

SOUTH AFRICA

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PROCEDURE FOR THE APPOINTMENT OF JUDGES TO THE HIGHEST JUDICIAL OFFICES AS PROVIDED FOR IN SECTION 178 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

The appointment of judges to the highest judicial offices, namely the High Courts, the Supreme Court of Appeal and the Constitutional Court, is regulated by the Constitution of the Republic of South Africa, 1996, which provides for an open and transparent system.

Section 178 of the Constitution establishes the Judicial Service Commission consisting of the Chief Justice, the President of the Supreme Court of Appeal, a Judge President of one of the nine High Courts, the Cabinet member responsible for the administration of justice, four practising members of the legal profession, one teacher of law, six persons designated by the House of Assembly from among its members (at least three of which must be members of the opposition parties represented in the Assembly), four members of the National Council of Provinces, four persons designated by the President as head of the national executive, after consultation with the leaders of all the parties represented in the National Assembly and, when considering matters relating to a specific High Court, the Judge President of that Court and the Premier of the province concerned.

Vacant judicial positions are advertised by the JSC and solicitors, barristers, academics, judges and other suitably qualified persons can apply to be considered for these positions. The JSC screens the candidates by reviewing their Curricula Vitae and written statements, and then conducting interviews with applicants. The internal JSC meetings are not public, but interviews are televised. The JCS then compiles a shortlist of candidates from which the President can then appoint persons to vacancies.



The Southern African Chief Justices' Forum

LILONGWE PRINCIPLES AND GUIDELINES ON THE SELECTION AND APPOINTMENT OF JUDICIAL OFFICERS

ADOPTED AT THE SOUTHERN AFRICAN
CHIEF JUSTICES' FORUM CONFERENCE
AND ANNUAL GENERAL MEETING,
LILONGWE, 30 OCTOBER 2018

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SOUTHERN AFRICAN CHIEF JUSTICES' FORUM

Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers adopted at the Southern African Chief Justices' Forum Conference and Annual General Meeting, Lilongwe, 30 October 2018

1. Introduction.

At its 2015 Annual Conference, the Southern African Chief Justices' Forum (SACJF), made a firm commitment towards improving both the institutional independence of judiciaries and the decisional independence of judges. The forum noted that one of the key processes which enhances judicial independence is the selection and appointment of judicial officers. To that end it adopted a resolution to:

Establish an ad hoc team of Judicial Service Commissions from the region to work towards developing regional principles and guidelines on selection and appointment of judges in Africa to be presented to the SACJF for discussion and adoption at its 2017 Annual Conference.

The ad hoc working group contemplated by the 2015 resolution drafted the principles and guidelines, drawing on research by the Democratic Governance and Rights Unit (DGRU) of the University of Cape Town, and also taking into account international and regional declarations and instruments relating to judicial appointments.

From its research and consultations, the working group has compiled these principles and guidelines to assist jurisdictions in the development of legislation, policy and practice on the selection and appointment of judicial officers. The overriding purpose of the guiding principles and best practices is to safeguard the independence and integrity of the judiciary.

The working group is cognisant that judicial independence is ensured through the integrity of the selection and appointment process along with security of tenure of judicial officers. This process also enhances public confidence and trust in the administration of justice.

For the purposes of these principles and guidelines, the following terms have been used:

a) "selection and appointment authority" to refer to Judicial Service Commissions, Judicial Appointment Commissions, Supreme Judicial Councils, all or any bodies which may be involved in the selection and appointment of judicial officers.

b) "selection and appointment process" (or the "process") to refer to the entire process of the recruitment of judicial officers, from the declaration of a vacancy to the final act of appointment of the judicial officer.

c) "appointing authority" to refer to the specific body or person responsible for the appointment of judicial officers.

d) "judicial officers" refers to all persons appointed to perform judicial functions.

e) "appointment" refers to the formal process of appointment of a candidate.

The implementation of the principles and guidelines will take place subject to national law.

This document is structured as follows. Section 2 lists the underlying general principles which inform the specific guidelines, and may serve to provide broad guidance for all aspects of the selection and appointment process. Section 3 then sets out the specific principles and guidelines, accompanied by an explanation of both the principles and guidelines, including descriptions of best practice, based on the underlying research. The guidelines are listed under the relevant underlying principles, although some principles are applicable to multiple guidelines.

2. Underlying Principles for the Selection and Appointment of Judicial Officers:

- i) The principle of transparency should permeate every stage of the selection and appointment process.
- ii) The selection and appointment authority should be independent and impartial.
- iii) The process for the selection and appointment of judicial officers shall be fair.
- iv) Judicial appointees should exceed minimum standards of competency, diligence and ethics.
- v) Appointments of candidates should be made according to merit.
- vi) The appointment process should ensure stakeholder engagement at all relevant stages of the process.
- vii) Objective criteria for the selection of judicial officers should be pre-set by the selection and appointment authority, publicly advertised, and should not be altered during that process.
- viii) The judicial bench should reflect the diversity of society in all respects, and selection and appointment authorities may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench.
- ix) Candidates shall be sourced according to a consistent and transparent process. x) The shortlisting of candidates shall be credible, fair and transparent.
- xi) Candidates shortlisted for interview shall be vetted and stakeholders invited to comment on the candidate's suitability for appointment prior to interview.
- xii) Interviews should be held for the selection of candidates for appointment to judicial office.
- xiii) The final selection (decision) to recommend for appointment shall be fair, objective and based on weighing the suitability of the candidate for appointment against the criteria set for that appointment.
- xiv) Formal appointment shall be made constitutionally and lawfully.
- xv) Provision shall be made for judicial officers to assume office timeously once appointed.

3. Guidelines for the Selection and Appointment of Judicial Officers

3.1. Overall framework

3.1.1. Transparency

Principle (i): The principle of transparency should permeate every stage of the selection and appointment process.

Guideline: Appropriate records of each stage of the process shall be kept by the selection and appointment authority and available to interested parties.

Transparency is a principle which should be encouraged throughout the selection and appointment process to enhance the integrity of the process. As far as possible, processes which encourage record keeping and transparency should be favoured in the development of legislation, policy and practice.

Transparency as a principle should permeate all levels of the selection and appointment process:

- a) the public should be made aware of the persons and bodies involved in the various stages of the process;
- b) vacancies should be widely advertised with reasonable time provided for candidates to be nominated, recommended, or to apply. That procedure should pay due regard to achieving the substantive objects and purposes of the selection and appointment process, rather than heed to administrative and procedural technicalities;
- c) the criteria for the appointment, shortlisting, selection and decision-making process should be pre-determined and publicly available. They should not be amended during the selection process;
- d) subject to national laws, all records generated by the process should be documented and kept by the selection and appointment body, and be available to interested parties; and
- e) the nomination of persons, appointment and assumption of office by a judicial officer should be publicised in order to ensure the integrity of the process.

3.1.2. Independence of selection and appointment authority

Principle (ii): The selection and appointment authority should be independent and impartial.

Guideline: The Chief Justice should represent the Judiciary on the selection and appointment authority.

The selection and appointment authority should be independent and impartial, not subject to the direction or control of any person, ministry, body or organisation. The Chief Justice should be represented on that body and best practice is for broad involvement from a wide range of representatives. International best practice instruments recommend that a broad-based selection and appointment body, comprising around 33% judicial officers, as well as members of the legal profession, teachers of law, and lay persons¹.

To secure the fairness of the administration of the process, there may be need to separate the administration of the selection and appointment authority from any factors which may affect the integrity of the process. Best practice may be to ensure that the administration should be in separate offices or premises from other structures within the judiciary, or any other organ of state.

¹ See for example Commonwealth Lawyers' Association, Commonwealth Legal Education Association and Commonwealth Magistrates' and Judges' Association -Judicial Appointments Commissions: A Model Clause for Constitutions, article 2.

3.1.3. Fairness

Principle (iii): The process for the selection and appointment of Judicial Officers shall be fair.

There should be fairness at all levels of the selection and appointment process including measures designed to guard against abuse of discretion, arbitrary interference, and unconscious bias. There should be substantively equal treatment of similarly placed candidates.

3.1.4. Appointment on merit

Principle (iv): Judicial appointees should exceed minimum standards of competency, diligence and ethics.

Principle (v): Appointments of candidates should be made according to merit.

Appointments should primarily be made according to merit. There is an overarching need to ensure that judicial appointees exceed the minimum standards of competency, diligence and ethics through rigorous interviewing and vetting processes in order to ensure effective and just decision-making, and the integrity of the judiciary. Meritorious appointments increase public confidence in the judiciary.

Seniority on the bench may be a relevant criterion for the purpose of continuity and judicial promotion, but should not equate to automatic promotion.

A candidate's professional performance may be a key component of assessment of eligibility for appointment or promotion.

1 See for example Commonwealth Lawyers' Association, Commonwealth Legal Education Association and Commonwealth Magistrates' and Judges' Association -Judicial Appointments Commissions: A Model Clause for Constitutions, article 2.

3.1.5. Stakeholder engagement

Principle (vi): The appointment process should ensure stakeholder engagement at all relevant stages of the process.

In order to ensure the legitimacy and accountability of the process, meaningful engagement and participation from all relevant stakeholders should be sought at all applicable stages of the process.

3.2. Criteria

Principle (vii): Objective criteria for the selection of judicial officers should be pre-set by the selection and appointment authority¹ publicly advertised¹ and should not be altered during that selection process.

Guideline: In order to be appointable¹ judicial officers should¹ at a minimum: (a) hold a recognised law degree;

(b) hold an appropriate level of post-qualification experience; (c) be a fit and proper person;

(d) be competent to perform the functions of a judicial officer; (e) possess good written and communication skills;

(f) be able to diligently render a reasoned decision;

(g) not have any criminal convictions¹ other than for minor offences; (h) not have any ongoing political affiliation after appointment.

Principle (viii): The judicial bench should reflect the diversity of society in all respects and selection and appointment authorities may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench.

The principles of fairness and transparency are reinforced by the publication of criteria for the selection of judicial officers. These criteria should be pre-set by the selection and appointment authority, advertised at the opening of the recruitment process, and should not be altered during the process, in line with the rule of law.

Established criteria act as a guide to candidates and provide objective standards to bind the actions of the selection and appointment authority.

3.2.1. Minimum requirements

Criteria should cover the minimum requirements candidates are expected to meet, and should include:

- a) academic qualifications, including, at minimum, a recognised law degree;
- b) a specified minimum level of post-qualification experience;
- c) ethical {fit-and proper) standards;
- d) competence to perform the functions of a judicial officer including the appropriate personal skills, adequate cultural and legal knowledge, and analytical capabilities;
- e) good written and communication skills, and
- f) an ability to make reasoned decisions, and to do so diligently.

3.2.2. Fit and Proper standards

Candidates shall be fit and proper persons to hold judicial office. The fit and proper requirement shall take into account the ability to uphold the provisions of the applicable Constitution and Judicial Code of Ethics. It is guided by the requirements in the Bangalore Principles of Judicial Conduct.

Immediately following appointment, candidates shall divest themselves of all interests which may affect their ability to carry out their judicial duties. At a minimum, appointees shall not hold political office or have any active political affiliations or membership.

Subject to domestic laws, candidates should not have any previous criminal convictions besides minor offences.

3.2.3. Diversity

In appointing candidates, the selection and appointment authority should ensure that the judicial bench reflects society in all respects, and may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench.

Appropriate grounds include:

- a) diversity of academic, personal, social, and professional background;
- b) gender;
- c) race;
- d) culture;
- e) ethnicity;
- f) disability;
- g) geographical and regional representation;
- h) religion;
- i) language; and
- j) people who have worked with those groups and are thereby aware of specific issues or challenges experienced by the groups.

Diversity of age groups on the bench may be considered in order to ensure continuity and progressive retirement.

3.3. Sourcing of candidates

Principle (ix): Candidates shall be sourced according to a consistent and transparent process.

Guideline (1): Candidates for appointment may be sourced through applications, nominations, proposals, direct searches or invitation to express interest and apply.

Guideline (2): Regardless of how candidates are sourced, no distinction may be drawn between candidates in the selection and appointment process once their names are sourced.

The selection and appointment authority may choose to source candidates through calls for application or nomination, or through directly inviting certain applicants or classes of applicants to apply. This may be done, for example, to specifically address diversity gaps.

This should be through a standardised, transparent process. Where nominations are accepted, a standardised process should protect against interference with the independence of the candidates. However the candidates are sourced, they should be subjected to the same process and complete the same documentation.

The required documentation should include a curriculum vitae, and contain sufficient detail on the following:

- a) health status;
- b) publications;
- c) employment history;
- d) business interests;
- e) previous political involvement including membership of political parties;
- f) potential conflicts of interest; and
- g) disclosure of anything which if discovered after appointment may cause the judiciary embarrassment or bring the judiciary into disrepute.

Records of all candidates shall be kept by the selection and appointment authority and made available.

3.4. Shortlisting

Principle (x): The shortlisting of candidates shall be credible, fair, and transparent.

Guideline (1): Objective criteria should be developed to guide the process for the shortlisting of appointable candidates.

Guideline (2): These criteria should be agreed and publicised before the shortlisting process.

Guideline (3): The body responsible for shortlisting should be made known to stakeholders and the candidates.

The selection and appointment authority shall develop guidelines to enable it to create a shortlist of appointable candidates who meet the minimum criteria for the available positions.

Shortlisting criteria, including how and by whom the shortlisting is done, shall be known prior to the sourcing of candidates.

The selection and appointment authority should ensure that a sufficient number of applicants are shortlisted to ensure a meaningful appointment process.

The selection and appointment authority may decide to make the names on the shortlist public.

3.5. Vetting and stakeholder engagement

Principle (xi): Candidates shortlisted for interview shall be vetted and stakeholders invited to comment on the candidate's suitability for appointment prior to interview.

Post-shortlisting, prior to interviewing, candidates shall be vetted and stakeholder comments shall be actively encouraged. Where the selection and appointment authority does not undertake the vetting process it shall not abdicate its function, but shall have the final say on the weight to be attached to findings about the suitability of candidates.

Financial interests, criminal records, wealth declarations and reference checks shall be carried out to ensure veracity of disclosure.

Vetting procedures shall be objective, factual and fair.

Stakeholder comment shall be encouraged as best practice. Comments shall be solicited from core groups, including the bar, academia, the judiciary and civil society. The shortlisted names should be made available to the general public.

Anonymous comments on candidates' suitability may be entertained where the comments have some foundation taking into account the gravity of the complaint, the credibility of the source, and the reasons for confidentiality.

Candidates shall be made aware of adverse comments arising out of the vetting process and stakeholder comment. Candidates may be given the opportunity to respond appropriately at, or prior to, the interview stage.

3.6. Interviews and selection

Principle (xii): Interviews should be held for the selection of candidates for appointment to Judicial Office.

Guideline (1): Interview processes should be equal, fair, rigorous, respectful and permit candidates the opportunity to choose to respond to adverse comments made against the candidate.

Guideline (2): Records of interviews shall be made, kept, and available.

Best practice is that interviews are held for the selection of candidates.

The interview process should ensure substantive equality in the treatment of candidates.

The interview may be supplemented by a written assessment.

Questions which may be put to candidates should be agreed in advance by the members of the selection and appointment authority, taking into account the need for flexibility in assessing persons from different backgrounds. Substantively similar questions shall be put to each candidate. Questions should be relevant to measuring the competencies and attributes of the candidate against the criteria for the appointment.

The tone of the interview should be non-confrontational and ensure that candidates are treated with dignity and respect. However, the selection and appointment authority may engage in robust but respectful questioning in appropriate cases. Interview questions should not seek to serve alternative agendas or take candidates by surprise.

Candidates should have the opportunity to respond adequately to adverse comments during the interview. The selection and appointment authority should enable candidates to elect to answer certain personal questions in private or in public. Candidates should also be able to withdraw from the process.

Records of the interview process shall be maintained by the selection and appointment authority, and made available.

3.7. Decision making

Principle (xiii): The final selection {decision) to recommend for appointment shall be fair, objective, and based on weighing the suitability of the candidate for appointment against the criteria set for that appointment.

After interviews, the decision-making process shall be fair, objective, and based on a weighing of the pre-set criteria.

Emerging best practice is for the development of a ranking and scoring process for assessing candidates. The selection and appointment authority is encouraged to meet before the interview process to decide mathematical weightings of the various criteria according to the needs of the position for appointment, and the needs of the judiciary as a whole. This creates substantive reasons for their recommendations.

Members of the selection and appointment authority should attempt to reach consensus, and may resolve deadlock by vote as a final resort.

Records of the decision-making process shall be kept by the selection and appointment authority.

Subject to constitutional and national legislation, the selection and appointing authority may choose to make its recommendations public for transparency purposes.

3.8. Appointment

I Principle (xiv): Formal appointment shall be made constitutionally and lawfully.

The appointment of judicial officers is made according to constitutional and national legislative provisions. Best practice is that this is made timeously.

3.9. Post appointment

Principle (xv): Provision shall be made for judicial officers to assume office timeously once appointed.

Guideline (1): Appointed candidates shall assume office timeously, preferably within six months of appointment.

Guideline (2): Appointees shall have adequate time to complete cases, close legal practices, and divest themselves of potential conflicts of interest.

Guideline (3): Arrangements shall be made for appropriate induction to the appointment position and ongoing skill and legal development.

Following appointment, the appointing authority and the judiciary should coordinate to ensure that the appointee assumes office within a reasonable time, allowing a maximum period of six months for the appointee to wrap up their practice, or finish judgments and to take appropriate steps to resign from conflicting interests.

Furthermore, the judiciary is responsible for ensuring that appointees are appropriately inducted. A compulsory period of training immediately post appointment is best practice, and requirements for ongoing legal and skills development should be encouraged.

3.10. Applicability

Guideline (1): The principles underlying these guidelines should be followed in the appointment of all judicial officers

Guideline (2): These guidelines should be applied as far as possible in the appointment of all judicial officers

As far as practicable these principles and guidelines for appointment should be applied to all judicial appointments, including short-term acting and contractual appointments, subject to variations in the constitutional and legislative frameworks governing such appointments. It is acknowledged that in some jurisdictions the appointment of judges on contract remains an important supplement to the bench, and measures should be taken to ensure that such candidates are appointed through the same process as permanent appointees.

Where abridged appointment processes take place for the appointment of acting judges, the same principles of merit, fairness, transparency and rationality of the appointment shall apply.