



THE JUDICIAL SERVICE COMMISSION'S 2023 CRITERIA AND GUIDELINES AN ANALYSIS

by Chris Oxtoby

INTRODUCTION

The Judicial Service Commission (JSC) has regularly been criticised for not developing detailed criteria to inform its selection of candidates for judicial office. While sections 174(1) and (2) of the Constitution provide broad guidance, the interpretation of these provisions, and any additional factors that might be considered, were largely left to the whims of commissioners. With the composition of the JSC regularly changing, and with lines of questioning appearing and then disappearing from one round of interviews to another, candidates must have faced a thankless task to prepare themselves for the JSC's public interviews.

Having clear, transparent criteria for judicial appointment are important for several reasons. It allows for principled debate about whether the criteria used are adequate; it assists those who nominate candidates for appointment or comment on nominees; it allows those who are considering putting themselves forward for nomination to assess their own candidacy; and it facilitates informed media reporting and public debate.¹ Despite these advantages, the JSC has been hesitant to develop and publicise criteria going beyond the broad criteria in the Constitution. The JSC's early attempts to articulate further criteria did not achieve all of these benefits, and did not appear to play much of a role, at

least in the public interview process.

In interviews for vacancies on the Constitutional Court in April 2021, some candidates were subjected to such abrasive questioning that the Council for the Advancement of the South African Constitution (CASAC) brought a legal challenge to set the interviews aside. Rather than oppose the litigation, the JSC settled the matter, re-running the interviews later that year. Happily, this appears to have sparked a reform movement within the JSC. In late 2022, it released a "[s]ummary and explanation of the criteria and guidelines used by the Judicial Service Commission when considering candidates for judicial appointment" for public comment. At the JSC's April 2023 sitting, it was announced that these criteria had been formally adopted (the document is available at <https://www.judiciary.org.za/index.php/judicial-service-commission/criteria-for-judicial-appointment>).

This article will compare the 2023 criteria to earlier criteria and aims to provide insight into the factors that will now be considered in judicial appointments. The adoption of the 2023 criteria is a crucial development which has the potential to lead to significant improvements in the JSC's practice, and thereby to restore confidence in the appointments process.

PREVIOUS CRITERIA

The Constitution provides that judges must be appropriately qualified and fit and proper (section 174(1)), and that the need for the judiciary to reflect the racial and gender composition of the country must be taken into account when appointments are made (section 174(2)). The judiciary must also be independent and is subject only to the Constitution and the law (section 165(2)).

These criteria were first amplified in 1998. The JSC's 1999 annual report records that the commission dedicated an "entire session [of its October 1998 meeting] to a discussion on the formulation of criteria and guidelines for appointment to and the transformation of the higher judiciary."²

In 2010, the JSC reviewed the 1998 criteria. The resulting 2010 criteria were almost identical, barring incidental changes of wording. The 2010 criteria comprised two sections. The first reiterated the criteria found in the Constitution. The second set out a list of six "supplementary criteria". The full wording of these criteria is set out in the next section of this article.

Despite calls for the JSC to develop more detailed criteria, the matter rested there for more than a decade. However, following the controversial April 2021 Constitutional Court interviews, the JSC revived the 2010 criteria, asserting that they would be applied – despite it not being apparent that the 2010 criteria had played any significant role in guiding interviews since their adoption.

Following the adoption of the 2023 criteria, it is helpful to compare the different attempts to identify appointment criteria. To this end, this article will compare the provisions of the 1998 and 2010 criteria with the 2023 criteria, identifying how these provisions are defined in the 2023 criteria, and discussing how the 2023 criteria represent a significant expansion on the 1998 and 2010 versions.

COMPARISON OF THE 1998/2010 AND 2023 CRITERIA

During a media briefing at the JSC's April 2023 sitting, a JSC spokesperson described the 2023 criteria as "teasing out" what the constitutional criteria entail. This is an accurate description of their structure and highlights an important difference from the 2010 criteria. The 2023 criteria expressly acknowledge that the constitutional criteria provide a minimum threshold and are not exhaustive, and conceptualises the factors listed as explaining the constitutional requirements (see paragraph 8). This is a sensible approach. It obviates possible criticism that the JSC had legislated criteria not provided for in the Constitution, whilst setting out transparently how the JSC intends to flesh out and apply the criteria found in the Constitution.

This structure marks a departure from the 2010 criteria, which distinguished between criteria listed in the Constitution and supplementary criteria but gave no indication of how they related to each other. Incorporating supplementary criteria under specific constitutional provisions is a preferable approach.

2010 CRITERIA

Criteria stated in the Constitution.

1. Appropriately qualified

This criterion is expressly identified in the 2023 criteria (paragraphs 9 – 14). It is understood as encompassing *inter alia* academic and professional qualifications, practical and acting judicial experience, relevant specialist experience, and an ability to resolve commercial disputes and disputes involving social media and technology. The weight given to acting experience is explained (it is desirable, but not essential). Importantly, the 2023 criteria emphasise that these qualities should be apparent from a candidate's track record.

2. Fit and proper

The 2023 criteria contemplate a "holistic assessment" of this criterion, encompassing factors such as integrity, knowledge, experience, judgment and character (paragraph 15). Other factors include competence, a demonstrated understanding of the Constitution and its underlying values, an ability to apply precedent and explain decisions, forensic and intellectual ability and an understanding of court procedures, a good judicial temperament, and qualities relating to industry and work ethic.

3. Would his or her appointment help to reflect the racial and gender composition of South Africa?

The greater depth of the 2023 criteria is perhaps most noticeable in the analysis of this criterion (paragraphs 23 – 29). Underlying justifications are presented, including the need for the judiciary to be sufficiently diverse to enable judges to understand the experience and needs of all South Africans. There is discussion of how diversity is to be measured in relation to the overall population. Diversity is defined as a "component of competence", on the basis that without diversity, the judiciary will lack public confidence and legitimacy (paragraph 25). The need for sensitivity to the needs and experience of those who appear before the courts is also emphasised (paragraph 26).

The 2023 criteria also include a lengthy discussion of the impact of systemic disadvantage on candidates' ability to gain experience and competence, and how factors will be weighed where a candidate who will not advance representivity is better qualified than others (paragraph 27). A candidate's commitment and contribution to transformation will also be considered (paragraph 28). Considering the amount of controversy which has been caused by the application of these factors, the JSC is to be commended for grappling openly with these issues.

A major difference between the 2010 and 2023 criteria is the latter's inclusion of independence as one of the constitutional criteria (paragraphs 30 – 35). It is striking that this was never previously articulated as a distinct criterion, and its inclusion is a further illustration of the greater depth of the 2023 criteria.



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SUPPLEMENTARY CRITERIA

1. Is the proposed appointee a person of integrity?

Integrity is mentioned twice in the 2023 criteria under the broader criterion of independence. Judges must have the “courage and integrity to resist pressure” (paragraph 32) and must be people of courage and integrity in order to exhibit their independence (paragraph 35). Indeed, it might be said that integrity is implicit in every facet of the criterion of independence.

2. Is the proposed appointee a person with the necessary energy and motivation?

This is included under the “fit and proper” criterion in the 2023 iteration, but is amplified significantly by the addition of consideration for candidates’ writing skills, critical reasoning, diligence, stamina, industry, work ethic and productivity – the latter with express reference to the timeous delivery of judgments (paragraph 21).

3. Is the proposed appointee a competent person?

- (a) Technically competent
- (b) Capacity to give expression to the values of the Constitution

Technical competence is expressly mentioned as a component of the “appropriately qualified” criterion (paragraph 9). The exposition of what constitutes “appropriately qualified” also clarifies how the JSC understands technical competence.

This criterion also appears in modified form under the “fit and proper” 2023 criterion. Paragraph 16 provides that a proposed appointee must be a competent and experienced person, and “must be technically competent and have the capacity to give expression to the values of the Constitution.” Then in paragraph 17, it is stated that judges must interpret and enforce the Constitution to support its fundamental

values, and candidates “should be able to demonstrate an understanding of the Constitution and the importance of infusing the jurisprudence of our courts with the core constitutional values, rights and obligations.” These provisions put far more flesh on the rather bare bones of item 3(b) of the 2010 criteria.

The requirements of competence and experience thus appear to have been infused through several parts of the 2023 criteria, rather than being standalone criteria as in the 2010 iteration.

4. Is the proposed appointee an experienced person?

- (a) Technically experienced
- (b) Experienced in regard to the values and needs of the community.

Technical experience is expressly mentioned as a component of the “appropriately qualified” 2023 criterion (paragraph 9), and many of the factors listed under this criterion will invariably involve an assessment of a candidate’s technical experience.

The requirement of experience is also combined with competence under the “fit and proper” criterion (paragraph 16), and the articulation of the constitutional criterion relating to race and gender composition emphasises the need for judges to “understand the experience of all South Africans and empathise with their needs” (paragraph 24), and that “a capacity for empathy and an appreciation of the needs of the community” are relevant considerations (paragraph 26). A candidate’s “commitment and participation to community based ... structures” will also be considered (paragraph 28). Therefore, the 2010 supplementary criterion in 4(b) is now unpacked in much more depth and infused into different aspects of the 2023 criteria.



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5. Does the proposed appointee possess appropriate potential?

Although not listed expressly as a criterion in the 2023 iteration, there is a lengthy discussion of the evaluation of a candidate's professional experience and potential, and how candidates may have experienced systemic disadvantage (paragraph 27), as a component of the reflecting racial and gender balance criterion.

6. Symbolism: What message is given to the community at large by a particular appointment?

This is dealt with in the 2023 criterion under the constitutional criterion of reflecting racial and gender balance, where it is stated that the message that an appointment "may convey to the community at large will also be considered." (paragraph 29). Additionally, there is significant discussion under this heading of how the JSC intends to deal with issues of structural disadvantage, and the impact of judicial transformation on the legitimacy of the judiciary (see the analysis of point 3 of the constitutional criteria), which also links to the symbolism of appointments.

A notable difference between the 2010 and 2023 criteria is that the guidelines regarding the JSC's approach to interviews (paragraphs 36 – 40 of the 2023 criteria) have no equivalent in the 2010 criteria, further illustrating the far more comprehensive nature of the 2023 document.

CONCLUSION

The 2023 criteria represent a significant improvement on the 2010 criteria. The structure emphasises the primacy of the Constitution whilst providing far greater detail regarding how those provisions are to be applied in practice. The addition of independence as a criterion is significant. The 2023 criteria also provide a far more detailed engagement with provisions relating to race and gender diversity. Considering the amount of controversy this issue has generated in the past, this development is welcome.

This is not to say that the 2023 criteria will not require further development. Some of the factors articulated under the fit and proper criterion might seem more suited to the criterion of appropriately qualified. Little elaboration is given to the particular requirements for apex court or leadership positions. For example, the 2023 criteria briefly discuss the evaluation of leadership qualities under the criterion of "appropriately qualified". Appropriate leadership qualifications are identified as including vision, leadership qualities, good interpersonal and caseload management skills, maturity of judgment, and relational wisdom. (Paragraph 14.6) Unlike, for example, the rich discussion of the meaning of the requirement of reflecting racial and gender composition (paragraphs 23 – 29), these qualities are not unpacked or elaborated on. As the JSC continues to engage with the criteria, there would be merit in further developing these aspects.

Lastly, under the guidelines for conducting interviews, mention is made of an objections committee, but its composition and the scope and basis of its mandate are not explained. And despite calls for the adoption of a code of conduct for JSC commissioners, there is no indication that this has been done.

Nevertheless, the 2023 criteria provide a far more substantive engagement with the JSC's role than the 2010 criteria. It is hoped that the application of these provisions will restore confidence in the JSC's role in judicial appointments, which has been the subject of so much criticism. **A**

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Notes

1. Susanna Cowen, *Judicial Selection in South Africa*, Democratic Governance and Rights Unit 2010, p. 9.
2. Report on the Activities of the Judicial Service Commission for the year ended 30 June 1999, available at https://www.justice.gov.za/reportfiles/1999reports/1999_judicial%20service%20comm.htm.