Parliament.³⁸³

Although he or she presides over the election of the President, the Chief Justice does not cast a vote as members of the National Assembly does, to elect the President of the Republic.³⁸⁴ The role of the Chief Justice is merely to decide on a date of electing the President of the Republic and facilitate the proceedings of making such election.³⁸⁵ It is, therefore, evident from this discussion that the judiciary does not have any active participation in the process of appointing members of the executive and legislative state organs. Conversely, it is perplexing to discern that members of the previously mentioned governmental branches enjoy active participation in the judicial appointment process. The ramifications of such participation are detrimental to judicial independence as it amounts to a political interference in the appointment of the court functionaries.

The President, a politician and head of the national executive can decide to nominate or appoint a judicial officer frequently either to different or the same court. By inference, the President may appoint a judge who previously delivered a judgement that is favourable to him or her governing party. The reason might be that the President hope that such judge will exercise his loyalty to the extent of adjudicating a legal dispute in favour of the President, his political party or related persons even if the facts do not favour them.

It has been argued from the previous chapter that the then President Jacob Zuma appointed Sandile Ngcobo as the Chief Justice in October 2009 based on favouritism, since the latter held a dissenting judgment in favour of the former, in a case where he was a party to the legal dispute.³⁸⁶ Ngcobo CJ was appointed to this court for the first time as a judge on 15 August 1999.³⁸⁷ Section 176(1) of Constitution limits a Constitutional Court judge's term of office to a non-renewable period of twelve years or until he or she attains the age of forty, unless an Act of

³⁸³ Section 92 (2) of the *Constitution of the Republic of South Africa, 1996*

³⁸⁴ Section 86 (2) of the *Constitution of the Republic of South Africa, 1996*.

³⁸⁵ Section 86 (3) of the *Constitution of the Republic of South Africa, 1996*.

³⁸⁶ See para 2.5 above.

³⁸⁷ Viljoen *Beyond the Law Multi-Disciplinary Perspectives on Human Rights* 32; Brickhill *et al* 2011 ASSAL 3

Parliament extends such term.³⁸⁸ In this regard, the term of Ngcobo CJ in the Constitutional Court bench was due to end on 14 August 2011.³⁸⁹

A few months prior to the end of Ngcobo CJ's term, President Zuma attempted to extend the judicial office of Ngcobo CJ relying on section 8(a) of the *Judges' Remuneration and Conditions of Employment Act (Judges' Remuneration Act)*, which provides for such extension.³⁹⁰ Ngcobo CJ accepted President Zuma's decision to extend his judicial tenure by five years.³⁹¹ The President subsequently informed the JSC and leaders of parties represented in the National Assembly about his decision.³⁹²

It does not surprise to learn that the Centre for Applied Legal Studies, the Justice Alliance of South Africa, the Advancement of the South African Constitution and Freedom under Law challenged this judicial appointment extension of tenure in the Constitutional Court.³⁹³ These four previously mentioned non-government organisations (applicants) submitted that section 8(a) of the *Judges Remuneration Act* is unconstitutional and the court must set aside the extension of Ngcobo CJ's judicial tenure.³⁹⁴ They contended that the aforementioned legislative provision contravenes section 176(1) of the Constitution.³⁹⁵

Furthermore, the applicants submitted that the wording of section 8(a) of the *Judges' Remuneration Act* currently indicates that only Parliament enjoyed the authority to extend the term of office of a Constitutional Court judge and this power may not be assigned to any other person.³⁹⁶ However, two days before the court prepared to

³⁸⁸ Section 176 (1) of the *Constitution of the Republic of South Africa*, 1996.

³⁸⁹ Brickhill *et al* 2011 ASSAL 3.

³⁹⁰ 47 of 2001. Section 8 (a) provides that A Chief Justice who becomes eligible for discharge from active service in terms of section 3(1)(a) or 4(1) or (2), may, at the request of the President, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa, for a period determined by the President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years. Brickhill *et al* 2011 ASSAL 3.

³⁹¹ Brickhill *et al* 2011 ASSAL 4.

³⁹² Brickhill *et al* 2011 ASSAL 5.

³⁹³ Brickhill *et al* 2011 ASSAL 6.

³⁹⁴ *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) para 15.

³⁹⁵ *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) para 42.

³⁹⁶ *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) para 43-44.

make a ruling in this matter, Ngcobo CJ announced the withdrawal of his acceptance of President Zuma's decision to extend his judicial office term.³⁹⁷

Despite Ngcobo CJ's announcement, the Constitutional Court ultimately delivered a unanimous judgment declaring section 8(a) of the *Judges' Remuneration Act* unconstitutional and the President's decision to extend a judicial office term to be inconsistent with the Constitution.³⁹⁸ The court correctly stated that Parliament is the only branch of government vested with the authority to determine the term of office of Constitutional Court judges through legislation, in terms of section 176(1) of the Constitution.³⁹⁹ Although Parliament enacted this legislative provision, the court held that section 8(a) shifts that authority from Parliament to the Executive and this amounts to an unlawful delegation.⁴⁰⁰

The Constitutional Court pointed out that the authority to extend the tenure of a Constitutional Court judge is fundamental to the judicial office term, separation of powers doctrine and judicial independence.⁴⁰¹ This authority rests with parliament through legislative measures, to assist and protect the courts in safeguarding their independence as the Constitution demands.⁴⁰² The Constitutional Court concluded that section 8(a) contravenes the independence of the judiciary, in affording the President the discretion to extend the judicial term of the Chief Justice and this was legitimately perceived as external interference of the executive.⁴⁰³

Although the Constitutional Court declared section 8(a) of the *Judges' Remuneration Act* unconstitutional, this case demonstrates the effects that the participation of politicians drawn from other branches of government dominating the judicial appointment process presents to the independence of the judiciary. Assuming that Sandile Ngcobo delivered a judgment in favour of Mr Zuma while he was a judge of

³⁹⁷ Brickhill and Corder 2013 ASSAL 6.

³⁹⁸ *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) para 116

³⁹⁹ *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) para 55;57;64;67;69.

⁴⁰⁰ *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) para 62.

⁴⁰¹ *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) para 65.

⁴⁰² Section 165 (4) of the *Constitution of the Republic of South Africa*, 1996. See *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) para 67.

⁴⁰³ *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) para 68.

the High Court division, after becoming the President, it is possible that Jacob Zuma could have appointed Mr Ncgobo as the Constitutional Court judge and ultimately the Chief Justice. For this to materialise, President Zuma could have done this through the assistance of the JSC which is politically dominated, especially by members of his governing party. Possibly, the President would have convinced or persuaded the ANC members in the JSC to vote in favour of Sandile Ncgobo so that he could be recommended, and he would ultimately appoint him as a judicial officer.

It is also possible that the judicial officers who see their judicial appointment through the current process may improperly interfere with the way courts function. A judge of a lower court may attempt to be in good books of the President even if it is through unethical conduct, hoping that the President will appoint him to higher courts. For example, such judge can attempt to influence his or her colleagues to act in the same manner when they preside over cases involving the President.

In *Nkabinde and Another v the Judicial Service Commission*,⁴⁰⁴ the court had to decide on the application filed by judge Nkabinde and other judicial officers, pertaining to the unethical conduct of then Western Cape High Court Judge President Hlophe. The applicants alleged that Judge President John Hlophe made several attempts to unduly influence judge Nkabinde and judge Jafta regarding the outcome of some court cases involving Jacob Zuma.⁴⁰⁵ The applicants firstly brought this matter before the JSC and they were not satisfied with the manner in which the Commission handled their complaint.⁴⁰⁶ Although the court ruled against the applicants,⁴⁰⁷ it is pertinent for this study to analyse their complaint for the purpose of demonstrating its impact on the independence of the judiciary.

The attempts of Judge President Hlophe to influence judge Nkabinde and judge Jafta to make favourable decisions to Jacob Zuma in some court cases jeopardises the integrity of the courts. Those attempts set a wrong precedent as they raised a reasonable perception to the society, that it is possible for persons to influence the court decisions. In this regard, Judge President Hlophe interfered with the

⁴⁰⁴ *Nkabinde v Judicial Service Commission* 2016 (2) All SA 415 (SCA).

⁴⁰⁵ *Nkabinde v Judicial Service Commission* 2016 (2) All SA 415 (SCA) para 2, 10, 11, 12, 13 24.

⁴⁰⁶ *Nkabinde v Judicial Service Commission* 2016 (2) All SA 415 (SCA) para 70, 71.

⁴⁰⁷ *Nkabinde v Judicial Service Commission* 2016 (2) All SA 415 (SCA) para 121, 122, 123, 125.

functioning of the Constitutional Court notwithstanding that he is also a member of the judiciary.⁴⁰⁸

The reasons that propelled Judge President John Hlophe to influence members of the Constitutional Court to decide in favour of President Zuma are unknown to the researcher at the time of conducting this present study. By inference, perhaps Hlophe have had any form of a direct or indirect relationship with Mr Zuma. Hlophe's conduct is a political influence on the functioning of the courts, although he is a judicial member.⁴⁰⁹ This is because he expected the judicial officers to decide in favour of a prominent politician.

At the time of this controversy, Jacob Zuma was the President of the ANC, aspiring to be elected as the President of the Republic of South Africa during the 2009 national elections.⁴¹⁰ Conceivably, Mr Zuma met with Judge President Hlophe during the adjudicating period of the previously mentioned court cases, and advised him to influence the Constitutional Court judges to rule in his favour, on judgments that would pave his way to be elected as the President of the Republic of South Africa. Moreover, Zuma might have promised Judge President Hlophe a judicial appointment to the higher courts bench after he had been elected as the President.

In 2009, the ANC won the general elections and its members who enjoyed the majority of seats in Parliament, elected Jacob Zuma as the President of the Republic of South Africa.⁴¹¹ Later in 2009, five judicial vacancies arose in the Constitutional Court, one for the Chief Justice and other four justices.⁴¹² President Jacob Zuma was vested with the power to fill those judicial vacancies in his capacity as head of the national executive enshrined in the Constitution.⁴¹³ The President nominated and appointed the then Constitutional Court judge Sandile Ngcobo as Chief Justice.

⁴⁰⁸ The alleged conduct of Judge President John Hlophe contravenes the Bangalore Principles of Judicial Conduct (2002), which states that:

V 1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

⁴⁰⁹ Mangcu *The Democratic Movement: South Africa's Prospects Under Jacob Zuma* 76.

⁴¹⁰ Encyclopedia Britannica *Book of the Year 2009* 112.

⁴¹¹ Kesselman, Krieger and Joseph *Introduction to Comparative Politics, Brief Edition* 307.

⁴¹² Mail and Guardian 2009 <https://mg.co.za>.

⁴¹³ Section 174 (3) -(5) of the *Constitution Republic of South Africa*, 1996.

Regarding the remaining four judicial vacant positions, President Zuma had to follow a different constitutional process.⁴¹⁴ It is noticeable that John Hlophe was among the nominees aspiring for a judicial appointment, to fill the aforesaid vacancies in the Constitutional Court.⁴¹⁵ It does not surprise to learn that the JSC did not nominate Hlophe to President Zuma for judicial appointment, amid the criticisms levelled against him, relating to the long running issue of influencing judge Nkabinde and judge Jafta on some cases involving Mr Zuma.⁴¹⁶ The decision of the JSC not to nominate John Hlophe is commendable because it could have casted doubt to judicial independence, in the context of the allegations of influencing the judicial officers of the apex court in the land.

It is stated from the above that the independence of the judiciary is a component of the separation of powers doctrine.⁴¹⁷ The latter requires the executive, legislature and the judiciary to perform and exercise their duties as well functions independent from one another through different persons.⁴¹⁸ This means that each of the previously mentioned branches of government must consist of different persons. Section 165(3) of the Constitution qualifies the separation of powers doctrine to ensure that no person or state organs interfere with the functioning of the courts.⁴¹⁹ The purposive interpretation of this constitutional provision provides that the administration of justice must be performed by judicial officers who are exclusively

⁴¹⁴ Section 174 of the *Constitution Republic of South Africa, 1996*:
(4) The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:

(a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.

(b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.

(c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.

(5) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.

⁴¹⁵ Shapiro and Tebeau *After Apartheid: Reinventing South Africa?* 258; Mail and Guardian 2009 <https://mg.co.za>.

⁴¹⁶ Oxtoby states that the JSC prepared a list of nominees as required by section 174 (4) (a) of the *Constitution Republic of South Africa, 1996*. The list included seven judges, Chris Jafta, Mandisa Maya, Leona Theron, Sisi Khamphophe, Mogoeng Mogoeng and Johan Froneman. The President appointed Mogoeng, Jafta, Froneman and Khamphophe from that list. See Oxtoby 2013 *SALJ* 219.

⁴¹⁷ See para 3.3.1 above.

⁴¹⁸ See para 3.3.1 above.

⁴¹⁹ Section 165(3) of the *Constitution of the Republic of South Africa, 1996*.

appointed to a judicial office, not to any other office in the executive and legislative branches of government or state organs.

It is worrisome to learn that in 2010, the Minister of Justice appointed a member of an independent organ of state as an acting judge. Minister Jeff Radebe appointed Mokotedi Mpshe as an acting judge in the North West High Court in February 2010 for six months period.⁴²⁰ It is worth mentioning that this appointment materialised at the time when Mr Mpshe was still an acting NDPP.⁴²¹ This judicial appointment proves that the appointment of acting judicial officers can also be detrimental to the independence of the judiciary.⁴²²

The NDDP heads the National Prosecuting Authority (NPA), an institution that is supposed to be independent from other governmental institutions or branches. In this context, it is surprising to learn that a person acting as head of an independent office was appointed to act as head of another independent office. This violates the separation of powers doctrine and amounts to an interference of an acting NDPP with the functioning of the courts, in the sense that the NPA is a state organ that functions independent from the judiciary. In this regard, miscarriage to the independence of the judiciary persists.

Since the Constitution prohibits other persons including state organs from interfering with the operation of courts,⁴²³ by implication, this prohibition also applies to judicial officers in legal disputes that they do not preside over, but are adjudicated by their colleagues, in the same or different courts bench. Differently put, a judicial officer should not interfere with the court proceedings concerning a legal dispute that he or she is not the one who adjudicates that dispute. Such interference also amounts to external interference with the functioning of the judiciary. Therefore, the courts and other persons including state organs must enforce the Constitution to promote and protect the independence of the judiciary. Because the important component to its'

⁴²⁰ See para 2.3.3.3 (e) above.

⁴²¹ See para 2.3.3.3 (e) above.

⁴²² Siyo and Mubangizi 2015 *PELJ* 847.

⁴²³ Section 165(3) of the *Constitution of the Republic of South Africa*, 1996.

institutional independence “is that the judiciary must be seen to be free from external interference”.⁴²⁴

3.5 Conclusion

The separation of powers doctrine which requires the judiciary to be independent from the executive and legislative arms of government is not specifically incorporated in the South African Constitution if one follows the literal approach of interpretation. However, this chapter demonstrated that a contextual approach to the same Constitution captures this doctrine, by dividing the functions and composition of each branch of government. This division gives the judiciary independent powers from the executive and the legislature. In terms of Constitution, the independence of the judiciary consists of two legs, individual independence of a judicial officer when he or she presides over a legal dispute, and institutional independence of the judiciary from other government branches, state organs or any person. The chapter discussed these two legs in detail through an analysis of judicial independence features that are stipulated in the Constitution.

The Constitution is the foundation of the rule of law principle and it is the duty of an independent judiciary to promote such principle. This chapter highlighted the way politically contaminated judicial appointment process presents a threat to judicial independence. In this regard, it is difficult to promote the rule of law without an independent judiciary. It is therefore, pertinent for this study to compare South Africa to other countries, so that it could learn from their judicial appointment processes that strive to protect the independence of the judiciary though minimal participation of politicians.

⁴²⁴ *Van Rooyen and Others v The State* 2002 (5) 246 (CC) para 32; *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) para 68.

CHAPTER 4

JUDICIAL APPOINTMENTS IN OTHER COUNTRIES

4.1 Introduction

Most countries have an independent judicial body or institution. This institution consists of men and women who hold the necessary skills and qualifications to discharge various obligations as judicial officers. The primary duty of these judicial officers is to adjudicate legal disputes and uphold the rule of law. For this to materialise, each country employs various legal processes of appointing judicial officers ensuring that appropriately qualified and competent persons are nominated, recommended, selected or appointed to various judicial courts.

The indispensable component for an independent judiciary is a judicial appointments process free from political domination or influence in every country. Countries such as Canada and Namibia appear to have this essential component in their laws. Those laws provide for a judicial appointment process that is not politically contaminated. Moreover, they minimise the influence of members of the executive and legislative branches of government in the judicial appointment process. It is on this premise that the present chapter examines the processes employed to appoint judicial officers in Canada and Namibia. The primary objective of this chapter is to highlight the lessons that the Republic of South Africa could draw from these countries, consequently steering away from the current judicial appointments process that is prone to politically-motivated decisions.

4.2 Canada

4.2.1 General Overview

The Prime Minister and Governor General are responsible for the appointment of judicial officers in Canada.⁴²⁵ The former appoints judicial officers to the Supreme Court of Canada,⁴²⁶ while the latter appoints judges of the District, Superior and

⁴²⁵ Prime Minister of Canada 2016 <https://pm.gc.ca>; Section 96 of the *Constitution Act*, 1867.

⁴²⁶ Prime Minister of Canada 2016 <https://pm.gc.ca>. Although section 4(2) of the *Supreme Court Act* 1985 stipulates that the Governor in Council appoints the judicial officers to the Supreme Court of Canada, it appears that he or she merely performs a ceremonial duty while the Prime Minister is in fact the one who execute the judicial appointments.

Country Courts in each Province, except to the Probate Courts in Nova Scotia, New Brunswick and Ontario.⁴²⁷ However, the Canadian Constitution is silent on the process that the Governor General must follow to appoint the previously mentioned judges.

In the absence of such a judicial appointment process, it is disturbing to learn that between 1945 and 1965 the Governor General appointed judicial officers who were affiliated to the then governing political party.⁴²⁸ Those judicial officers also played an active role in the politics of the country at the time of their appointment.⁴²⁹ This shows that judicial independence was absent, since the governing party took absolute control of all branches of government. The impartiality of those judicial officers in the adjudication of legal disputes that involved members of the governing party was also suspicious. Furthermore, these judicial appointments were based on political loyalty or preference above competence.

However, the same cannot be said about the current judicial appointments process in Canada. The Canadian government legislated and codified the process of appointing judicial officers to the Canadian Supreme Court and courts of provinces such as Nova Scotia, New Brunswick and Ontario which the Governor General and the Prime Minister must follow. All these judicial appointments processes are not politically contaminated but strive to eliminate dominance or influence of members from the legislature and executive during the judicial appointment. It is pertinent at this juncture to discuss the judicial appointment process to the Supreme Court of Canada and the provincial courts.

4.2.2 *Supreme Court of Canada*

The Prime Minister appoints all judges of the Supreme Court of Canada.⁴³⁰ The judicial appointment process begins with the Independent Advisory Board for the Supreme Court of Canada (Advisory Board). The latter consists of seven members, with four members drawn from the legal fraternity.⁴³¹ They include a retired judge

⁴²⁷ Section 96 of the *Constitution Act*, 1867.

⁴²⁸ Friedland "Appointment, Discipline and Removal of Judges in Canada" 52.

⁴²⁹ Friedland "Appointment, Discipline and Removal of Judges in Canada" 52.

⁴³⁰ Prime Minister of Canada 2016 <https://pm.gc.ca>; Department of Justice Canada 2017 <https://www.newswire.ca>

⁴³¹ Prime Minister of Canada 2016 <https://pm.gc.ca>.

nominated by the Canadian Judicial Council, two lawyers, one nominated by the Law Society and the other by the Association Bar of Canada, as well as a legal scholar designated by the Council of Canadian Law Deans.⁴³² The Minister of Justice nominates three other Advisory Board members who are lay persons.⁴³³

The Advisory Board assesses all applications for a judicial vacancy and compile a list of shortlisted candidates.⁴³⁴ It must submit that list to the Prime Minister who should then give it to the Minister of Justice, for arranging a consultation with the Chief Justice and other pertinent parties, to present their views regarding the suitability of those shortlisted candidates.⁴³⁵ The Minister of Justice subsequently submits the recommendations emanating from the previously referred views of pertinent parties to the Prime Minister who then appoints a suitable candidate as a judicial officer.⁴³⁶

This judicial appointment is subject to checks and balances that strengthen transparency and accountability. Within a month of appointing a judicial officer, members of the advisory Board should submit a report to the Prime Minister, explaining the manner in which they discharged their duties and include the expenses incurred during the judicial appointment process.⁴³⁷ Members of the public are also entitled to have access to this report.⁴³⁸ Moreover, all the parties which participated in the judicial appointment process must account to the Senate and Parliament.⁴³⁹

The Chairperson of the Advisory Board, the Minister of Justice and the Prime Minister are required to appear before the House of Commons Standing Committee on Justice and Human Rights (HCSCJHR) subsequent to the judicial appointment.⁴⁴⁰ These parties must explain the way the nominee was appointed and also indicate

⁴³² Prime Minister of Canada 2016 <https://pm.gc.ca>.

⁴³³ Prime Minister of Canada 2016 <https://pm.gc.ca>.

⁴³⁴ Prime Minister of Canada 2016 <https://pm.gc.ca>.

⁴³⁵ Prime Minister of Canada 2016 <https://pm.gc.ca>. The Minister of Justice consult with the Chief Justice of Canada, relevant provincial and territorial attorneys general, relevant cabinet ministers, opposition Justice Critics, as well as members of the House of Commons Standing Committee on Justice and Human Rights, and the Standing Senate Committee on Legal and Constitutional Affairs.

⁴³⁶ Prime Minister of Canada 2016 <https://pm.gc.ca>.

⁴³⁷ Prime Minister of Canada 2016 <https://pm.gc.ca>.

⁴³⁸ Prime Minister of Canada 2016 <https://pm.gc.ca>.

⁴³⁹ Prime Minister of Canada 2016 <https://pm.gc.ca>.

⁴⁴⁰ Prime Minister of Canada 2016 <https://pm.gc.ca>.

that he or she satisfied the pertinent criteria as well as legislative prerequisites.⁴⁴¹ The appointed judicial officer must also appear before the HCSCJHR to answer questions asked by members of this house, the Standing Senate Committee on Legal and Constitutional Affairs and delegates from the Bloc Québécois as well as the Green Party.⁴⁴²

4.2.3. *Nova Scotia*

The Minister of Justice recommends persons to the cabinet so that the latter could advise the Lieutenant Governor to appoint such persons as judicial officers.⁴⁴³ Although it appears that political influence persists in this process since all role players are politicians from the executive branch of government, there is a committee that mitigates such political influence. The Advisory Committee on Provincial Judicial Appointments (Advisory Committee) compiles a list of candidates qualifying for judicial appointment and provides it to the Minister of Justice.⁴⁴⁴ The latter must make recommendations from that list.⁴⁴⁵

The mitigating factor of political influence in the judicial appointment process is evident from the composition of the Advisory Committee. This Committee is well-balanced in that it is dominated by legal minds, in contrast to politicians. It consists of eight members: two judges appointed by the Chief Justice and two lawyers who see their appointment through the Nova Scotia Barristers Society Council.⁴⁴⁶ Other members of the Advisory Committee include four lay persons from which two represent the interests of the public in the Committee.⁴⁴⁷

It is not clarified who must be the remaining two members.⁴⁴⁸ All these latter four members can be regarded as political appointees in so far as they are appointed by the Minister of Justice. However, this does not present any threat of political

⁴⁴¹ Prime Minister of Canada 2016 <https://pm.gc.ca>.

⁴⁴² Prime Minister of Canada 2016 <https://pm.gc.ca>.

⁴⁴³ Anon date unknown <http://www.courts.ns.ca>.

⁴⁴⁴ Anon date unknown <http://www.courts.ns.ca>.

⁴⁴⁵ Anon date unknown <http://www.courts.ns.ca>.

⁴⁴⁶ Executive Council 2016 <https://www.novascotia.ca>.

⁴⁴⁷ Executive Council 2016 <https://www.novascotia.ca>.

⁴⁴⁸ In respect of these four members, it is provided that the Minister of Justice must consider Factors such as geographical representation, gender balance, minority representation, representation of persons with a disability and the interest of administrations of justice and public service, before he or she appoints them. See the Executive Council 2016 <https://www.novascotia.ca>.

dominance to the composition of the Advisory Committee. These four political appointees perform and share the same functions with the four legal minds in the Committee. Thus, it is within this context that the researcher contends that there is no political influence in the judicial appointment process in Nova Scotia.

4.2.4 *New Brunswick*

In New Brunswick, the Court of Appeal is the highest judicial authority within this province.⁴⁴⁹ It comprises the Chief Justice, five other judges, any former judge of this court as a supernumerary judge and any former Chief Justice of this province who is either a judge or a supernumerary judge.⁴⁵⁰ The Governor General in Council is vested with the power to appoint all these judicial officers,⁴⁵¹ based on the recommendations of the Judicial Advisory Committee.⁴⁵² The latter execute its functions through a process that is similar to the one followed by the Advisory Committee of Nova Scotia as highlighted above.⁴⁵³

The Judicial Advisory Committee of New Brunswick consists of seven members who see their nominations through various persons.⁴⁵⁴ The Chief Justice nominates one judge while the Attorney General, Law Society and Canadian Bar Association nominate one member each from the legal profession.⁴⁵⁵ The federal government nominates the remaining three members of this Judicial Advisory Committee.⁴⁵⁶ The composition of the latter demonstrates its independence from political interference, since persons from the legal fraternity dominate the composition, as opposed to the federal government appointees.⁴⁵⁷ Although the federal government appoints three members, it does not appoint them to serve government interests but to represent the public interests.⁴⁵⁸ By inference, the purpose of public representation in the

449 Government of New Brunswick date unknown <https://www.gnb.ca>.

450 Section 2 (2) of the *Judicature Act* of 1973.

451 Government of New Brunswick date unknown <https://www.gnb.ca>.

452 Department of Justice Canada 2017 <https://www.newswire.ca>.

453 See para 4.2.3 above.

454 Office of the Commissioner for Federal Judicial Affairs Canada 2017 <http://www.fja.gc.ca>.

455 Department of Justice Canada 2017 <https://www.canada.ca>.

456 Department of Justice Canada 2017 <https://www.canada.ca>.

457 A judge nominated by the Chief Justice and other legal practitioners nominated by the attorney General, Law Society and Canadian Bar Association, makes them four members drawn from the Legal fraternity are against three persons nominated by the federal government.

458 Department of Justice Canada 2017 <https://www.canada.ca>.

Judicial Advisory Committee is to afford members of the society participation in the judicial appointment process and strengthen their confidence in the judiciary.

4.2.5 Ontario

4.2.5.1 Appointment Process

Judicial appointments in Ontario are also progressive in the sense that they limit the power of the Lieutenant Governor in Council through a process embodied in the *Courts of Justice Act* (hereafter *Justice Act*).⁴⁵⁹ This legislation dictates that the Lieutenant Governor in Council should appoint provincial judges based on the recommendation of the Attorney General.⁴⁶⁰ Be that as it may, the recommendation of the latter also depends on the recommendations of the Judicial Appointments Advisory Committee (hereafter the Advisory Committee).⁴⁶¹ Differently put, the Advisory Committee must recommend candidates for judicial appointment to the Attorney General before the latter recommends appropriate candidate(s) to the Lieutenant Governor in Council.

The Advisory Committee is required to advertise a judicial vacancy to be filled and review all applications,⁴⁶² then subsequently interview screened candidates.⁴⁶³ This Committee should consider only candidates who were members of the bar in any Canadian provinces.⁴⁶⁴ Candidates must have been members of such bar for ten or more years, alternatively, an aggregate of at least ten years as a judge of any Canadian court, subsequent to being a member of the previously mentioned bar.⁴⁶⁵ The Advisory Committee is obliged to give the Attorney General a list consisting of at least two candidates, which recommends and furnishes reasons for those recommendations of the interviewed candidates.⁴⁶⁶

However, the Advisory Committee can also make recommendations from candidates who were interviewed during the preceding year, subject that there is not sufficient

⁴⁵⁹ 43 of 1990.

⁴⁶⁰ Section 42 (1) of the *Courts of Justice Act* 43 of 1990.

⁴⁶¹ Section 43 (8) of the *Courts of Justice Act* 43 of 1990.

⁴⁶² Section 43 (9) 1. of the *Courts of Justice Act* 43 of 1990.

⁴⁶³ Section 43 (9) 4. of the *Courts of Justice Act* 43 of 1990.

⁴⁶⁴ Section 43 (10) of the *Courts of Justice Act* 43 of 1990.

⁴⁶⁵ Section 43 (10) of the *Courts of Justice Act* 43 of 1990.

⁴⁶⁶ Section 43 (9) 2. of the *Courts of Justice Act* 43 of 1990.

time to advertise and review the applications.⁴⁶⁷ The Attorney General must recommend to the Lieutenant Governor in Council only candidates who are recommended by that Advisory Committee to fill a judicial vacancy.⁴⁶⁸ However, the Attorney General can express dissatisfaction with the Committee's recommendations list and request it to furnish another list consisting of new candidates.⁴⁶⁹

4.2.5.2 Composition of the Judicial Appointments Advisory Committee

Although judicial appointments seem to be progressive, the composition of the Advisory Committee is, to some extent, worrisome. Section 43 of the *Justice Act* states that:

- (2) The Committee is composed of,
 - (a) Two provincial judges, appointed by the Chief Justice of the Ontario Court of Justice;
 - (b) Three lawyers, one appointed by The Law Society of Upper Canada, one by the Canadian Bar Association-Ontario and one by the County and District Law Presidents' Association;
 - (c) seven persons who are neither judges nor lawyers, appointed by the Attorney General;
 - (d) a member of the Judicial Council, appointed by it.⁴⁷⁰

In view of this legislative provision, the total number of the Advisory Committee is thirteen. From this number, the Attorney General appoints seven persons who are not legal practitioners. This means that such persons enjoy the majority within the Advisory Committee. The procedures and criteria of appointing these persons are not clear to the researcher as there are some murky issues. One might argue that these Committee members are political appointees since the Attorney General, who is a political figure, appoints them.⁴⁷¹ If this argument is credible, then it would open the floodgates of concerns from the public, alleging political influence in the Advisory Committee.

However, the appointment of these seven Attorney General appointees could be conceived as public representatives to champion the public interest in the Advisory Committee. In the absence of evidence showing political affiliation of these persons

⁴⁶⁷ Section 43 (9) 4. of the *Courts of Justice Act* 43 of 1990.

⁴⁶⁸ Section 43 (11) of the *Courts of Justice Act* 43 of 1990.

⁴⁶⁹ Section 43 (12) of the *Courts of Justice Act* 43 of 1990.

⁴⁷⁰ Section 43 (2) of the *Courts of Justice Act* 43 of 1990.

⁴⁷¹ Section 134 of the *Constitution Act*, 1867 state that the Lieutenant Governor of Ontario appoints the Attorney General. The latter forms part of the Executive Council of this province in terms of section 63 of this *Constitution*.

to the governing or any other political parties, they are just lay persons in legal context. The seven members possess various qualifications, experience and they are drawn from different professions.⁴⁷² By inference, therefore, these Attorney General appointees are not politicians and cannot be perceived as loyalists of the Attorney General. Thus, their appointment does not pose adverse threat to judicial independence since they are not politicians drawn from the legislative or executive organs of state.

4.2.6 Independence of the Judiciary

The Constitution of Canada does not explicitly stipulate a clause that provides for the independence of the judiciary. However, in *Reference re Remuneration of Judges of the Provincial Court*, the Supreme Court held that:

...judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*. The existence of that principle, whose origins can be traced to the *Act of Settlement* of 1701, is recognized and affirmed by the preamble to the *Constitution Act, 1867*...⁴⁷³

In view of the above, it is evident that the independence of the judiciary is an implied principle enshrined in the Canadian Constitution. This is because the preamble to

⁴⁷² Ontario Court of Justice 2017 <http://www.ontariocourts.ca>. At the time of writing this research study, the Attorney General appointed Freed Amin, Sylvie Beauvais, Kathleen O'Keefe (all these three are from Toronto), Jean Hebert (from Orléans), Asha Luthra (from Mississauga), Brian Mullan (from Ancaster) and Gabriel Tremblay (from Blind River). Freed Amin the current chairperson of the Advisory Committee is a member of a non-profit and charitable organisations. He holds a degree in Applied Geography and Planning, a Certificate in Leadership and a Certificate in Public Administration a Master's degree in Public Administration. Sylvie Beauvais is the Associate Vice-President at Collège Boréal. She holds a Diploma of Higher Specialized Studies in Adult Education, a Bachelor of Science in Nursing and a Master's in Education – School Administration. Kathleen O'Keefe is the President of Crillion Benefits Advisory Group Inc, a firm that gives legal advice to small and medium businesses in Canada. She obtained a Bachelor of Arts degree in English. Jean Hebert is the chairperson of the Travel Industry Council of Ontario Board and part of the Executive Committee. He holds a Bachelor Degree in Political Science and Honours in Honours in Public Administration. Asha Luthra is the Director of Business Development and the Excelsior Financial Group which deals with the investment in Canada and India. She is also the Chief of AL Consulting. Luthra obtained a postgraduate degree in Economics. Brian Mullan is a member of the Deputy President of the St. Joseph's Hospital Foundation and a member of the Board of Governors for Mohawk College. He has a vast experience in the police service as he served as a police officer for a long time. Mullan holds a Bachelor Degree in Business Administration. He graduated from the FBI Academy in Quantico, attended in Mohawk College and Bay Area Leadership Program the University of Toronto's Rotman School of Business. Gabriel Tremblay sits in a Board of Algoma District Services Administration to represent the territory without municipal organisation. He is also the Director of the Blind River Development Corporation and the President of Blind River Non-Profit Housing Corporation.

⁴⁷³ *Reference re Remuneration of Judges of the Provincial Court*, (P.E.I.), [1997] 3 S.C.R. 3 para 83.

the Constitution recognises the *Act of Settlement*,⁴⁷⁴ which incorporated the principle of judicial independence.⁴⁷⁵ The *Canadian Charter of Rights and Freedoms* scheduled to the *Constitution Act (Charter)*,⁴⁷⁶ also protects the independence of the judiciary. The *Charter* states that an independent and impartial tribunal has the authority to prove the accused person guilty according to law in a fair and public hearing.⁴⁷⁷ This shows that the judicial officers must be impartial and independent from any pressures or influences when they perform the administration of justice.

The judicial appointments process in Canada aims to select, nominate, or recommend impartial candidates as judicial officers to safeguard the independence of the judiciary.⁴⁷⁸ This is because this process is free from political manipulation, in that the judiciary is dominated by legal minds in the Judicial Advisory Committees as highlighted above.⁴⁷⁹ The Supreme Court held that the independence of the judiciary is protected if the relationship between the judiciary and other governmental branches remains depoliticised.⁴⁸⁰ Furthermore, the courts should not only be free but must be seen as free from political interference.⁴⁸¹ The process of appointing judicial officers in Canada appears to satisfy the propositions or prerequisites made by the Supreme Court. Therefore, it is in this context that this process is free from political influence that may jeopardise the independence of the judiciary; instead, they strive to protect such independence.

⁴⁷⁴ of 1701.

⁴⁷⁵ *Reference re Remuneration of Judges of the Provincial Court*, (P.E.I.), [1997] 3 S.C.R. 3 para 83.

⁴⁷⁶ The *Constitution Act*, 1982.

⁴⁷⁷ Section 11 (d) of the *Constitution Act*, 1982.

⁴⁷⁸ In mindful of that judicial officers are appointed in terms of section 96 of the *Constitution Act*, 1867, this constitutional provision protects the independence of the judiciary in the sense that in *Reference re Remuneration of Judges of the Provincial Court*, (P.E.I.), [1997] 3 S.C.R. 3 the court held:

Para 84; “Moreover, since well before the enactment of the *Charter*, ss. 96 -100 of the *Constitution Act*, 1867, separately and in combination, have protected and continue to protect the independence of provincial superior courts”

Para 85; “Sections 96-100, for example, only protect the independence of judges of the superior, district, and county courts, and even then, not in a uniform or consistent manner.”

⁴⁷⁹ See para 4.2.2-4.2.5 above

⁴⁸⁰ *Reference re Remuneration of Judges of the Provincial Court*, (P.E.I.), [1997] 3 S.C.R. 3 para 131.

⁴⁸¹ *Reference re Remuneration of Judges of the Provincial Court*, (P.E.I.), [1997] 3 S.C.R. 3 para 131.

4.4 Namibia

4.4.1 An Overview

The Constitution of Namibia incorporates a process of appointing judicial officers.⁴⁸² It affords the President the authority to execute judicial appointments for the Supreme Court and High Court of Namibia, based on the recommendations of the Judicial Service Commission (JSC).⁴⁸³ The latter should not cause confusion with the JSC of South Africa, since the name is the same but the composition of the two is absolutely different. The composition of the Namibian JSC is more convenient to recommend persons to the President for judicial appointments as politicians do not dominate this Commission.

4.4.2 Composition of the Judicial Service Commission

The JSC consists of five members: the Chief Justice of the Supreme Court, a Judge who is the President's appointee, the Attorney-General and the legal profession organisation(s) nominates two legal practitioners to form part of this institution.⁴⁸⁴ In view of this composition, it is clear that all members of the JSC are legal minds or legal professionals, despite the fact that the President appoints a Judge and the Attorney-General.⁴⁸⁵ Moreover, political influence is exiated in the JSC since there is no room for political figures drawn from other branches of government.

The composition of this Commission demonstrates its capacity to choose suitable candidates for judicial appointment and institutional independence. This is because it consists of legally experienced persons who can determine and recommend candidates who possess sufficient qualities to be appointed as judicial officers. The JSC makes judicial recommendations and performs its functions within the confines of the Constitution and the *Judicial Service Commission Act* (hereafter the *Commission Act*).⁴⁸⁶

⁴⁸² *The Constitution of the Republic of Namibia*, 1990.

⁴⁸³ Article 82(1) *Constitution of the Republic of Namibia*, 1990.

⁴⁸⁴ Article 85(1) *Constitution of the Republic of Namibia*, 1990.

⁴⁸⁵ The President appoints the Attorney-General in terms of article 32(3)(i)(cc) of the *Constitution of the Republic of Namibia*, 1990.

⁴⁸⁶ 18 of 1995.

4.4.3 Functions of the Judicial Service Commission

The *Commission Act* recognises one of the JSC functions as recommending persons to the President for the appointment of permanent or acting judicial officers.⁴⁸⁷ This legislation provides that the JSC, on execution of such recommendations, must consider affirmative action and the obligation to balance the structure of the judiciary.⁴⁸⁸ This means that the JSC should ensure that it also recommends persons who were economically, educationally and socially disadvantaged due to previously unjust laws of the apartheid regime.⁴⁸⁹

The rationale behind this legislative provision is to demonstrate that the Namibian government recognises and strives to address the injustices of the past within the judiciary. The JSC has the authority to draft rules and regulations that govern its procedures and functions when recommending persons for judicial appointment, which are consistent with the Constitution or any other law.⁴⁹⁰ Therefore, the Commission adopted the regulations outlining the process of recommending judges of the Supreme Court and the High Court.⁴⁹¹

4.4.4 The Process of Recommending Judicial Officers of the Supreme Court

The Chief Justice has the responsibility to notify the JSC about a judicial vacancy available in the Supreme Court.⁴⁹² If such a judicial vacancy is in the office of the Chief Justice, the President of Namibia must appoint a judge who is expected to consult with the Attorney-General to notify the JSC regarding such vacancy.⁴⁹³ However, the Attorney-General cannot be consulted if he or she is among the candidates aspiring to fill such judicial vacancy.⁴⁹⁴ In this regard, the Commission must appoint one of its commissioners who is not a candidate, to consult with the judge.⁴⁹⁵ The latter cannot also participate in this process if he or she is a candidate, thus, the Attorney-General would then take over his or her role and consult with one

⁴⁸⁷ Section 4 (1) (a) of the *Judicial Service Commission Act* 18 of 1995.

⁴⁸⁸ Section 5 (1) of the *Judicial Service Commission Act* 18 of 1995.

⁴⁸⁹ Article 23 (2) and (3) of the *Constitution of the Republic of Namibia*, 1990.

⁴⁹⁰ Article 85 (3) of the *Constitution of the Republic of Namibia*, 1990.

⁴⁹¹ GenN 60 in GG 4674 of 24 March 2006.

⁴⁹² Reg 2 (2) in GenN 60 in GG 4674 of 24 March 2006.

⁴⁹³ Reg 2 (9) (a) in GenN 60 in GG 4674 of 24 March 2006.

⁴⁹⁴ Reg 2 (9) (a) in GenN 60 in GG 4674 of 24 March 2006.

⁴⁹⁵ Reg 2 (9) (a) in GenN 60 in GG 4674 of 24 March 2006.

of the commissioners appointed by the JSC.⁴⁹⁶ If the Attorney-General is a candidate, then the Minister of Justice would consult the previously mentioned commissioner to notify the JSC about a judicial vacancy in the Supreme Court.⁴⁹⁷

The JSC must, without delay, acquaint the pertinent parties about the vacancy and invite them to nominate a person who they wish to be considered for judicial appointment within a stipulated deadline.⁴⁹⁸ Additionally, the Chief Justice can identify suitable persons to the JSC for the latter's consideration.⁴⁹⁹ In this regard, he or she may privately communicate with those suitable persons, the Minister of Justice, interested parties, individual persons and equivalent organisations as well as institutions in other Commonwealth states.⁵⁰⁰ The Chief Justice must compile and submit a list of nominated or identified suitable persons to the JSC.⁵⁰¹

The JSC has the discretion to invite any nominated or identified person for a private oral interview.⁵⁰² Its members would subsequently engage behind closed doors about the suitability of each candidate and ultimately recommend the most promising candidate to the President for judicial appointment.⁵⁰³ Transparency may lack in this regard since no one, except the commissioners, can witness the scope and content of the deliberations as they are made in private. However, this could be justified by the fact that the JSC must furnish the President with reasons explaining the basis of recommending each candidate.⁵⁰⁴

⁴⁹⁶ Reg 2 (9) (b) in GenN 60 in GG 4674 of 24 March 2006. This regulation also provides that the commissioner must also not be one of the candidates hoping to be recommended for judicial appointment.

⁴⁹⁷ Reg 2 (9) (c) in GenN 60 in GG 4674 of 24 March 2006.

⁴⁹⁸ Reg 2 (3) in GenN 60 in GG 4674 of 24 March 2006. In terms of Reg 2 (4) in GenN 60 in GG 4674 of 24 March 2006, A nomination referred in sub regulation (3) must contain the following-

(a) a letter of nomination signed by an authorised representative of a designated organisation making the nomination;

(b) the nominee's written acceptance of the nomination; and

(c) a detailed curriculum vitae prepared by the nominee, together with any questionnaire that the Commission may send to a designated organisation and, duly, completed by the nominee.

⁴⁹⁹ Reg 2 (5) in GenN 60 in GG 4674 of 24 March 2006.

⁵⁰⁰ Reg 2 (5) in GenN 60 in GG 4674 of 24 March 2006.

⁵⁰¹ Reg 2 (6) in GenN 60 in GG 4674 of 24 March 2006. The list must include the curriculum vitae of those persons, prepared by themselves.

⁵⁰² Reg 2 (7) in GenN 60 in GG 4674 of 24 March 2006

⁵⁰³ Reg 2 (8) in GenN 60 in GG 4674 of 24 March 2006

⁵⁰⁴ Reg 2 (8) in GenN 60 in GG 4674 of 24 March 2006. Reg 4 in GenN 60 in GG 4674 of 24 March 2006, also states that the secretary of the Commission, or in his or her absence any member requested by the chairperson to do so, must record the essence of the Commission's

4.4.5 *The Process of Recommending Judicial Officers of the High Court*

The recommendation process for candidates to the High Court is almost similar to the one that is employed regarding the Supreme Court process as discussed above.⁵⁰⁵ Thus, it is not necessary to repeat such process.⁵⁰⁶ There are only two differences that exist between the recommendation process of the Supreme Court and the High Court. Firstly, the Supreme Court gives the Chief Justice authority to inform the JSC about available judicial vacancy in this court, the Judge-President does the same regarding the High Court. Secondly, if such vacancy exists in the Judge-President's office, the Chief Justice should be the one who informs the JSC about it,⁵⁰⁷ so that this commission recommends a suitable candidate to the State President for judicial appointment.⁵⁰⁸

4.4.6 *The President's Duty*

The primary duty that the State President must exercise is to appoint a suitable candidate based on the recommendations of the JSC.⁵⁰⁹ However, there is no legal obligation that restricts him or her from appointing every person from the recommendations of the JSC. He or she can repudiate any recommendation on sound reasons reduced in writing and ask the JSC to furnish him or her with another recommendation.⁵¹⁰ In this regard, the President must appoint a suitable person from those new recommendations. Regarding the appointment of acting judges, the Chief justice can request the President to appoint the acting judges of the Supreme Court to fill vacancies if they exist.⁵¹¹ The Chief Justice must also do the same regarding the appointment of acting Judges for the High Court.⁵¹² All judicial officers appointed by the President must subsequently take an oath or affirmation of a judicial office.⁵¹³

reasons for recommending any person for appointment and such reasons must accompany the Commission's recommendations to the President.

⁵⁰⁵ See para 4.4.4 above.

⁵⁰⁶ See Reg 3 in GenN 60 in GG 4674 of 24 March 2006 for a complete recommendation process of candidates to be appointed as judicial officers of the High Court.

⁵⁰⁷ Reg 3 (9) in GenN 60 in GG 4674 of 24 March 2006

⁵⁰⁸ Reg 2 (8) and 3 (9) in GenN 60 in GG 4674 of 24 March 2006

⁵⁰⁹ Article 82(1) *Constitution of the Republic of Namibia*, 1990.

⁵¹⁰ Section 5 (2) (a) of the *Judicial Service Commission Act* 18 of 1995.

⁵¹¹ Article 82 (2) of the *Constitution of the Republic of Namibia*, 1990.

⁵¹² Article 82 (3) of the *Constitution of the Republic of Namibia*, 1990.

⁵¹³ Article 82(1) *Constitution of the Republic of Namibia*, 1990.

4.4.7 Oath or Affirmation by Judicial Officers

The final stage of the judicial appointment process in the Republic of Namibia is where the appointed judicial officers, before they commence with judicial duties, swear or affirm to defend and uphold the Namibian Constitution as it is the supreme law of the land.⁵¹⁴ Furthermore, they solemnly swear that they shall administer justice to everyone impartially through the Namibian laws.⁵¹⁵ This oath or affirmation strives to promote constitutional supremacy and judicial independence in Namibia, in the sense that the judicial officers commit themselves to perform the administration of justice independently and within the confines of the Constitution.⁵¹⁶ Therefore, considering the nomination procedure of candidates, composition of the JSC, role of the President and the oath or affirmation of a judicial office, the judicial appointment process in Namibia is not politically dominated but protects the independence of the judiciary.

4.4.8 Judicial Independence

In Namibia, the judiciary is independent from the executive and legislative branches of government. The Namibian Constitution prohibits any person including the state organs from interfering with the judicial officers when they execute their judicial functions.⁵¹⁷ However, the executive, legislature and all persons must assist the courts to administer justice with dignity, effectiveness and independently, as the Constitution or any other law demands in this country.⁵¹⁸ It is worth indicating that the courts in the Republic of Namibia are independent and subject only to the Constitution and the law. This means that the judicial officers in Namibia ought to apply the law objectively as the Constitution and the law of the land mandates them to administer justice accordingly.

⁵¹⁴ Schedule 1 of *Constitution of the Republic of Namibia*, 1990.

⁵¹⁵ Schedule 1 of *Constitution of the Republic of Namibia*, 1990.

⁵¹⁶ Schedule 1 of *Constitution of the Republic of Namibia*, 1990 enshrines an oath or affirmation that judicial officers must take as follows:

"I, do hereby swear/solemnly affirm that as a Judge of the Republic of Namibia I will defend and uphold the Constitution of the Republic of Namibia as the Supreme Law and will fearlessly administer justice to all persons without favour or prejudice and in accordance with the laws of the Republic of Namibia.

(in the case of an oath). So help me God."

⁵¹⁷ Article 78 (3) *Constitution of the Republic of Namibia*, 1990.

⁵¹⁸ Article 78 (3) *Constitution of the Republic of Namibia*, 1990.

In principle, judicial officers of the Namibian courts must be impartial and not susceptible to external pressures.⁵¹⁹ The Constitution guarantees this principle by incorporating the separation of powers doctrine which provides for the executive legislative and judicial organs of states that discharge their duties independent from each other.⁵²⁰ In this context, the judicial officers perform the administration of justice with independent minds and without any interference from any other person including the executive and legislative branches of government.

The constitutional process of appointing the judicial officers also sustains the independence of the Namibian judiciary, in the sense that it is transparent, fair and reasonable.⁵²¹ Moreover the composition and functions of the JSC also promote the independence of the judiciary.⁵²² This is because the JSC comprise of legal minds, who vests with the power to adopt regulations that guide its members to nominate or recommend suitable candidates for judicial appointment.

4.5 Conclusion

A minimal political participation in the process of appointing judicial officers is a fundamental aspect intended to establish an independent judiciary and to uphold the rule of law. It is, therefore, plausible that Canada and Namibia enacted and promulgated laws that aim to achieve this intention. Although members of the executive have the ultimate power to appoint judicial officers in these two countries, they do not make those appointments as they please, but subject to the advice and recommendations of independent institutions. The latter are at the heart of the judicial appointment process, since their members are vested with the responsibility to determine suitable candidates and make recommendations accordingly to the pertinent authorities. Eventually the latter are bound to appoint from those candidates to a vacant judicial office.

The composition of these independent institutions remains a crucial factor to the judicial appointment process because one can determine the credibility to recommend appropriate persons. If such institutions are politically dominated as the

⁵¹⁹ Horn and Bösl *The Independence of the Judiciary in Namibia* 214

⁵²⁰ Article 1 (3) *Constitution of the Republic of Namibia*, 1990.

⁵²¹ Horn and Bösl *The Independence of the Judiciary in Namibia* 215

⁵²² Horn and Bösl *The Independence of the Judiciary in Namibia* 216

case in South Africa, they are conceivably less credible and open floodgates for criticism that could also be extended to the recommended candidates for judicial appointment, as well as imperilling the independence of the judiciary. This chapter highlighted the way Canada and Namibia endeavour to circumvent this possibility, since both countries have an independent institution dominated and exclusively comprising of legal minds. It is within this context that South Africa could learn lessons from Canada and Namibia, to ameliorate its judicial appointment process as this study proposes possible solutions and recommendations below.⁵²³

⁵²³ See Chapter Five.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Judicial officers play a very crucial role of administering justice within the Republic of South Africa. The Constitution provides various processes for appointing these judicial officers to the different courts of law. The primary aim of this study was to determine the extent and nature of political influence on the judicial appointments process and the manner in which it affects the independence of the judiciary in this democratic era. Before democracy, judicial appointments were dominated by politicians drawn from the executive branch of government. The pre-democratic era constitutions and legislation afforded the Minister of Justice and the Governor General, who subsequently became the State President, the authority to appoint judicial officers. Only white male senior advocates had the prospect and privilege of being appointed to the bench, except Judge Leonora van der Heever, even though the constitution did not make a provision for judicial appointments of this fashion.

During the post-apartheid era, the Republic of South Africa attempted to move away from a politically dominated judicial appointments process, through the adoption of the Interim Constitution. The latter provided various judicial appointments process with the President of the Republic retaining the authority of making judicial appointment. He or she had the power to execute judicial appointments of the higher courts, through consultation with the cabinet. With the aim of deviating from the absolute power of the executive branch of government and political influence on the judicial appointments, the Interim Constitution introduced the JSC. This institution had the function of nominating, selecting and recommending suitable candidates to the President for distinct judicial appointments.

However, the introduction of the JSC did not materially achieve the aim of moving away from judicial appointments that are politically dominated, since political influence was manifest through the composition of this institution. As highlighted and discussed in chapter two of this study, the JSC consisted of judicial members, legal practitioners, academic staff members and politicians. Although at first sight legal minds appeared to dominate within the JSC, the fact that the President appointed

some of them to the Commission rendered them to be perceived as political appointees. Thus, the judicial appointments process under the Interim Constitution was politically contaminated.

Mindful of the fact that the Interim Constitution was transitional in nature, to pave way for the “final Constitution”, the Constitutional Assembly adopted the *Constitution of the Republic of South Africa, 1996* (the Constitution). This Constitution also incorporates the current judicial appointments process provision. Political influence still persists in these judicial appointments process since it involves political figures such as the President, Minister of Justice and the leaders of political parties represented in the National Assembly. Moreover, it is evident from chapter two that the JSC is at the centre of these previously stated judicial appointments processes, since aspirant judicial officers bypass its proceedings to determine their suitability for judicial appointment.

However, just as under the Interim Constitution, the composition of the judicial commission is a major concern in the judicial appointment process, in the sense that it does not reflect its independence and objectivity to nominate or recommend appropriate persons to the President for judicial appointment. This is because politicians drawn from the legislative branch of government, especially from the governing party, dominate in this Commission wherein most of them are not legal professionals. Moreover, the appointment of the other four commissioners by the President also has the effect of increasing party-political presence and power within the JSC since the President appoints them without any directive of choosing from a specific profession.

Although the study has noted that these commissioners are sometimes regarded as lay persons, historically, the President has appointed those that he prefers from the legal profession. Thus, they are political appointees and their decisions in the Commission can be perceived as being politically motivated. This study has also demonstrated that a number of politicians in the JSC manifest doubt in their ability to decide which person must be appointed as judicial officer since they lack legal experience. Therefore, the decisions of the JSC regarding the recommendation, selection or nomination of suitable candidates for judicial appointment are not legally

but politically inclined. It is because those decisions are taken through a majority vote of members who are politicians and presidential appointees.

The present study has also highlighted that the decisions of the JSC are subject of the procedure that this institution has the constitutional power to develop. Although the JSC should be an independent institution, the power afforded to this politically dominated Commission has the effect of encouraging its members to make arbitrary decisions. For example, in chapter two the study noted the decision of the JSC not to recommend any candidate to the President for judicial appointment to the Western Cape High Court division, despite having received many applications. The Commission justified its conduct by asserting that they do not have an obligation to give reasons for this decision. However, it is plausible that the Supreme Court of Appeal rejected their assertion, because a decision does not exist in a vacuum but it is influenced by reasons, which members of this Commission were supposed to give to the concerned parties, including the President.

Criticism is levelled against the role of the President on the judicial appointments that have been made during the democratic era. Such criticism is motivated by the judicial appointments that were made during the tenure of various democratically elected presidents. Different relationships have been identified as having existed between some of the appointed judicial officers and the President who appointed them. This is because the basis of appointment might be on political loyalty, favouritism or any other form of an existing or previous relationship instead of competence.

This study also demonstrated that political influence persists in the process of appointing acting judges, since the President and the Minister of Justice are the final arbiters in such a process. These two previously mentioned politicians, who are members of the national executive branch of government, can also make acting judicial appointments based on the incumbents' loyalty above competence. Furthermore, those appointments jeopardise the independence of the judiciary as it was in the appointment of Mpshe examined in chapter two of this study.

Chapter three of this study defined judicial independence as a principle that emanates from the separation of powers doctrine, to ensure that the judiciary exists

and executes its functions independent from the executive and legislative state governmental branch. Although the Constitution does not directly express the separation of powers, the study has proven the way a purposive interpretation of the same Constitution recognises this doctrine. It incorporates different clauses that provide for the composition and functions of the executive, legislature and judiciary that are separate from one another. This study did not discuss the separation of powers doctrine in depth, but analysed the judicial independence principle, to scrutinise the way the current judicial appointment process threatens the independence of the judiciary.

The study briefly outlined the general scope of judicial independence principle and its various features. Furthermore, it defined and examined the parameters of this principle, with its elements as enshrined in the Constitution. Focus was primarily on two elements; firstly, the impartiality of judicial officers, and secondly, the prohibition of any person from interfering with the functioning of the courts.

There is significant doubt that persists on the impartiality of judicial officers who see their appointment through the current judicial appointment process. Such doubt is justified by the application of recusal filed by the parties who alleged bias against judicial officers who adjudicated a legal dispute involving former President Mandela, since the latter appointed them to the Constitutional Court bench. In this regard, reference was made through the analysis of *SARFU* case in chapter three of the study. The *SARFU* is one of the examples where potential political influence on the judicial appointment process has the effect of compromising the impartiality of presiding officers in a matter that involves politicians, especially from the governing party, including the President.

Since impartiality is not the only feature of judicial independence that is affected by the judicial appointment process, the institutional independence of the judiciary is also equally threatened. In light of the fact that politicians who dominate the judicial appointment process are members of the executive and legislative branches of government, they interfere with the functioning of the judiciary since those members have power to determine persons that must be part of the judiciary. Some members of the latter branch might also attempt to influence other members who preside over cases that involve a politician tangled in the judicial appointment process as

highlighted in the Hlophe saga in chapter three of this study. Therefore, political influence on the judicial appointments process endangers the independence of the judiciary.

The final aim of this study was to highlight lessons that South Africa could learn from other countries regarding judicial appointments process in statutory legislative frameworks that are not politically contaminated. In Canada, politicians such as the Governor General, Lieutenant Governor, Prime Minister and the Minister of Justice appoint judicial officers to various courts at the federal and provincial level. It has been established that these persons exercise their judicial appointment authority subject to the nominations, selections and recommendations of the Judicial Appointment Advisory Committees.

The Judicial Appointment Advisory Committees are dominated by legal minds such as judicial officers and legal practitioners, instead of politicians. Lay persons are also a part of these Advisory Committees, to ensure that they represent the interests of the public in the judicial appointments process, to the extent that the community have a strong confidence in the judiciary. Thus, the judicial appointment process in Canada is not politically manipulated but aims to protect the independence of the judiciary, which is an unwritten and implied constitutional prerequisite.

Although the President has the power to make judicial appointments in Namibia, the Constitution limits his or her powers in that he or she must only appoint candidates who are recommended by the JSC. The JSC in Namibia comprises five commissioners who are all independent legal minds, except the Attorney-General, who is a member of the executive branch of government. This composition demonstrates that the JSC has legal influence above political influence within the judicial appointment process in Namibia. Furthermore, such process protects and assures the independence of the judiciary.

The Namibian Constitution recognises the judicial independence principle, in that it provides that the courts must apply the law impartially and independently from the executive and legislature. Thus, the current judicial appointment process in Namibia strives to achieve this constitutional principle. It is evident from this study that the judicial appointments in Canada and Namibia are progressive, in contrast to the

processes in the Republic of South Africa which are open to political scheming. Such judicial appointments eliminate the threats imposed to the separation of powers and strive to protect the independence of the judiciary. Therefore, it is pertinent for this study to propose the following recommendations that would require amendment of the Constitution.

5.2 Recommendations

5.2.1 Minimising the Composition of the Judicial Service Commission

It has been highlight from this study that the South African JSC comprises of the twenty-three to twenty-five members.⁵²⁴ This number renders this institution to be unnecessarily large. This number ought to be minimised in accordance with the National Development Plan (NDP) which corroborates this submission.⁵²⁵ The NDP states that the JSC is “too large to function effectively and to be hamstrung by political interests”.⁵²⁶ Both the NDP and this study propose that the current JSC structure should be reconsidered to assess whether or not it is suitable to execute its obligations. This study recommends that the number of JSC members must be reduced to eleven restructuring this commission.⁵²⁷ Since eleven is an odd number, eleven members of the Commission would assist the JSC to reach its decisions through majority votes.

5.2.2 Restructuring the Judicial Service Commission

This study recommends two possible options to restructure the JSC.

5.2.2.1 The first possible structure of the JSC comprises the following members:

- 1) Two retired judges who shall be the Chairperson and the Deputy Chairperson of the Commission appointed by the Chief Justice;

⁵²⁴ See para 2.4.1 above.

⁵²⁵ Department of Planning, Monitoring and Evaluation 2012 <http://www.nationalplanningcommission.org.za>

⁵²⁶ Department of Planning, Monitoring and Evaluation 2012 <http://www.nationalplanningcommission.org.za>

⁵²⁷ See para 6. 2.2 below.

- 2) two practising advocates nominated from within the advocates' profession to represent the profession, and appointed by the Chief Justice;
- 3) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the Chief Justice;
- 4) one teacher of law designated by teachers of law at South African universities;
- 5) two persons designated by the National Assembly from among the Non-Governmental Organisations; and
- 6) President of the Supreme Court of Appeal or when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that Division.

5.2.2.2 The second possible structure of the JSC consists of the following members:

- 1) two retired judges who shall be the Chairperson and the Deputy Chairperson of the Commission, appointed by the Chief Justice;
- 2) one Judge President designated by the Judges' President;
- 3) one Cabinet member responsible for the administration of justice
- 4) two practising advocates nominated from within the advocates' profession to represent the profession, and appointed by the Chief Justice;
- 5) two practising attorneys nominated from within the attorneys' profession to represent the profession, and appointed by the Chief Justice;
- 6) two teachers of law designated by teachers of law at South African universities;
- 7) President of the Supreme Court of Appeal or when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that Division.

In view of the above two recommended compositions of the JSC, it is evident that both consist of eleven members and persons from the legal fraternity make a majority. In

the first composition, eight members are legal minds, while two are lay persons. The latter are drawn from non-governmental organisations (NGOs) through a parliamentary process. The National Assembly must invite all NGOs within the Republic to nominate one person each, for selection to the JSC. The nomination forms must indicate the qualifications and credentials of the nominee who has not historically been affiliated to any political party.

From all the nominations received, the National Assembly must elect the nominees through an election process. Two persons who obtain a majority of votes should be declared selected to the JSC. The purpose of having lay persons in the Commission is to represent the interests of the public on the judicial appointments process, so that the judiciary gains strong confidence from the society. This composition resembles the structure of the Canadian Judicial Appointments Advisory Committees, which consist of legal minds who are in the majority and lay persons who are a minority.

To the exclusion of the Minister of Justice, the second composition of the JSC consists of only legal minds. This recommended structure represents a lesson drawn from the Namibian JSC, which comprises only legal professionals, excluding the Attorney-General who is a member of the executive.⁵²⁸ However, the appointment of two retired judges by the Chief Justice emerges from the Canadian approach, especially in the Ontario province.

Since persons from the legal profession have the legal education, skills and experience, they are the most convincing candidates to determine qualities that a person must possess in order to be a judicial officer rather than politicians and laymen. Therefore, an exclusively legal minds JSC is also in a better position to nominate or recommend suitable candidates for judicial appointment. The inclusion of the Minister of Justice in this Commission is to exercise the checks and balances principle, to strengthen transparency and responsiveness between the JSC, the executive and the judiciary.⁵²⁹

⁵²⁸ See para 4.6.2 above.

⁵²⁹ The Minister of Justice vests with the duty to ensure that the courts have the administrative Support they need. Therefore, it is advisable that the he or she participate in the judicial appointments, to ensure that the judicial officer see their appointment through a fair procedure so that they subsequently receive the support from him or her without hesitation.

5.2.3 *Functions of the Judicial Service Commission*

Since it is an independent institution with the power to develop its own procedures, the JSC should continue to have the function of nominating, selecting and recommending suitable candidates for judicial appointment through the procedure interrogated above.⁵³⁰

5.2.3.1 Recommend the Chief Justice, Deputy Chief Justice, President and Deputy President of the Supreme Court of Appeal

If there is a vacancy in one of the abovementioned judicial offices, the JSC should advertise such vacancy in the government gazette and other media platforms within the country. It must allow interested persons to nominate themselves or be nominated by other parties. Upon receipt of the nominations, the JSC must shortlist the most convincing candidates, in terms of satisfying the specifically outlined prerequisites for judicial appointment and subsequently interview those candidates. The members of the Commission must thoughtfully consider on the suitability of the candidates and vote for those that they regard as being suitable for judicial appointment. They must prepare a list of those candidates and submit it to the President of South Africa for judicial appointment, stating the reasons justifying their decision.

5.2.3.2 Nominating and Selecting the Constitutional Court, Supreme Court of Appeal and High Court Judges

The JSC should also retain their function to nominate appropriate candidates for judicial appointment as Constitutional Court Judges. Furthermore, it must also select suitable candidates for appointment as judges of the Supreme Court of Appeal and the High Court of South Africa. The selection and nomination process must be made to the Chief Justice, not the President of South Africa, as set out in the Constitution and discussed above.⁵³¹

⁵³⁰ See para 2.4.2.2 (a)-2.4.2.2 (b) above.

⁵³¹ See para 2.4.2.2 (b) above.

5.2.4 *The Role of the President*

After receiving a list of candidates who the JSC recommended, selected and nominated for judicial appointments concerned, the President must make the judicial appointments from the names provided on that list, stating the reasons that justify each appointment. He or she must appoint the Chief Justice, Deputy Chief Justice, President and Deputy President of the Supreme Court of Appeal. Although the President is both the head of state and head of the national executive, the Constitution must afford the former the power to make judicial appointments instead of the latter. This is because the national executive is a branch of government, from which the judiciary must function independently with respect to interference. Therefore, judicial appointments by a head of the national executive create the impression that the executive has the power to constitute the judiciary and this poses a threat to the independence of the judicial branch of government.

4.2.5 *The Role of the Chief Justice*

Section 165(6) of the Constitution positions the Chief Justice of South Africa as the head of the judiciary.⁵³² Therefore, he or she must appoint all other judicial officers of the Constitutional Court, Supreme Court of Appeal and High Court from the recommendations of the JSC as discussed above.⁵³³ It should be borne in mind that the President of the Republic of South Africa is head of the national executive and vested with the authority to appoint cabinet members.⁵³⁴ He or she enjoys the constitutional liberty to appoint any member of the National Assembly or any less than two persons outside this house of Parliament to the cabinet.⁵³⁵ Thus, the Constitution should afford the Chief Justice, in his capacity as head of the judiciary, the power to appoint all other judicial officers, according to the recommendations of the JSC.

⁵³² Section 165 of the *Constitution of the Republic of South Africa*, 1996 provides:
(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts. This constitutional provision is added by section 1 of the *Constitution Seventeenth Amendment Act 72 of 2012*.

⁵³³ See para 5.2.3.2 above.

⁵³⁴ Section 91(2) of the *Constitution of the Republic of South Africa*, 1996.

⁵³⁵ Section 91(3) and section 93(1) of the *Constitution of the Republic of South Africa*, 1996

5.2.6 *Appointment of Acting Judges*

The Chief Justice of the Republic of South Africa must enjoy the authority to appoint acting judges, if there is a judicial vacancy that is not filled at any court of law within the Republic. He or she must do so after consulting the senior judge of the court on which the acting judge should be appointed to serve. An acting judge must be chosen from the existing judicial officers in higher or lower courts as long as such appointment is not perceived as a demotion. This means that a judicial officer of a higher status court or jurisdiction should not be an acting judge of a court with a lower status but *vice versa*.

5.2.7 *Judicial Office Oath and Affirmation*

All appointed judicial officers must take an oath or affirmation of office in accordance with the current constitutional provisions regulating this process as highlighted above.⁵³⁶ This oath or affirmation concludes the judicial appointments process, ensuring that the appointed judicial officers pledge to be impartial and abide by the Constitution in the administration of justice. Furthermore, they undertake to discharge their duties freely without any internal or external influences emanating from other persons, including the politicians.

If the Republic of South African could adopt these proposed recommendations, it could move away from the judicial appointments process that is currently susceptible to political influence. This would protect judicial officers from the charges of being biased when they administer justice, especially in legal disputes that involve politicians and the latter's relatives. Furthermore, the judiciary would be independent and safe from interference emanating from other persons, including government entities as required by the Constitution, the supreme law of the land.

⁵³⁶ See para 2.3.3.3 (f) above.

Bibliography

Literature

African National Congress “Transformation of the Judiciary and Legal Sector”

African National Congress “Transformation of the Judiciary and Legal Sector” in *Peace and Stability Discussion Document 5th National Policy Conference* (30 June-5th July 2017 Gallagher Convention Centre, Midrand) 17-18

Ahmed An-Na'im *Human Rights Under African Constitutions-Realizing the Promise for Ourselves*

Ahmed An-Na'im *A Human Rights Under African Constitutions-Realizing the Promise for Ourselves* 1st ed (University of Pennsylvania Press Philadelphia 2003)

Albertyn “Judicial Diversity”

Albertyn C “Judicial Diversity” in Hoexter C and Olivier M (eds) *The Judiciary in South Africa* 1st ed (Juta Cape Town 2014)

Allan *Constitutional Justice: A Liberal Theory of the Rule of Law*

Allan TRS *Constitutional Justice: A Liberal Theory of the Rule of Law* 1st ed (Oxford University Press New York 2001)

Amarteifio *Humanity and the Nature of Man*

Amarteifio *Humanity and the Nature of Man* 1st ed (Author House Bloomington 2013)

Andrews and Ellmann *The post-apartheid constitutions: perspectives on South Africa's basic law*

Andrews and Ellmann *The post-apartheid constitutions: perspectives on South Africa's basic law* 1st ed (Witwatersrand University Press Johannesburg 2001)

Backhaus *The Elgar Companion to Law and Economic*

Backhaus JG *The Elgar Companion to Law and Economic* 2nd ed (Edward Elgar Publishing Limited Montpellier Parade 2005)

Barak “On Judging”

Barak A “On Judging” in Scheinin M, Krunke H and Aksenova M (eds) *Judges as Guardians of Constitutionalism and Human Rights* 1st ed (Edward Elgar United Kingdom 2016)

Basimba and Peter *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal*

Basimba HK and Peter CM *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal* 1st ed (Mkuki na Nyota Publishers Tanzania 2007)

Basson *South Africa’s Interim Constitution: Text and Notes*

Basson DA *South Africa’s Interim Constitution: Text and Notes* 2nd ed (Juta Cape Town 1995)

Botha *Statutory Interpretation: An Introduction for Students*

Botha CJ *Statutory Interpretation: An Introduction for Students* 5th ed (Juta Cape Town 2005)

Brickhill *et al* 2011 ASSAL

Brickhill *et al* “The Administration of Justice” 2011 ASSAL 1-48

Brickhill *et al* 2013 ASSAL

Brickhill *et al* “The Administration of Justice” 2013 ASSAL 1-60

Broun *Saving Nelson Mandela: The Rivonia Trial and the Fate of South Africa*

Broun KS *Saving Nelson Mandela: The Rivonia Trial and the Fate of South Africa* 1st ed (Oxford University Press New York 2012)

Calland *Anatomy of South Africa: Who holds the Power*

Calland *Anatomy of South Africa: Who holds the Power* 1st ed (Zebra Press South Africa 2008)

Cameron 2010 *Advocate*

Cameron E “Judicial independence – a substantive component?” 2010 *Advocate* 24-29

Casarin “Non-Market Strategies in Legal Arenas”

Casarin AA "Non-Market Strategies in Legal Arenas" in Lawton TC and Rajwani TS (eds) *The Routledge Companion to Non-Market Strategy* 1st ed (Routledge New York 2015)

Church J *et al Human Rights from a Comparative and International Law Perspective*
Church J *et al Human Rights from a Comparative and International Law Perspective*
1st ed (UNISA Press Pretoria 2007)

Corder "Appointment, discipline and removal of judges in South Africa"
Corder H "Appointment, discipline and removal of judges in South Africa" in Lee HP (ed) *Judiciaries in Comparative Perspective* 1st ed (Cambridge University Press New York 2011) 96-116

Cort and Segal *One Law, One Nation: The Making of the South African Constitution*
Cort S and Segal L *One Law, One Nation: The Making of the South African Constitution* 1st ed (Jacana Media (Pty) Ltd Sunnyside 2011)

Cowen *Judicial Independence in South Africa*
Cowen S *Judicial Independence in South Africa* 1st ed (Paarl Media Cape Town 2010)

Cummings *The Paradox of Professionalism: Lawyers and the Possibility of Justice*
Cummings SL *The Paradox of Professionalism: Lawyers and the Possibility of Justice* 1st ed (Cambridge University Press New York 2011)

Currie and De Waal *The Bill of Rights Handbook*
Currie I and De Waal J *The Bill of Rights Handbook* 6th ed (Juta Cape Town 2013)

Currie I and De Waal J *The New Constitutional and Administrative Law* 1st ed (Juta Cape Town 2001)

Danziger, Levav and Avnaim Pessó 2011 *PNAS*
Danziger S, Levav J and Avnaim Pessó L "Extraneous factors in judicial decisions" 2011 *PNAS* 6889-6892

Dauids and Le Roux *Precedent and Possibility: The (ab)use of Law in South Africa*
Dauids D and Le Roux M *Precedent and Possibility: The (ab)use of Law in South Africa* 1st ed (Double Storey Cape Town 2009)

Dawson *Justice as Attunement: Transforming Constitutions in Law, Literature, Economics and the Rest of Life*

Dawson R *Justice as Attunement: Transforming Constitutions in Law, Literature, Economics and the Rest of Life* 1st ed (Routledge New York 2014)

Deegan *South Africa Reborn: Building A New Democracy*

Deegan *South Africa Reborn: Building A New Democracy* 1st ed (UCL Press London 1999)

De Visser *Developmental Local Government: A Case Study of South Africa*

De Visser J *Developmental Local Government: A Case Study of South Africa* 1st ed (Hart Publishing United Kingdom 2005)

Dugard *Human Rights and the South African Legal Order*

Dugard J *Human Rights and the South African Legal Order* 1st ed (Princeton University Press New Jersey 1978)

Du Plessis and Maunganidze 2016 SACQ

Du Plessis A and Maunganidze O "Interview with Shaun Abrahams, National Director of Public Prosecutions: on the record" 2016 SACQ 61-67

Du Preez Bezdrob *Winnie Mandela*

Du Preez Bezdrob AM *Winnie Mandela* 1st ed (Zebra Cape Town 2004)

Du Toit, Swart and Teuteberg *South Africa and the Case for Renegotiating the Peace*

Du Toit P, Swart C and Teuteberg S *South Africa and the Case for Renegotiating the Peace* 1st ed (SUN Press Stellenbosch 2016)

Ebrahim "Governance and Administration of the Judicial System"

Ebrahim H "Governance and Administration of the Judicial System" in Hoexter C and Olivier M (eds) *The Judiciary in South Africa* 1st ed (Juta Cape Town 2014)

Ebrahim *The Soul of a Nation: Constitution-Making in South Africa*

Ebrahim H *The Soul of a Nation: Constitution-Making in South Africa* 1st ed (Oxford University Press Virginia 1998)

Edlin *Common Law Judging: Subjectivity, Impartiality and the Making of Law*

Edlin DE *Common Law Judging: Subjectivity, Impartiality and the Making of Law* 1st ed (University of Michigan Press United States 2016)

Encyclopedia Britannica *Britannica Book of the Year 2009*

Encyclopedia Britannica *Britannica Book of the Year 2009* 1st ed (Encyclopedia Britannica London 2009)

Erasmus "The Law of Civil Procedure"

Erasmus HJ "The Law of Civil Procedure" in Van der Merwe CG, Du Plessis JE and Zimmermann (eds) *Introduction to the Law of South Africa* 1st ed (Kluwer United Kingdom 2014)

Etzioni-Halevy *Fragile Democracy*

Etzioni-Halevy E *Fragile Democracy* 1st ed (Transaction Publishers London 1989)

Fagan "Roman Dutch Law in its South African Historical Context"

Fagan E "Roman Dutch Law in its South African Historical Context" in Zimmermann R and Visser DP (eds) *Southern Cross: Civil Law and Common Law in South Africa* 1st ed (Oxford University Press New York 1996)

Fassbender *The United Nations Charter as the Constitution of the International Community*

Fassbender B *The United Nations Charter as the Constitution of the International Community* 1st ed (Martinus Nijhoff Publishers Boston 2009)

Ferree *Framing the Race in South Africa: The Political Origins of Racial Census Elections*

Ferree K *Framing the Race in South Africa: The Political Origins of Racial Census Elections* 1st ed (Cambridge University Press New York 2011)

Fessha *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia*

Fessha YT *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* 1st ed (Routledge New York 2016)

Fombad *Constitutional Adjudication in Africa*

Fombad CM *Constitutional Adjudication in Africa* 1st ed (Oxford University Press United Kingdom 2017)

Freedman *Understanding the Constitution of the Republic of South Africa*

Freedman W *Understanding the Constitution of the Republic of South Africa* 1st ed (Juta Cape Town 2013)

Friedland "Appointment, Discipline and Removal of Judges in Canada"

Friedland ML "Appointment, Discipline and Removal of Judges in Canada" in Lee HP (ed) *Judiciaries in Comparative Perspective* 1st ed (Cambridge University Press New York 2011) 46-65

Galland *Anatomy of South Africa: Who holds the Power*

Galland R *Anatomy of South Africa: Who holds the Power* 1st ed (Zebra Press Cape Town 2006)

Giliomee and Mbenga *New History of South Africa*

Giliomee B and Mbenga HB *New History of South Africa* 1st ed (Tafelberg Cape Town 2007)

Goldberg *A Life for Freedom: The Mission to End Racial Injustice in South Africa*

Goldberg D *A Life for Freedom: The Mission to End Racial Injustice in South Africa* (University Press of Kentucky United States 2016)

Gravett 2017 *JCRDL*

Gravett W "Towards an Algorithmic Model of Judicial Appointment: The Necessity for Radical Revision of the Judicial Service Commission's Interview Procedures" 2017 *JCRDL* 267-286

Green *Around and About: Memoirs of A South African Newspaperman*

Green M *Around and About: Memoirs of A South African Newspaperman* 1st ed
(David Philip Claremont 2004)

Hammond, Bonneau and Sheehan *Strategic Behavior and Policy Choice on the U.S
Supreme Court*

Hammond T, Bonneau CW and Sheehan R *Strategic Behavior and Policy Choice on
the U.S Supreme Court* 1st ed (Stanford University Press United Kingdom 2005)

Hargrove *Judicial Branch of Government*

Hargrove J *Judicial Branch of Government* 1st ed (Lorenz Company Dayton 2000)

Heyns *Human Rights Law in Africa*

Heyns C *Human Rights Law in Africa* 4th ed (Kluwer Law International The Hague
Netherlands 2002)

Hoexter "The Structure of Courts"

Hoexter C "The Structure of Courts" in Hoexter C and Olivier M (eds) *The Judiciary
in South Africa* 1st ed (Juta Cape Town 2014)

Hoexter "The Judicial Service Commission: Lessons from South Africa"

Hoexter C "The Judicial Service Commission: Lessons from South Africa" in Gee G
and Rackley E (eds) *debating Judicial Appointments in an Age of Diversity* 1st ed
(Routledge New York 2017) 83-100

Holomisa *A Double-Edged Sword: A Quest for a Place in the African Sun*

Holomisa P *A Double-Edged Sword: A Quest for a Place in the African Sun* 2nd ed
(Lotsha Publications Cape Town 2010)

Hornby *et al Oxford Advanced Learner's Dictionary*

Hornby *et al Oxford Advanced Learner's Dictionary* 8th ed (Oxford University Press
2010)

Horn and Bösl *The Independence of the Judiciary in Namibia*

Horn N and Bösl A *The Independence of the Judiciary in Namibia* 1st ed (Macmillan
Education Namibia Windhoek 2008)

Hosten *et al Introduction to South African Law and Legal*

Hosten WJ *et al Introduction to South African Law and Legal* 1st ed (Butterworth Durban 1983)

Human Rights Watch *South Africa: Violence against Women and the Medico-legal System*

Human Rights Watch *South Africa: Violence against Women and the Medico-legal System* 9th ed (Human Rights Watch South Africa 1997)

Joubert and Prinsloo *The Law of Education in South Africa*

Joubert and Prinsloo *The Law of Education in South Africa* 2nd ed (Van Schaik Publishers South Africa 2009)

Joubert *Applied Law for Police Officials*

Joubert C *Applied Law for Police Officials* 3rd ed (Juta Claremont 2010)

Kesselman, Krieger and Joseph *Introduction to Comparative Politics, Brief Edition*

Kesselman M, Krieger J and Joseph WA *Introduction to Comparative Politics, Brief Edition* 2nd ed (Wadsworth USA 2013)

Kleyn and Viljoen *The Beginner's Guide for Law Students*

Kleyn and Viljoen *The Beginner's Guide for Law Students* 4th ed (Juta Cape Town 2010)

Klug "South Africa's Experience in Constitution-Building"

Klug H "South Africa's Experience in Constitution-Building" in Boston J, Butler P and Petra R (eds) *Reconstituting the Constitution* 1st ed (Springer Heidelberg Dordrecht London New York 2011)

Kmezic *EU Rule of Law Promotion: Judiciary Reform in the Western Balkans*

Kmezic M *EU Rule of Law Promotion: Judiciary Reform in the Western Balkans* 1st ed (Routledge New York 2017)

Krotoszynski, *Privacy Revisited: A Global Perspective on the Right to be Left Alone*

Krotoszynski RJ, *Privacy Revisited: A Global Perspective on the Right to be Left Alone* 1st ed (Oxford University Press New York 2016)

Lee "Appointment, Discipline and Removal of Judges in Australia"

Lee HP "Appointment, Discipline and Removal of Judges in Australia" in Lee HP (ed) *Judiciaries in Comparative Perspective* 1st ed (Cambridge University Press New York 2011) 27-45

Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution*

Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* 1st ed (Juta Cape Town 2010)

Liebenberg "Adjudicating Social Rights Under a Transformative Constitution"

Liebenberg "Adjudicating Social Rights Under a Transformative Constitution" in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 1st ed (Cambridge University Press New York 2008)

Lind "Politics, Partnership Rights and the Constitution in South Africa... (and the Problem of Sexual Identity)"

Lind "Politics, Partnership Rights and the Constitution in South Africa... (and the Problem of Sexual Identity)" in Andenas M and Robert (eds) *W Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* 1st ed (Hart Publishing Portland and Oregon 2001)

Little "The Reform of the Scottish Judiciary"

Little GFM "The Reform of the Scottish Judiciary" in Sutherland EE *et al* (eds) *Law Making and the Scottish Parliament* 1st ed (Edinburgh University Press Edinburgh 2011)

Lone "Rule of Law: A Tort Law Perspective"

Lone "Rule of Law: A Tort Law Perspective" in Wang and Yang (eds) *The Rule of Law: A Comparative Perspective-Festschrift for Anton MJ Cooray on the Occasion of his Sixty-fifth Birthday* 1st ed (City University of Hong Kong Press Hong Kong 2013)

Magoon *Nelson Mandela: A Leader for Freedom*

Magoon K *Nelson Mandela: A Leader for Freedom* 1st ed (ABDO Minnesota 2008)

Masson *What's so Funny?: Under the Skin of South African Cartooning*

Masson A *What's so Funny?: Under the Skin of South African Cartooning* 1st ed (Double Storey Claremont 2010)

Malan 2014 *PELJ*

Malan K "Reassessing Judicial Independence and Impartiality against The Backdrop of Judicial Appointments in South Africa" 2014 *PELJ* 1965-2040

Mangcu *The Democratic Movement: South Africa's Prospects Under Jacob Zuma*

Mangcu K *The Democratic Movement: South Africa's Prospects Under Jacob Zuma* 1st ed (Jacana Media Auckland Park 2009)

Manyathi-Jele 2013 *De Rebus*

Manyathi-Jele N "Legal profession pays tribute to Justice Langa" 2013 *De Rebus* 6-7

Mason and Curtis *Don't Joke: The Year in Cartoons*

Mason A and Curtis J *Don't Joke: The Year in Cartoons* 1st ed (Jacana Media Auckland Park 2009)

Mathews *Law Order and Liberty in South Africa*

Mathews *Law Order and Liberty in South Africa* 1st ed (University of California Press London 1972)

Masterman *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom*

Masterman R *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* 1st ed (Cambridge University Press New York 2011)

Mathews *Law, Order and Liberty in South Africa*

Mathews AS *Law, Order and Liberty in South Africa* 1st ed (University of California Press London 1972)

McCulloch *Charisma and Patronage: Reasoning with Max Webber*

McCulloch AD *Charisma and Patronage: Reasoning with Max Webber* 1st ed (Routledge New York 2014)

McLean *Constitutional Deference, Courts and Socio-economic Rights in South Africa*

McLean KS *Constitutional Deference, Courts and Socio-economic Rights in South Africa* 1st ed (Pretoria University Law Press Pretoria 2009)

Misra-Dexter and February *Testing Democrac: Which Way is South Africa Going?*
Misra-Dexter and February *Testing Democrac: Which Way is South Africa Going?*
1st ed (ABC Press Cape Town 2010)

Mitchell *Native vs Settler: Ethnic Conflict in Israel/Palestine, Northern Ireland and South Africa*

Mitchell TG *Native vs Settler: Ethnic Conflict in Israel/Palestine, Northern Ireland and South Africa* 1st ed (Greenwood Press London 2000)

Mojapelo 2013 *Advocate*

Mojapelo PM "The Doctrine of Separation of Powers (A South African Perspective)"
2013 *Advocate* 37-46

Mokgatle 1987 *SAJHR*

Mokgatle D D "The Exclusion of Blacks from the South African Judicial System" 1987
South African Journal on Human Rights 44-51

Montesh and Berning 2012 *SAJC*

Montesh M and Berning J" A need for a single anti-corruption agency in South Africa:
a comparative study" 2012 *SAJC* 117-137

Morris, Boston and Butler *Reconstituting the Constitution*

Morris C, Boston J and Butler P *Reconstituting the Constitution* 1st ed (Springer
Heidelberg Dordrecht London New York 2011)

Mostert *The Constitutional Protection and Regulation of Property and its Influence on
the Reform of Private and Landownership in South Africa and Germany: A
Comparative Analysis*

Mostert H *The Constitutional Protection and Regulation of Property and its Influence
on the Reform of Private and Landownership in South Africa and Germany: A
Comparative Analysis* 1st ed (Springer New York 2002)

Myburgh" Did Mpshe Plagiarise a Hong Kong Judge?"

Myburgh J " Did Mpshe Plagiarise a Hong Kong Judge?" in Harber A and Renn M (eds) *Troublemakers: The Best of South Africa's Investigative Journalism* 1st ed (Jacana Media Auckland Park 2010) 50-59

Mwakikagile *Africa in the Sixties*

Mwakikagile G *Africa in the Sixties* 1st ed (New Africa Press Tanzania 2014)

Mwakikagile *Africa 1960-1970: Chronicle and Analysis*

Mwakikagile G *Africa 1960-1970: Chronicle and Analysis* 1st ed (New Africa Press Tanzania 2014)

Mwakikagile *South Africa in Contemporary Times*

Mwakikagile G *South Africa in Contemporary Times* 1st ed (New Africa Press Pretoria 2008)

Mwakikagile *The African Liberation Struggle: Reflections*

Mwakikagile *The African Liberation Struggle: Reflections* 1st ed (New Africa Press Pretoria 2018)

Ndletyana and Nomarwayi 2016 *JPA*

Ndletyana M and Nomarwayi T "ANC's loss of the jewel – Nelson Mandela Bay" 2016 *JPA* 573-595

Ndlovu *A Balancing Act: A History of the Legal Resources Foundation in Zimbabwe 1985-2015*

Ndlovu M *A Balancing Act: A History of the Legal Resources Foundation in Zimbabwe 1985-2015* 1st ed (Legal Resources Foundation Harare 2016)

Ndlovu-Gatsheni *The Decolonial Mandela: Peace, Justice and the Politics of Life*

Ndlovu-Gatsheni SJ *The Decolonial Mandela: Peace, Justice and the Politics of Life* 1st ed (Bergham Books New York 2016)

Olivier and Hoexter "The Judicial Service Commission"

Olivier M and Hoexter C "The Judicial Service Commission" in Hoexter C and Olivier M (eds) *The Judiciary in South Africa* 1st ed (Juta Cape Town 2014) 154-199

Olivier “The Selection and Appointment of Judges”

Olivier M “The Selection and Appointment of Judges” in Hoexter C and Olivier M (eds) *The Judiciary in South Africa* 1st ed (Juta Cape Town 2014) 116-153

Oomen *Chiefs in South Africa: Law, Culture, and Power in the Post-Apartheid Era*

Oomen B *Chiefs in South Africa: Law, Culture, and Power in the Post-Apartheid Era* 1st ed (Palgrave New York 2005)

Oxtoby 2013 *SALJ*

Oxtoby C “New Appointments to the Constitutional Court 2009–2012” 2013 *SALJ* 219-230

Oxtoby 2017 *SLR*

Oxtoby C and Masengu T “Who nominates judges? Some issues underlying judicial appointments in South Africa” 2017 *SLR* 540 – 562

Paul *The Legal Realism of Jerome N.Franck: A Study of Fact-Skepticism and the Judicial Process*

Paul J *The Legal Realism of Jerome N.Franck: A Study of Fact-Skepticism and the Judicial Process* 1st ed (Martinus Nijhoff The Hague 1959)

Perišin and Rodin *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union*

Perišin T and Rodin S *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union* 1st ed (Hart Publishing London 2018)

Pikis *Constitutionalism-Human Rights-Separation of Powers: The Cyprus Precedent*

Pikis GM *Constitutionalism-Human Rights-Separation of Powers: The Cyprus Precedent* 4th ed (Martinus Nijhoff Publishers Leiden 2006)

Quarcoo 2009 *ASR*

Quarcoo SC “Prosecution Politics: Recalibrating the Role of Prosecution Within the Anti-Corruption Agency Agenda” 2009 *ASR* 32-49

Rautenbach "South Africa: Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995-2010)"

Rautenbach "South Africa: Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995-2010)" in Andenas M and Fairgrieve D (eds) *Courts and Comparative Law* 1st ed (Oxford University Press United Kingdom 2015)

Rabe *Equality, Affirmative Action and Justice*

Rabe J *Equality, Affirmative Action and Justice* 1st ed (Hamburg Germany 2001)

Radebe 2014 *PELJ*

Radebe MK "The Unconstitutional Practices of The Judicial Service Commission Under The Guise Of Judicial Transformation: Cape Bar Council V Judicial Service Commission [2012] 2 ALL 143 (WCC)" 2014 *PELJ* 1196-1205

Roux *The Politics of Principle: The First South African Constitutional Court*

Roux T *The Politics of Principle: The First South African Constitutional Court, 1995-2005* 1st ed (Cambridge University Press New York 2013)

Schauer "Is There a Psychology of Judging?"

Schauer F "Is There a Psychology of Judging?" in Klein DK and Gregory M (eds) *The Psychology of Judicial Decision Making* 1st ed (Oxford University Press New York 2010)

Seibert-Fohr *Judicial Independence in Transition*

Seibert-Fohr A *Judicial Independence in Transition* 1st ed (Springer Heidelberg New York 2012)

Shapiro and Tebeau *After Apartheid: Reinventing South Africa?*

Shapiro I and Tebeau K *After Apartheid: Reinventing South Africa?* 1st ed (University of Virginia Press London 2011)

Shimoni *Community and Conscience: The Jews in Apartheid South Africa*

Shimoni G *Community and Conscience: The Jews in Apartheid South Africa* 1st ed (David Philip Publishers Cape Town 2003)

Siyo and Mubangizi 2015 *PELJ*

Siyo Land Mubangizi JC "The Independence of South African Judges: A Constitutional and Legislative Perspective" 2015 *PELJ* 817-846

Slabbert 2011 *PELJ*

Slabbert M "The Requirement of Being A "Fit and Proper" Person For The Legal Profession" 2011 *PELJ* 209 – 231

Smith *Judges and Democratization*

Smith *Judges and Democratization* 1st ed (The ST Leonard's Press United Kingdom 2014)

South Africa Department of Education *The Age of Hope: Century of Struggle to Freedom 1906-2006*

South Africa Department of Education *The Age of Hope: Century of Struggle to Freedom 1906-2006* 1st ed (Department of Education South Africa 2006)

South African Institute of Race Relations *South Africa Survey*

South African Institute of Race Relations *South Africa Survey* 1st ed (The Institute South Africa 2006)

Spitz and Chaskalson *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement*

Spitz R and Chaskalson M *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* 1st ed (Hart Publishers London 2000)

Stephan and Klimenko *International Law and International Security: Military and Political Dimensions*

Stephan PB and Klimenko BM *International Law and International Security: Military and Political Dimensions* 1st ed (M.E. Sharpe Inc. New York 1991)

Tarr *Without Fear or Favour: Judicial Independence and Judicial Accountability in the states*

Tarr GA *Without Fear or Favour: Judicial Independence and Judicial Accountability in the states* 1st ed (Stanford University Press California 2012)

Turner *The Statesman's Yearbook 2008: The Politics, Cultures and Economies of the World*

Turner B *The Statesman's Yearbook 2008: The Politics, Cultures and Economies of the World* 1st ed (Macmillan Publishers New York 2007)

Un "The Judicial System and Democratization in Post-Conflict Cambodia"

Un "The Judicial System and Democratization in Post-Conflict Cambodia" in Öjendal and Lilja (eds) *Beyond Democracy in Cambodia: Political Reconstruction in a Post-Conflict Society* 1st ed (Nordic Institute of Asian Studies Denmark 2009)

Van der Merwe and Du Plessis *Introduction to the Law of South Africa*

Van der Merwe GG and Du Plessis JE *Introduction to the Law of South Africa* (Kluwer Law International Hague Netherlands 2004)

Van der Merwe *et al* "The Comparative Evidence-The Republic of South Africa"

Van der Merwe *et al* "The Comparative Evidence-The Republic of South Africa" in Palmer VV (ed) *Mixed Jurisdictions Worldwide* 2nd ed (Cambridge University Press New York 2012)

Van der Westhuizen 1980 *De Rebus*

Van der Westhuizen J "Our Chief Justice" 1980 *De Rebus* 38-41

Van Gend *Judicial Selection in South Africa*

Van Gend S *Judicial Selection in South Africa* 1st ed (Democratic Governance and Rights Unit Cape Town 2013)

Van Heerden 2007 *Politeia*

Van Heerden M "The 1996 Constitution of the Republic of South Africa: Ultimately supreme without a number" 2007 *Politeia* 33-44

Van Niekerk JP "An Introduction to South African Law Reports and Reporters" 2013 *Fundamina* 106-145

Van Niekerk 2013 *Fundamina-JLH*

Van Niekerk JP "An Introduction to South African Law Reports and Reporters, 1828 to 1910" 2013 *Fundamina-JLH* 106-145

Ventura *From Your Gods to Our Gods: A History of Religion in India, South Africa and British Courts*

Ventura M *From Your Gods to Our Gods: A History of Religion in India, South Africa and British Courts* 1st ed (Wipf and Stock Publishers Eugene 2014)

Viljoen *Beyond the Law Multi-Disciplinary Perspectives on Human Rights*

Viljoen F *Beyond the Law Multi-Disciplinary Perspectives on Human Rights* 1st ed (Pretoria University Press Pretoria 2012)

Vittal *More Musings on Governance, Governing, and Corruption*

Vittal N *More Musings on Governance, Governing, and Corruption* 1st ed (ICFAI University Press India 2005)

Case law

South Africa

Black Sash Trust v Minister of Social Development 2017 (3) SA 335 (CC)

Economic Freedom Fighters v Speaker of the National Assembly 2018 (3) BCLR 259 (CC)

Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly 2016 (5) BCLR 618 (CC)

Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of The Republic of South Africa, 1996 1996 (4) SA 744 (CC)

Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of The Republic of South Africa, 1996 1997 (2) SA 97 (CC)

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (2) SA 374 (CC)

Judicial Service Commission v Cape Bar Council 2012 1 11 BCLR 1239 (SCA)

Justice Alliance of South Africa v President of Republic of South Africa 2011 (5) SA 388 (CC)

McDonald & others v Minister of Minerals and Energy & others 2007 (5) SA 642 (C)

Nkabinde v Judicial Service Commission 2016 (2) All SA 415 (SCA)

President of South Africa and Others v Reinecke 2014 2 All SA 376 (SCA)

President of the Republic of South Africa and others v SARFU 1999 (4) 147 (CC)

Take & Save Trading CC v The Standard Bank of SA Limited 2004 (4) SA 1 (SCA)

Sager v Smith 2001 (3) SA 1004 (SCA)

S v Basson 2005 (1) SA 171 (CC)

S v Mamabolo 2001 (5) BCLR 449 (CC)

South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd 2000 (3) SA 705 (CC)

United Democratic Movement v Speaker of The National Assembly and 2017 (8) BCLR 1061 (CC)

Zuma v National Director of Public Prosecutions (1) All SA 54 (N)

Canada

Reference re Remuneration of Judges of the Provincial Court, (P.E.I.), [1997] 3 S.C.R. 3

Legislation

South Africa

Citation of Constitutional Laws Act 5 of 2005

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa, 1996

Judicial Service Commission Act 9 of 1994

Promotion of Administration Justice Act 3 of 2000

Republic of South Africa Constitution Act, 32 of 1961

Republic of South Africa Constitution Act, 110 of 1983

Supreme Courts Act 59 of 1959

Union of South Africa Act, 1909

Canada

Act of Settlement of 1701

Constitution Act, 1867

Constitution Act, 1982

Courts of Justice Act 43 of 1990

Judicature Act of 1973

Supreme Court Act 1985

Namibia

Constitution of the Republic of Namibia, 1990

Judicial Service Commission Act 18 of 1995

International instruments

Bangalore Principles of Judicial Conduct (2002)

Universal Declaration of Human Rights (1948)

Government publications

South Africa

GN R423 in GG 24596 of 27 March 2003

Namibia

GenN 60 in GG 4674 of 24 March 2006

Internet sources

Anon date unknown *How Judges Are Appointed* http://www.courts.ns.ca/About_Judges/how_judges_appointed.htm accessed 17 March 2018

Child K 2017 *EFF Slams Chief Justice for Interrupting Fellow Judge* <https://www.timeslive.co.za/politics/2017-12-29-eff-slams-chief-justice-for-interrupting-fellow-judge/> accessed 18 January 2018

Constitutionally Speaking 2013 *Transcript: Chief Justice Mogoeng on the Rule of Law in South Africa* <https://constitutionallyspeaking.co.za/transcript-chief-justice-mogoeng-on-the-rule-of-law-in-south-africa/> accessed 12 January 2018

Department of Justice Canada 2017 *Government of Canada announces judicial appointment in the province of New Brunswick* <https://www.newswire.ca/news-releases/government-of-canada-announces-judicial-appointment-in-the-province-of-new-brunswick-651950183.html> accessed 20 March 2018

Department of Justice Canada 2017 *Judicial Advisory Committee Appointments* http://www.canada.ca/en/departmentjustice/news/2017/06/judicial_advisorycommitteeappointments.html#NB accessed 23 March 2018

Department of Justice Canada 2017 *Minister of Justice announces Judicial Advisory Committee appointments* <https://www.newswire.ca/news-releases/minister-of-justice-announces-judicial-advisory-committee-appointments-631346253.html> accessed 23 March 2018

Dolley C and Serrao A 2017 *New Constitutional Court judge's links to Zuma need scrutiny – NGO* <http://www.msn.com/en-za/news/featured/new-constitutional-court-judges-links-to-zuma-need-scrutiny-ngo/ar-AArrt5M?ocid=SL5MDHP> accessed 25 September 2017

ENCA 2016 *Moseneke Speaks on Being Overlooked for Chief Justice Position* <https://www.enca.com/south-africa/moseneke-speaks-on-being-overlooked-for-chiefs-justice-position> accessed 23 March 2017

Executive Council 2016 *Provincial Judicial Appointments Guidelines to Ensure Appointments Based on Merit* https://www.novascotia.ca/just/court_services/_docs/guidelines_provincial_judicial_appts_september_2016.pdf accessed 17 March 2018

Eyewitness News 2017 *Justice Mandisa Maya Becomes First Woman to Occupy Top SCA Post* <http://ewn.co.za/2017/05/26/justice-mandisa-maya-becomes-first-woman-to-occupy-president-of-sca-post> accessed 14 February 2018

Hawker D 2012 *Concourt Candidate Riles Commissioners* <http://www.iol.co.za/news/crime-courts/concourt-candidate-riles-commissioners-1315509> accessed 15 January 2018

Herman P 2017 *Zuma Appoints New ConCourt judge* <http://www.news24.com/SouthAfrica/News/zuma-appoints-new-concourt-judge-20170630> accessed 25 September 2017

Jones 2008 *Retirement of SCA President Craig Howie* <http://www.sabar.co.za/law-journals/2008/august/2008-august-vol021-no2-contents.html> accessed 20 August 2017

Judges Matter 2016 *JSC interview of Judge N F Kgomo for the Limpopo Deputy Judge President (Judges Matter)* <https://www.youtube.com/watch?v=q5wJuhi4Tuo&t=8s> accessed 12 August 2018

Judges Matter 08 March 2017 *Examining the JSC Deliberations Process* <http://www.judgesmatter.co.za/opinions/anc-to-examine-criteria-for-judges/> accessed 22 August 2017

Mail and Guardian 2009 *Hlophe Grilled by JSC* <https://mg.co.za/article/2009-09-21-hlophe-grilled-by-jsc> accessed 05 February 2018

Merriam Webster date unknown *Impartial* <http://www.merriam-webster.com/dictionary/impartial> accessed 20 June 2017

Office of the Commissioner for Federal Judicial Affairs Canada 2017 *Federal Judicial Advisory Committee for New Brunswick* <http://www.fja.gc.ca/appointments>

[nominations/committees-comites/members-membres/mem-nb-eng.html](#) accessed 23 March 2018

Ontario Court of Justice 2017 *Judicial Appointments Advisory Committee » Members* <http://www.ontariocourts.ca/ocj/appointments/> accessed 22 March 2018

Prime Minister of Canada 2016 *New process for judicial appointments to the Supreme Court of Canada* <https://pm.gc.ca/eng/news/2016/08/02/new-process-judicial-appointments-supreme-court-canada> accessed 17 March 2018

Government of New Brunswick date unknown *The Court of Appeal of New Brunswick* https://www.gnb.ca/cour/03_COA1/index-e.asp accessed 23 March 2018

Timeslive 2017 *Dali Mpofu Appointed to Judicial Service Commission by Zuma* <http://www.timeslive.co.za/politics/2017-09-29-dalimpofu-appointed-to-judicialservice-commission-by-zuma/> accessed 10 October 2017

Trollip 2009 *DA Opposes Soni and Ndoni Appointments to JSC* <http://www.Politicsweb.co.za/news-and-analysis/da-opposes-soni-and-ndoni-appointments-to-jsc> accessed 15 July 2017