Crisis of Confidence at the Concourt

By Chris Oxtoby and Richard Calland

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The Constitutional Court has an extraordinary international reputation. To say it "punches above its weight" in the arena of legal scholarship and practice would be a serious understatement, such is the high regard with which its jurisprudence is held.

A place on its bench used to be one of the most attractive positions a lawyer could aspire to. Now, apparently, hardly anyone wants to even touch it. Despite two attempts to attract nominations of sufficient quantity and quality, the Judicial Service Commission (JSC) has had to postpone the appointment process for the current vacancy on the Concourt, giving rise to numerous questions and rumours.

In August, Judge Sandile Ngcobo stepped down as chief justice after the legislation used to extend his tenure was declared unconstitutional. While he has been replaced as chief justice, there is still a vacancy on the court, which has been filled by various acting judges.

On March 8 the JSC released a media announcement setting out the shortlisted candidates for various judicial vacancies. They are to be interviewed next month. It said no candidates had been shortlisted for the Concourt vacancy because of "an insufficient number of appropriate nominations".

The position will thus be re-advertised at a later date.

For appointments to the Concourt, the constitution requires that the JSC provide the president with a list of names numbering three more than the number of vacancies on the court. So in this case, four names would have had to be sent to the president from which he would then make the appointment.

For the JSC's role in selecting those four to be meaningful, this would require it to interview more than the minimum of four – probably at least seven. By way of comparison, when there were last vacancies on the court, in September 2009, the JSC interviewed 22 candidates for four vacancies.

It is worth reflecting on this for a moment. Just more than two years ago, more than 20 judges and lawyers put themselves forward to be interviewed for a place on the country's

highest court. Fast-forward to today, and the JSC cannot even find four to shortlist for one vacancy.

What on earth is going on? It is cause for genuine concern. It is also, inevitably, a cause of rumour-mongering that can do little but harm a range of individuals and institutions.

Does the lack of applicants show a loss of faith by the judiciary in the JSC's decision-making and interviewing processes? Does it show a lack of faith in the leadership of the court and the judiciary by the new chief justice, controversially appointed ahead of more established members of the court?

Or is there, as some commentators have suggested, a feeling in the judiciary and in the legal profession generally that the choice has already been made, and that subjecting themselves to the JSC's sometimes gruelling public interview process would be a futile exercise?

Or is it simply a strategic choice?

A second vacancy will soon become open, when Justice Zac Yacoob's tenure expires early next year. Are prospective Concourt judges simply making a calculation that their chances of appointment will be better if they are in a bigger "pot" for more vacancies?

It would be speculative to attempt a decisive answer to any of these questions and all these factors may play some part. But some things may be clearer than others. First, the current impasse is unhelpfully timed, given the apparently delicate nature of current relations between the government and the judiciary, and unfortunate for the Concourt itself.

Assuming that the vacancy is filled after the JSC's next round of interviews in October, there will have been a vacancy for more than a year.

It is legally and practically possible to fill the vacancy on the court with an acting judge (who will usually be a judge from the Supreme Court of Appeal or a senior high court judge).

But to do so over such a long period may be harmful to the cohesion and stability of the court.

This situation is aggravated by the fact that the Deputy Chief Justice Dikgang Moseneke is on long leave until the end of May, meaning that two acting judges need to serve on the court until his return.

Furthermore, as acting judges are permanently based in other courts, they will usually only be seconded to the Concourt for limited periods. Having acting judges on the courts may be disruptive to the development of a cohesive, collegial dynamic among the judges of the court.

It is also harmful to perceptions of the independence of acting judges. However strong their personal integrity and commitment to the independence of the judiciary, an acting judge who may subsequently want to apply for permanent appointment to the court might be perceived as vulnerable to pressure, for example in cases involving the government or the JSC itself as a party to litigation.

Second, the failure to attract sufficient candidates for a vacancy on the country's highest court may indicate a serious breakdown of faith in the system of appointments from within the legal community.

The Concourt ought to be seen as the pinnacle of a lawyer's career, an opportunity for which they would put themselves forward fearlessly, swallowing any anxiety about the interview

process. Yet it appears that only two active judges (Raymond Zondo and Robert Nugent) put themselves forward.

It should also be noted that the JSC was able to shortlist only five candidates for six vacancies on the Pretoria and Johannesburg high courts, and did not receive any suitable nominations for a vacancy on the Electoral Court.

This is a truly astonishing state of affairs. The JSC was established by the constitution in an attempt to move away from the politicised and unrepresentative appointments practices followed before the constitutional era. It was meant to usher in a more diverse and responsive judiciary.

These are important goals that the constitution requires be fulfilled. But they will not be achieved if the best (or indeed any) candidates do not put themselves forward for selection, raising questions about why progressive organisations either did not nominate suitable candidates or were unable to persuade such candidates to accept nomination.

What can be done to improve the situation?

The JSC may need to re-think how it carries out its constitutional mandate, without retreating in any way from the appropriately rigorous testing of a candidate's qualifications and credentials, as it has done on an increasing number of occasions, not least, and most memorably, during the day-and-a-half long interview of the new chief justice himself in September.

It would be helpful, for starters, if the JSC was to articulate more openly and clearly what it is looking for in an "ideal" judge, and if it's interview process focused more closely on these attributes.

Although the JSC's processes have strengthened in recent times, leading to a more consistent approach to its assignments, and to many sound appointments, too often commissioners spend remarkably little time interrogating candidates' judicial records.

The process must be one that does not show appointments to be a foregone conclusion and gives every candidate a fair chance to prove to the JSC that they are worthy of a place on the bench.

Accounts of the JSC's final decision-making in September 2009 suggest that there was only limited, if any, discussion of the merits of all the candidates. If that is how the JSC operates, it cannot be surprised if potential good candidates for high judicial office decide not to apply but remain in the havens of the lower courts or the prosperous sanctuary of the Bar. But the judiciary, and the country as a whole, will be the poorer for it.

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