

# WHO NOMINATES JUDGES? SOME ISSUES UNDERLYING JUDICIAL APPOINTMENTS IN SOUTH AFRICA\*

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## 1 Introduction

This article examines the importance and impact of the process of nomination on the appointment of judges in South Africa. The process of judicial appointment has changed dramatically following South Africa's transition from apartheid to constitutional democracy. In the pre-constitutional era, appointments were made by the state president in cabinet, with little or no external input beyond that elicited from a small political and legal elite.<sup>1</sup> This contributed to the creation of a judiciary that was entirely lacking in diversity in terms of demographic representation, social background and professional career paths.<sup>2</sup> Judges were drawn almost exclusively from the ranks of senior advocates, and until the early 1990s, were almost exclusively white men.<sup>3</sup> This system was reformed significantly, first in terms of the Interim Constitution of 1993, and then in terms of the Constitution of the Republic of South Africa, 1996 ("Constitution"). One of the most marked changes was the establishment of the Judicial Service Commission ("JSC") to recommend the appointment of judges to the superior courts. A large and diverse body, the JSC includes representatives from the executive, the legislature, the judiciary, the organised

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<sup>1</sup> M Wesson & M du Plessis "Fifteen years on: central issues relating to the transformation of the South African judiciary" (2008) 24 *SAJHR* 187 190.

<sup>2</sup> A lack of diversity was of course not the only difficulty with the apartheid era judiciary, which was seen as generally complicit in the injustice of apartheid. Wesson & Du Plessis *Fifteen years on 190-191*; Truth and Reconciliation Commission of South Africa *Report* (1998) 101.

<sup>3</sup> On the date of South Africa's first democratic election, 27 April 1994, the judiciary comprised of three black men, one white woman, and 160 white men. MTK Moerane "The meaning of transformation of the judiciary in the new South African context" (2003) 120 *SALJ* 708 712. For an overview of appointments in the pre-constitutional era, see also M Olivier "The Selection and Appointment of Judges" in C Hoexter & M Olivier (eds) *The Judiciary in South Africa* (2014) 117-120.

legal profession and academia.<sup>4</sup> This diversity stemmed from the desire to make the appointment process more transparent and accountable, and open to greater input from bodies like the organised legal profession, and other users of the courts.<sup>5</sup>

The new constitutional system necessitated the creation of a transformed and transformative judiciary, as transformation is part and parcel of the reconstruction of society. The transformation of the judiciary is a contested issue and understood broadly, it includes factors such as the life experiences and mindset of prospective judicial officers.<sup>6</sup> Transformation of the judiciary includes, amongst other definitions, the re-organisation and re-engineering of the structures and branches of the judiciary, and a change in the way judges do their work.<sup>7</sup> With this re-engineering came the need for a change in the demographic composition of the judiciary. This type of transformation has been a hotly contested topic over the years.<sup>8</sup> Significant progress has been made in improving the racial composition of the bench, with the composition of black judges<sup>9</sup> increasing from 1.4% in 1994 to 65% as of July 2016. However, gender transformation has long lagged behind, with the representation of women on the bench increasing from 1.2% to 36% over the same period.<sup>10</sup> Racial transformation has been a critical aspect of transforming the judiciary in the democratic era. However, as Leona Theron J has aptly stated, “it seems that gender took the backseat to race”.<sup>11</sup> Steady improvements in regard to gender transformation have only been visible since 2013, and a number of challenges continue to beset women. These challenges are not only faced by women in the legal profession who aspire to become judges, but are equally encountered by women in the judiciary who seek appointment to higher courts.<sup>12</sup>

A key rationale that has been identified for the creation of the JSC is to establish a system of judicial appointment that is more open and independent.<sup>13</sup> One of the ways in which this is achieved is through the JSC’s procedures

<sup>4</sup> See s 178 (1) of the Constitution for the full composition of the JSC.

<sup>5</sup> M Olivier & C Hoexter “The Judicial Service Commission” in C Hoexter & M Olivier (eds) *The Judiciary* (2014) 155-156.

<sup>6</sup> For a thorough analysis of various concepts of transformation in relation to judicial appointments, see C Albertyn “Judicial Diversity” in C Hoexter & M Olivier (eds) *The Judiciary* (2014) 245-287.

<sup>7</sup> Moerane (2003) *SALJ* 711.

<sup>8</sup> See for example DB Ntsebeza SC “Transformation of the Judiciary: The Role of the Judicial Service Commission” (2014) *The Fifth Annual Griffiths & Victoria Mxenge Memorial Lecture* 4-12, P Hoffman “How the JSC selects judges” (15-11-2012) *Politicsweb* <<http://www.politicsweb.co.za/news-and-analysis/how-the-jsc-selects-judges>> (accessed 30-08-2017); J Myburgh “The great Constitutional Court mystery” (29-08-2008) *Politicsweb* <<http://www.politicsweb.co.za/news-and-analysis/the-great-constitutional-court-mystery>> (accessed 30-08-2017). Judicial appointment has also been the subject of two major pieces of litigation in *Judicial Service Commission v Cape Bar Council* 2013 1 SA 170 (SCA) and *Helen Suzman Foundation v Judicial Service Commission* 2017 1 SA 367 (SCA).

<sup>9</sup> As legislated, the term “black” refers to people of African, Indian and Coloured descent, as per section 1 of the Broad Based Black Economic Empowerment Act 53 of 2003.

<sup>10</sup> Statistics provided by the Department of Justice and Constitutional Development, on file with the authors.

<sup>11</sup> JSC interviews for the Constitutional Court of South Africa held on 9 July 2015 at the OR Tambo Southern Sun hotel.

<sup>12</sup> See T Masengu “It’s a Man’s World: Barriers to Gender Transformation in the South African Judiciary. Perspectives from Women Advocates and Attorneys” (2016) 23 *International Journal of the Legal Profession* 305-319.

<sup>13</sup> Wesson & Du Plessis *Fifteen years on* 193.

specifically requiring input from the organised legal profession. This input takes place at the nomination stage, when candidates are being sought for judicial vacancies, and at the interview stage, when comments are solicited on the suitability of candidates for appointment. The legal profession is not the only sector of society that provides comments to the JSC. Civil Society Organisations (“CSOs”) and individuals are also encouraged to do so, and have done so in the past.<sup>14</sup> Having observed the JSC interviews for a considerable period of time, however,<sup>15</sup> the authors have noted that the submissions from the legal profession and legal organisations are of particular importance. First, comments from the legal profession are considered to be comments from a candidate’s peers, and thus are more influential because they often speak to crucial qualities such as the candidate’s work ethic and knowledge of the law. Second, if a candidate is vying for a high court position, comments from the legal profession on how a candidate performed as an acting judge provide the JSC with insight as to whether the candidate is suitable for judicial office, based on factors such as demeanour in court, treatment of counsel and witnesses, and the ability to control court proceedings.

This article seeks to present and analyse research findings of data collated from participant observations of the JSC interviews and candidates’ applications—specifically in relation to the nominations process. This is a novel contribution to the literature on judicial appointments. We explore the impact of nomination by asking three primary questions:

- (a) Does the identity of the nominator of a candidate have any impact on the candidate’s chances of appointment?
- (b) Do nominators give sufficient attention to demographic transformation when making nominations?
- (c) What other factors influence nominators’ decisions to nominate a candidate?

To answer these questions, we conducted a survey of the application forms of candidates interviewed for positions on the High Court, Labour Court, Labour Appeal Court, Competition Appeal Court, and the Supreme Court of Appeal by the JSC between October 2010 and October 2016.

The survey includes nominations for leadership positions (such as Judges President or Deputy Judges President) on the courts listed above. However, we do not analyse the nomination of candidates for positions in the Constitutional Court, or for the leadership positions of Chief Justice and Deputy Chief Justice, or President and Deputy President of the Supreme Court of Appeal. The reason for this is that the appointment process for these positions is significantly different to the process for other judicial appointments.<sup>16</sup> These differences, in our view, render such appointments too dissimilar from other superior court appointments to be a helpful comparison. Furthermore, our

<sup>14</sup> Individual submissions in particular have been enlightening and revealed useful information, including information about instances in which a candidate’s integrity has been questioned.

<sup>15</sup> Chris Oxtoby since late 2009 and Tabeth Masengu since April 2012.

<sup>16</sup> This difference will be discussed in further detail in the text to part 2 below.

analysis focuses on those candidates who have been nominated and then subsequently shortlisted for interview by the JSC. One of the transparency gaps in the South African judicial appointments process is that information about candidates who have been nominated, but not shortlisted, is not made available. Our survey therefore does not take these candidates into account.

Part 2 of this article locates the nomination process within the legal framework for judicial appointments in South Africa. We briefly consider the comparative position in Kenya and Zimbabwe, in order to contextualise the South African situation. These countries are the only other jurisdictions in the region that allow public viewing of judicial interviews. This comparative perspective is helpful as it provides a general view of the role that the process of nomination is meant to play in a judicial appointment process. In part 3, we present the results of our analysis of the impact of nominations on judicial appointment. We begin by explaining the role of the organised legal profession and professional legal organisations in the judicial appointments process, including a consideration of the mandate of these organisations insofar as it relates to nominations and the transformation of the judiciary. We then analyse the data generated by our study, in order to address questions such as which organisations or individuals (or groupings of individuals) are the most frequent nominators of candidates for judicial office. We also try to ascertain whether there is a discernible pattern of some nominators being more successful (that is, those that they nominate are ultimately appointed to judicial office) than others. Thereafter, we examine the substantive reasons given for nominating candidates, with a primary focus on the Black Lawyers Association (“BLA”) and the South African Chapter of the International Association of Women Judges (“SAC-IAWJ”). In this section, we explore how the nomination of candidates for judicial appointment meets the transformative mandate of these two organisations and others.

Finally, in part 4 we specifically focus on the gendered nature of the nominations and of the judicial appointment system more generally. In order to rectify the current gender imbalances in the judiciary, it is important to recognise aspects of the appointments process that may impede women’s abilities to be permanently appointed as judges, or promoted within the judiciary. What might appear to be a fair and equitable nomination process may, upon closer inspection, be substantively unequal. Thus, this section examines the complete appointments process through a gender lens. We analyse the entire process, from the advertisement of vacancies, to the final recommendation of candidates for appointment and answer the question of whether the process is equal in both theory and fact. We conclude this contribution with a summary of the significance of the information gathered from our survey, and our final thoughts on the nominations process.

## **2 The South African legal framework for nominations for judicial appointment**

Before turning to consider the specifics of the nomination procedure, a general overview of the process of judicial appointment and selection is

necessary. The JSC is a key actor in this process. It consists of a minimum of 23 members, rising to 25 when candidates for provincial high courts are interviewed. These members comprise three judges, the Minister of Justice, four lawyers, one teacher of law, ten members of Parliament (both the upper and lower houses are represented)<sup>17</sup>, and four persons designated by the President (who inevitably tend to be practising lawyers). As well as playing a key role in the judicial appointments process, the JSC is empowered to advise national government on issues relating to the judiciary or the administration of justice,<sup>18</sup> and plays a central role in judicial discipline, including the removal of judges from office.<sup>19</sup>

The JSC is involved in the appointment of all judges to South Africa's superior courts, with appointments to the magistracy dealt with separately by the Magistrates' Commission. But, as was canvassed in the introduction, not all superior court judges are appointed in the same way. The President appoints the Chief Justice and Deputy Chief Justice, after consultation with the JSC and leaders of political parties represented in the National Assembly. The President appoints the President and Deputy President of the Supreme Court of Appeal after consulting the JSC.<sup>20</sup> In practice, the President effectively nominates these appointees, by advising that he is minded to appoint them to these positions, and seeking the input of the prescribed organisations. This renders these appointments so different from other judicial appointments that we have excluded them from this study.

For judges of the Constitutional Court, the JSC must send a list of names, three more in number than the number of vacancies available, to the President, who then makes the appointment after consulting the Chief Justice and the leaders of political parties represented in the National Assembly.<sup>21</sup> This high level of presidential discretion in the appointment process, in our view, reduces the potential significance and power of nominating organisations, and hence we have excluded candidates for the Constitutional Court from this research. However, for other superior court judges, the JSC has a much more powerful role to play. These judges are formally appointed by the President, but "on the advice of" the JSC<sup>22</sup> – a formulation that is accepted as binding the President to the advice received from the JSC.<sup>23</sup> Therefore, the JSC in effect makes such appointments. Candidates are interviewed in public by the JSC, after which the commissioners deliberate in private before announcing their

<sup>17</sup> S 178(1)(h) and (i) of the Constitution. With six members designated by the National Assembly, at least three of whom must be members of opposition parties; and four permanent delegates designated by the National Council of Provinces.

<sup>18</sup> S 178(5) of the Constitution.

<sup>19</sup> S 177. See also the detailed procedures for dealing with complaints against judges, set out in sections 7-34 of the Judicial Service Commission Act 9 of 1994 (as amended) ("JSC Act").

<sup>20</sup> S 174(3) of the Constitution.

<sup>21</sup> S 174(4)(a).

<sup>22</sup> S 174(6).

<sup>23</sup> Olivier "Selection and Appointment" in C Hoexter & M Olivier *The Judiciary* 127-128.

recommendations.<sup>24</sup> A majority of its members must support all decisions by the JSC.<sup>25</sup>

The Constitution makes no provision for how candidates for judicial appointment are to find their way before the appointing authorities. The regulations governing the JSC's procedure<sup>26</sup> require that the JSC publicly announce judicial vacancies, and call for nominations.<sup>27</sup> The regulations further set out specific requirements for what a nomination must contain,<sup>28</sup> including the requirement that there be a letter of nomination specifically identifying the nominator, nominee, and for high court candidates, the division of the court to which a candidate is nominated.<sup>29</sup> The JSC's public announcement of judicial vacancies specifically 'invites nominations' to fill vacancies in specified courts, and, following the regulations, provides specifically for the material that must be included with a nomination.<sup>30</sup>

Accordingly, a candidate's chance of being appointed as a judge is conditional, at an early stage in the proceedings, on finding someone willing to nominate them. This point might seem banal, but two interviews during the JSC's April 2016 sitting illustrated how even such an apparently elementary requirement can get a candidate into difficulties. The first of these interviews was that of Nare Kgomo J, who was a candidate for the position of Deputy Judge President of the Limpopo High Court.<sup>31</sup> In the course of his interview, it emerged that administrative staff members at the Limpopo High Court had nominated Kgomo J.<sup>32</sup> A commissioner specifically commented that, had he not received the nominations of these individuals (who held subordinate positions to the judge); he would not have received a nomination.<sup>33</sup> The reaction of commissioners gave a strong sense of unease about the possibility for an abuse of power in such a situation. The second interview was that of attorney Magdalena De Klerk, a candidate for appointment to the Limpopo High Court.<sup>34</sup> During the course of the interview, it transpired that Ms de Klerk had applied for the position, rather than being nominated for it. This raised questions from commissioners as to whether her candidacy was properly before the JSC.<sup>35</sup> Ms de Klerk was ultimately not appointed. In light

<sup>24</sup> Reg 2(i) and (k) and 3(i) and (k) of the Judicial Service Commission Act 9 of 1994: Procedure of Commission GN R 423 in *GG* 7616 of 27-03-2003.

<sup>25</sup> S 178(6) of the Constitution.

<sup>26</sup> Judicial Service Commission Act 9 of 1994: Procedure of Commission GN R 423 in *GG* 7616 of 27-03-2003.

<sup>27</sup> Reg 2(b) deals with Constitutional Court judges and Reg 3(b) with High Court and Supreme Court of Appeal judges.

<sup>28</sup> Reg 2(c) and 3(c) respectively.

<sup>29</sup> Regs 2(c)(i) and 3(c)(i) respectively.

<sup>30</sup> For example, Judicial Service Commission "Media Announcement: Judicial Vacancies" undated, unpublished paper, released ahead of the JSC's April 2016 sitting (copy on file with authors).

<sup>31</sup> For a transcript of the interview, see "Interview of Judge NF Kgomo" (7-06-2016) *Judges Matter* <<http://www.judgesmatter.co.za/wp-content/uploads/2016/06/Limpopo-Deputy-Judge-President-Kgomo.pdf>> (accessed 15-11-2016).

<sup>32</sup> *Judges Matter* "Interview of Judge N F Kgomo" (07-06-2016) 7.

<sup>33</sup> *Judges Matter* "Interview of Judge N F Kgomo" (07-06-2016) 13.

<sup>34</sup> For a transcript of the interview, see "Interview of Ms De Klerk" (7-06-2016) *Judges Matter* <<http://www.judgesmatter.co.za/wp-content/uploads/2016/06/Limpopo-Division-of-the-High-Court-De-Klerk.pdf>> (accessed 15-11-2016).

<sup>35</sup> *Judges Matter* "Interview of Ms De Klerk" (07-06-2016) 3-4.

of the JSC's regulations of procedure making reference to nomination and not application, it was surprising that Ms de Klerk was even shortlisted.

These interviews highlight an important aspect of the nomination process: it provides the JSC with some early form of peer review and 'quality control' of candidates. However, it should be noted that in many cases, this will be limited by the extent of information available about why a candidate has been nominated. The fact that no person is prepared to sign off as a nominator would obviously speak against a candidate's suitability for appointment. Similarly, as highlighted by Kgomo J's interview, a nominator who does not have significant standing in the legal community, or over whom a candidate is seen to be in a position of influence, can hamper a candidate's prospects of appointment.

The operations of the two other African countries that conduct public interviews for judicial appointments are also interesting and worth noting briefly. The Kenyan appointment process is governed by section 166 of the Kenyan Constitution of 2010. Vacancies in the courts are posted in the government gazette, and on the Kenyan JSC's website, and a notice of the vacancy is sent to the Law Society of Kenya and any other lawyers' professional associations.<sup>36</sup> Unlike the South African process, the vacancies are also published in national newspapers. Had Ms de Klerk, referred to in the South African example above, been applying for a judicial vacancy in Kenya, there would have been no objection to her application. This is because the Kenyan system actually requires that candidates apply for vacancies, and the governing section states that "each applicant seeking consideration for nomination and recommendation" must apply in the prescribed manner.<sup>37</sup> The nomination referred to here is not as we know it in South Africa, but rather refers to being nominated by the JSC as a suitable candidate for recommendation to the President.<sup>38</sup>

Thus, involvement from the public at the application stage is limited, and only plays a role in the proceedings after candidates have been shortlisted. The public is then called upon to provide the JSC with any information of interest regarding the candidates.<sup>39</sup> Consequently, while organisations can encourage their members to apply, they cannot nominate them, as nominating candidates would be considered tantamount to interfering with the independence of the JSC.<sup>40</sup> The operations of the JSC have often come under the spotlight, and in 2016 alone, the JSC was the subject of litigation proceedings in three important matters. First, the Law Society of Kenya petitioned the High Court seeking a declaration of the unconstitutionality of a parliamentary amendment to the JSC recommendation process.<sup>41</sup> Then the Trusted Society of Human Rights Alliance and others sought an order declaring the JSC's short-listing process

<sup>36</sup> Sch 1 s 3 of the Judicial Service Act 1 of 2011 ("Judicial Service Act").

<sup>37</sup> S 4 (2) First Schedule of the Judicial Service Act.

<sup>38</sup> Ss 14-16.

<sup>39</sup> S 9.

<sup>40</sup> Response from Elsyé Sainna, Deputy Executive Director, ICJ Kenya in electronic communication on 17 November 2016.

<sup>41</sup> See *Law Society of Kenya v Attorney General* Petition No. 3 of 2016 eKLR.



for the positions of Chief Justice, Deputy Chief Justice and Supreme Court vacancies as unconstitutional.<sup>42</sup> Finally, the National Commission for Gender Equality petitioned the Court to have the appointment of a Supreme Court Justice set aside, on the basis that his appointment violated the right to gender equality enshrined in the Constitution.<sup>43</sup> This litigation bears testament not only to the importance of the appointment process in Kenya, but also to the role that CSOs are playing in ensuring that the process remains as untainted as possible.

In Zimbabwe, as in South Africa, organisations can nominate candidates for judicial positions. The fairly new appointment process, including public interviews, was ushered in by a new Constitution in 2013.<sup>44</sup> In contrast to the South African framework, there are no JSC regulations that govern the appointment procedure. Section 180 of the Zimbabwean Constitution alone governs the appointment of judges. It specifically requires that a position is advertised, and both the President and the public are invited to nominate candidates.<sup>45</sup> The advertisements are widely circulated by the JSC, and in addition to being posted on the JSC website,<sup>46</sup> the advertisements are placed in both public electronic and print media.<sup>47</sup> While the South African process requires a nomination letter, in Zimbabwe specific nomination forms are available at Provincial Magistrates' Court Centres and at the JSC offices in Harare.<sup>48</sup> It is interesting to note that the nomination form is very concise, and does not require a nominator to provide reasons as to why they are nominating a particular candidate. One could speculate that perhaps the JSC wanted to encourage more people to nominate potential judges, and requiring the nominator to substantiate their reason for nominating a candidate would be too tedious. But such an approach does limit the preliminary vetting function potentially provided by the South African nominations process.

Considering the novelty of the Zimbabwean process, problems regarding the nomination of candidates are yet to arise.<sup>49</sup> Zimbabwean Lawyers for Human Rights ("ZLHR"), who have been observing the JSC's interviews since their inception, note that because the process is still new, with only five rounds of public interviews having been held to date, few organisations have engaged with the process.<sup>50</sup> Nevertheless, it is worth reflecting on the difference between the Kenyan, Zimbabwean and South African systems,

<sup>42</sup> *Trusted Society of Human Rights Alliance v The Judicial Service Commission* Petition No. 314 of 2016 eKLR.

<sup>43</sup> *National Gender and Equality Commission v The Judicial Service Commission* Petition No. 446 of 2016.

<sup>44</sup> Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

<sup>45</sup> S 180(b).

<sup>46</sup> The JSC's website may be found at <<http://www.jsc.org.zw>>.

<sup>47</sup> For instance, see Veritas "Nominations Invited for Supreme & High Court Judicial Vacancies" (18-03-2014) *The Zimbabwean* <<http://www.thezimbabwean.co/2014/03/nominations-invited-for-supreme-high/>> (accessed 15-11-2016) and Veritas "Zimbabwe Court Watch 5-2014" (17-03-2014) *Veritas* <<http://www.veritaszim.net/node/871>> (accessed 15-11-2016).

<sup>48</sup> South African candidates are required to fill out a specific JSC form, but this is a separate requirement from the nominating letter.

<sup>49</sup> Though there is litigation underway regarding the selection process for the Chief Justice of Zimbabwe, see *Judicial Service Commission v Romeo Zibani* SC 41/17.

<sup>50</sup> Response from Agnes Muzondo, Senior Project Lawyer at Zimbabwe Lawyers for Human Rights (ZLHR) in electronic communication with Tabeth Masengu on 17 November 2016.



in the initial stages of the appointment process. Why does the former allow candidates to apply, while the latter two countries require that the public or president to nominate candidates?

A requirement for nomination is often indicative of the view that their peers should nominate candidates, because they are best suited to assess a potential candidate's ability. In truth, there are cases where self-assessment can be deceptive, because it allows one to minimise one's flaws and accentuate one's strengths – perhaps to a negative extent. For both South Africa and Zimbabwe, a clean break from the previous system of appointments influenced by patronage was desired. The requirement of nominations for positions is possibly an effort to engage the public and the legal profession more effectively, thereby also allowing for some sort of peer review. This would be particularly pertinent in the South African situation, where a nominator has to provide a motivation for why they think someone is a good candidate. The positive aspect of this is that it is assumed that those who are nominated at least possess some of the criteria for judicial office, and that others have noticed it. The negative aspect, however, is that it could lead people to join organisations for the wrong reason, because they know an endorsement in the future will be of benefit. Furthermore, a system of nomination could also create a form of gatekeeping, because the absence of a nomination means one cannot be considered for a position. Thus for a candidate like Kgomo J, mentioned above, who believed that he was ready to take up a judicial leadership position, the absence of a nomination from his peers, perhaps led to the acquiring of a nomination from administrative staff – an action which was frowned upon by the JSC. Conversely, the Kenyan model's approach seems to lean towards allowing candidates to self-assess. If they believe they are qualified, they are given an opportunity to put themselves forward and leave the determination of their suitability up to the JSC.

### **3 The impact of nominations in South Africa**

Under the South African system, it is easy to imagine that it would matter who nominates a candidate for judicial appointment. Beyond being merely a formal requirement, one would expect that the identity of the nominator would, at some level, have an impact on the appointing body. This can be either favourable, through providing affirming peer review endorsement, or unfavourable, as illustrated by the Kgomo J and Ms De Klerk examples. To test this assumption, we conducted a simple numerical analysis to determine who nominates candidates for judicial appointment, by examining the nomination forms of all candidates interviewed by the JSC between October 2010 and October 2016, subject to the exclusions previously discussed. We investigated whether there are any patterns in the relationship between the organisations and individuals who nominate candidates, and whether a candidate is ultimately appointed. We further broke down the demographic composition of candidates nominated by particular organisations, in order to assess whether and to what extent nominators are taking into account transformational imperatives in making their nominations. This analysis

is undertaken in the context of the stated goals of various organisations in relation to the transformation of the judiciary.

### 3 1 The role of the organised legal profession in the appointments process

The change in the appointments system from the pre-Constitutional to the Constitutional system has created a significant role for organisations which were previously excluded from the process. Organisations such as the National Association of Democratic Lawyers (“NADEL”) and the BLA are represented in the structures of the organised legal profession.<sup>51</sup> Indeed, the regulations governing the JSC’s procedures specifically identify NADEL and the BLA, as well as the General Council of the Bar and the Law Society of South Africa, as institutions which must be informed about judicial vacancies, and in the course of doing so the JSC must call for nominations.<sup>52</sup> These organisations are also among those to which the shortlist of candidates is specifically distributed for comment.<sup>53</sup> As was alluded to earlier, in addition to trying to ensure broader participation in the appointments process, the Constitution specifically enjoins the JSC and other decision makers to take into account the need for the judiciary to be broadly reflective of national demographics, when recommending appointments.<sup>54</sup> The goal of transforming the judiciary to better reflect South African society has been a central concern of the JSC since the commission was established. It is therefore important to explore how this issue is impacted by, and impacts on, the nomination process.

The mandates of several of the organisations identified at the beginning of this sub section would suggest that they should be at the forefront of nominating candidates in order to address the transformational imperatives identified by the Constitution. The BLA identifies the need for the judiciary to be independent, transparent, accountable, non-sexist and non-racial.<sup>55</sup> NADEL describes its primary goal as contributing to the development of “a legal and judicial system that realises access to justice for disadvantaged people and the rule of law”.<sup>56</sup> The SAC-IAWJ highlights the importance of the transformation of the judiciary, identifying as one of its main objectives:

“To eradicate the barriers which interfere with the full participation by women in the legal system in order to promote and support the advancement of women at all levels of the judiciary so that the judiciary reflects the demographics of the society it serves.”<sup>57</sup>

<sup>51</sup> The BLA and NADEL are constituent members of the Law Society of South Africa: see article 3.1 of the Constitution of the Law Society of South Africa. For the role of AFT in the structure of the General Council of the Bar, see articles 3(c), 3(e)(ii) and (f) of the Constitution of the General Council of the Bar of South Africa.

<sup>52</sup> Reg 3(b) of the Judicial Service Commission Act 9 of 1994: Procedure of Commission GN R 423 in GG 7616 of 27-03-2003 reg 3(b).

<sup>53</sup> Regs 2(g) and 3(g).

<sup>54</sup> S 174(2) of the Constitution.

<sup>55</sup> E-mail from Mr Lutendo Sigogo, President of the BLA (copy on file with authors).

<sup>56</sup> See KwaZulu-Natal Law Society “National Association of Democratic Lawyers Overview” KZNLS (undated) <<https://www.lawsoc.co.za/default.asp?sl=&id=1972>> (accessed 20-11-2016).

<sup>57</sup> S 1.4(vii) of the SAC-IAWJ Constitution.

The authors' observations of the JSC's public interview process suggest that questions raising the issue of which organisations nominate and support candidates, and how the organised legal profession in particular views a candidate's suitability for appointment, are becoming more frequent.

The input of the organised legal profession and related organisations can thus play a significant role when candidates are interviewed by the JSC. As well as nominating individual candidates, organisations regularly comment on the suitability of all shortlisted candidates for appointment. Both positive and adverse comments will regularly be put to candidates during the interviews. However, the impact of such input is a complex issue to interpret. While adverse comments from professional bodies can naturally be harmful to a candidate, there are instances of candidates being appointed despite serious criticism of their judicial attributes. For example, Mmonoa Teffo, previously an attorney, was appointed following the JSC's sitting in October 2011, notwithstanding comments from the Johannesburg Bar Council that she lacked experience and was unable to deliver judgments promptly.<sup>58</sup> The authors' perception of the mood among commissioners during the interview was that this criticism created sympathy for the candidate.

### 3.2 Numerical analysis

We analysed the nominations of candidates who were interviewed by the JSC between the commission's sitting in October 2010 and October 2016. This constitutes fourteen distinct sittings of the JSC. As explained above, we did not include candidates for vacancies on the Constitutional Court, or for leadership positions on the Supreme Court of Appeal. We included those candidates who had been nominated but then subsequently withdrew their candidacy. Since the hypothesis we are testing is whether the identity of a nominator is influential in the process of selection and appointment to the bench, a situation where a candidate has withdrawn before (or even during) their interview remains relevant to the analysis.

Across the surveyed period, a total of 379 candidates were nominated for 174 judicial vacancies.<sup>59</sup> The letters of nomination were analysed in order to determine whether signatories made the nominations in their individual capacity, or on behalf of organisations. It must immediately be noted that in several instances there are overlaps where candidates have been nominated by both organisations and individuals. Our research shows that 317 nominations were made by 222 individual nominators,<sup>60</sup> who were predominately judges, lawyers, or academics. It is apparent from these numbers that most individuals do not make many distinct nominations. Indeed, only five individuals have made five or more nominations.

<sup>58</sup> H McLea "Judge Patel gets the nod" (25-10-2011) *The Times* <<http://www.timeslive.co.za/politics/2011/10/25/judge-patel-gets-the-nod>> (accessed 21-11-2016).

<sup>59</sup> In the April 2014 sitting of the JSC, the Labour Appeal Court was listed as having eleven vacancies, but only seven candidates were shortlisted. We have therefore counted this data as seven vacancies, since the remainder were vacancies that could never have been filled.

<sup>60</sup> By "individual nominator", we mean a person, rather than an organisation or entity.

The most frequent individual nominators are as follows:

NOMINATOR	NUMBER OF NOMINATIONS MADE
Judge Achmat Jappie	7
Advocate GL Grobler SC	6
Advocate N Cassim SC	6
Advocate BR Tokota SC1	5
Advocate AA Gabriel	5

The leading individual nominator, Jappie J, is now the Judge President of the KwaZulu-Natal High Court, although none of these nominations were made after his elevation to judicial leadership. Advocates make up the largest constituency among the individuals who have nominated candidates, with 93 individual advocates each having nominated at least one candidate. A total of 145 nominations were made by these advocates. Further, 47 individual judges, including retired judges, nominated at least one candidate, with a total of 83 nominations made.

In total, 238 nominations were made by 51 organisations. Six of these organisations have made ten or more nominations. It is therefore apparent that it is far more common for organisations to be repeat nominators than is the case with individuals. The most frequent nominators among these organisations were as follows:

NOMINATOR	NUMBER OF NOMINATIONS MADE
BLA	65
NADEL	49
SAC – IAWJ	17
South African Women Lawyers' Association ("SAWLA")	11
Advocates for Transformation ("AFT")	10
Association of Regional Magistrates of South Africa ("ARMSA")	10

In addition to the large number of nominations by individual advocates, noted above, individual bar councils or other advocates' professional organisations made some nominations, as follows:

NOMINATOR	NUMBER OF NOMINATIONS MADE
Northern Cape Society of Advocates	4
Bhisho Society of Advocates / Bar Council	4
Johannesburg Society of Advocates	3 <sup>2</sup>
Port Elizabeth Society of Advocates	1
Mthatha Society of Advocates	1
Transkei Society of Advocates	1
Thohoyandou Society of Advocates	1
Free State Society of Advocates	1

Again, the diffuse nature of the nominations is striking, with only three bar organisations having nominated more than a single candidate. However, what

is perhaps most noteworthy is that the umbrella governance organisation of the advocates' profession, the General Council of the Bar, has not nominated any candidates. This may be explained, at least in part, by practical difficulties in coordinating such a process at a national level.

A similar pattern is discernible in the attorneys' profession. The Law Society of South Africa, the umbrella national body representing the attorneys' profession, made no nominations. Constituent law societies and associations of attorneys have made a small number of nominations, as follows:

NOMINATOR	NUMBER OF NOMINATIONS MADE
Butterworth Region Attorneys' Association	2
Cape Law Society	2
East London and Mdantsane Attorneys' Association	2
Transkei Attorneys' Association	2
Grahamstown Attorneys' Association	1

Many attorneys' firms have made nominations, although again the nominations are very diffuse. With the exception of Honey Attorneys, who have made two nominations, none of the other fourteen law firms to have made nominations have done so more than once.

In looking at nominations made by attorneys and advocates, it is necessary to remember that organisations like the BLA and NADEL, who feature prominently on the list of regular nominators, comprise both attorneys and advocates. Indeed, the BLA and NADEL are constituent members of the Law Society of South Africa.<sup>61</sup> But it is interesting to note that it is organisations like the BLA and NADEL that appear to be engaging far more extensively with the nomination of prospective judges than those organisations which might be considered the 'traditional' governance structures of the legal profession. This suggests the possibility that those organisations that are most involved in nominations are galvanised to do so by the need to transform the judiciary. We examine this question more fully in part 3 3 below.

Efforts to transform the demographic composition of the judiciary have forced a broadening of the pool from which judges were traditionally selected. Magistrates have increasingly begun to be tapped as potential judges. It is thus not surprising to see two magistrates' organisations featuring prominently among the list of nominating organisations. In addition to the Association of Regional Magistrates (ARMSA), listed on the above table as having nominated ten candidates, the Judicial Officers Association of South Africa ("JOASA") has nominated six.

What rate of success do the nominators have? It would be difficult for us to claim that there is a causal link between identifying the nominator, and whether or not a candidate is appointed. As the JSC deliberates in private, and as reasons for appointment are seldom made public, such a link would be difficult to establish definitively. Nevertheless, we are interested to see

<sup>61</sup> See the text to part 3 1 above.

whether the data might suggest that some nominators are more successful than others, and thus whether the source of nomination appears to make a difference to a candidate's chances of success.

Among individual nominators, the number of successful nominations are:

NOMINATOR	NUMBER OF NOMINATIONS	SUCCESSFUL NOMINATIONS
Judge Achmat Jappie	7	4
Advocate GL Grobler SC	6	2
Advocate N Cassim SC	6	2
Advocate BR Tokota SC	5	4
Advocate AA Gabriel	5	3

Whilst Jappie J, Advocate Gabriel and particularly Advocate Tokota have high ratios of nominated candidates being appointed, the relatively low number of nominations made (certainly compared to the number of nominations made by leading organisational nominators) makes us hesitant to draw too firm a conclusion about the impact of their nominations. Their relative success must also be balanced against the lower success rates of Advocates Grobler and Cassim.

To test the hypothesis further, we can compare the collective success rates of advocates and judges. One might expect that nominations by judges would carry particular weight. Judges are intimately familiar with the demands of the judicial office, and one would anticipate that this form of effective peer review would be given added weight by the JSC. Advocates, as regular users of the superior courts, might also be expected to have their nominations carry additional weight.

Do the numbers bear this expectation out? Of the 83 nominations made by judges, 36 (43%) have been successful. Even allowing for instances of duplication (where multiple judges nominated the same candidate), this is a significantly lower success rate than what we would have expected. It might be argued that this is a healthy sign that the JSC is not rubber-stamping nominations from existing or recently retired judges. If this were the case, it would become apparent that the constitutional appointments system fails to provide the diversity of input into the process of judicial appointment that it was intended to. This might raise concerns that the judiciary is in effect regulating its own membership. On the other hand, those concerned about the abilities of those appointed to the bench would likely argue that the views of judges, as evidenced by their nomination of candidates, ought to be given greater weight.

Among advocates, 61 of the 145 nominations made were successful (42%). As is the case with nominations by judges, this is a lower percentage than what might have been expected, and casts some doubt over whether, or at least to what extent, the hypothesis that it matters who nominates a prospective judge is correct.

Among the leading organisations to have made nominations, the number of successful nominations are:



NOMINATOR	NUMBER OF NOMINATIONS	SUCCESSFUL NOMINATIONS
BLA	65	23
NADEL	49	19
SAC – IAWJ	17	7
SAWLA	11	5
AFT	10	4
ARMSA	10	2

It is striking that not one of the organisations listed has a percentage of successful nominations that exceeds 45%, and that across the most frequent nominators overall, candidates' numerical chances of appointment (taking only the identity of the nominator into account) seldom exceed 50%. There does not, based on this data, seem to be any one single nominator that gives their chosen candidate a better chance of being appointed than any other. Advocates Tokota and Gabriel have more successful ratios, but it is notable that they each made only five nominations, compared to the notably larger number of nominations made by the leading organisations, in particular the BLA and NADEL. Indeed, whilst regular individual nominators have a somewhat higher percentage of successful nominations than the equivalent organisations, the leading individual nominators have nominated significantly fewer candidates than the equivalent leading organisations (compare for instance Jappie J's seven nominations to the BLA's 65). It is conceivable that a smaller ratio of successful nominations is the inevitable result of nominating a large number of candidates. Thus, the numerical analysis provides limited support for the assumption that the identity of a candidate's nominator is a strong predictor of their successful judicial appointment.

### 3 3 Analysis of substantive reasons given for nomination by the leading nominators, compared with transformative goals

In part 3 2, we noted that the leading nominating organisations are organisations established to address issues of transformation of the legal system. In order to examine whether their active role in nominating candidates for judicial appointment was indeed driven by transformative objectives, the five top nominating organisations were approached to provide feedback on the reasons for their nominations. They were also asked about the process for nominating candidates, their full membership component, and other relevant factors that could assist in our examination of the nominations we have highlighted.<sup>62</sup> A questionnaire was forwarded to the relevant organisations which included questions about whether their constitution addresses the issue of transformation explicitly; what the membership of the organisation is; where the membership is drawn from; and what the organisational process for nominating judicial candidates is. Further, the organisations were asked

<sup>62</sup> This communication was conducted by our research assistant Rudo Chitapi, and later by Tabeth Masengu, by means of electronic and telephone communications between September and November 2016.

about what qualities they look for when nominating candidates; who in the organisation is responsible for drafting the nominations; and whether they commented on other judicial candidates not drawn from their membership.<sup>63</sup>

To date, only the BLA and SAC-IAWJ have responded, hence this section will discuss those two organisations in detail. Brief mention will be made of the other organisations who did not respond, but the analysis of their nominations will be as theorised by the authors. It must be noted that our aim is not to reach any conclusions concerning whether the organisations have sufficiently considered the full spectrum of judicial attributes, such as a candidate's commitment to human rights or their competence as a judicial officer. We merely seek to examine whether there is *prima facie* evidence of the nominees matching the nominating requirements. Organisations were specifically selected for this section as opposed to individual nominators, because the former have a wider reach and often nominate a number of candidates in one sitting. Individual nominators often only nominate one candidate for a particular sitting of the JSC.

As previously noted, the BLA's Constitution specifically states that it supports a judiciary that is independent, transparent, accountable, non-sexist and non-racial.<sup>64</sup> On its website, the BLA explains that the "organisation's focus is that of empowering the black lawyer, however, the organisation is non-racial and membership is open to all those who believe in what it stands for".<sup>65</sup> The goal of empowering the black lawyer is evident from the numbers, with 63 of its 65 nominees being black.<sup>66</sup> Only two of the nominees were white.

In reply to the question of what qualities the BLA looks for in a judge, the response highlighted academic qualifications, experience in practice, experience as a presiding officer,<sup>67</sup> and a candidate's professional conduct record with regulatory bodies. A detailed study of the nomination letters written by the BLA revealed that some nominations had detailed motivations as regards the suitability of a nominee for appointment, while others had none.<sup>68</sup> Where motivation was provided, the BLA focused, in respect of leadership positions, on the nominees' potential to ensure smooth running of the court and enhanced administration of justice. In respect of high court positions, the BLA focused on the nominees' potential to contribute towards achieving access to justice for the poor and vulnerable.<sup>69</sup> In some

<sup>63</sup> Questionnaire designed by the authors.

<sup>64</sup> Response to DGRU questionnaire completed by the President of the BLA, Mr Lutendo Sigogo, 15-09-2015 (copy on file with authors).

<sup>65</sup> See The Black Lawyers Association "About Us" (undated) *BLA* <<http://www.blaonline.org.za/aboutus>> (accessed 13-11-2016).

<sup>66</sup> In South Africa, this refers to Africans, Indians and Coloureds who were all previously disadvantaged by Apartheid.

<sup>67</sup> This could be experience in the Small Claims Court, in the Commission for Conciliation, Mediation and Arbitration, in the Magistracy, and in acting judge positions.

<sup>68</sup> For instance, the nominations of Mokgere Masipa for the KwaZulu-Natal High Court, Phatudi J for the Deputy Judge President's position on the Limpopo High Court, Mr George Phatudi's nomination for the Limpopo High Court, and Legodi J for the Supreme Court of Appeal, all in the April 2016 sitting of the JSC, had no detailed motivation for nomination.

<sup>69</sup> All derived from an analysis of all the nomination letters in the authors' possession.

nominations, the BLA emphasised nominees' sensitivity to access to justice and human rights protection, to the promotion of social justice, and to the duty to uphold the Constitution. Commitment to social justice and a concern for the poor, though not mentioned in the response to the questionnaire, are clearly a concern for the BLA. Therefore, it seeks to nominate people who espouse commitment to these ideals. It would seem that the BLA recognises that it is not enough to change the face of the judiciary and the legal profession without changing the conditions in which the majority of South Africans live. Hence, the organisation empowers black lawyers so that they in turn can empower the communities they serve in, as this too is part of the transformative agenda.

To shed light on the question of how the nomination process in the organisation works, the response from BLA was as follows:

"Branches nominate and recommend to the national executive committee which assess the nominees' CVs. Branches are called to comment on nominations per province. The secretary and president talk to nominees on their candidature. Those who do not qualify are advised not to avail themselves."<sup>70</sup>

It is interesting that candidates who do not qualify based on the qualities the organisation is looking for, are told not to avail themselves for judicial vacancies. Thus, it can be presumed from our data that the 65 candidates who the BLA did nominate had to pass this first hurdle within their own organisation, before passing the second hurdle of the JSC sifting committee. The importance of the internal BLA phase must be understood in context. It sifts out members who the organisation believes do not make the grade, thereby saving the candidate time and effort. However, it also means that if a candidate insists on finding another nominator and successfully makes it through the JSC sifting process they may face hard questions about why their organisation (the BLA) has not nominated them. The application form specifically asks if one is a member of a professional organisation, so going it alone would often spell doom for the candidate's judicial aspirations. A redeeming quality may be that in exceptional circumstances, the BLA does nominate non-members, and sometimes even recommends them for appointment if they qualify.<sup>71</sup>

The SAC-IAWJ's response to our survey was the most detailed. The organisation provided us with a copy of their Constitution and a sample of a nomination letter.<sup>72</sup> The preamble specifically notes that women judicial officers are in a unique position to impact on the rights of the marginalised and underprivileged through the judicial system and to protect and empower women throughout the world.<sup>73</sup> In section 1.4, the organisation lists its objectives, one of which is:

"To assist women to participate meaningfully in the justice system in South Africa and to assist in the provision of public legal education and information programmes."<sup>74</sup>

<sup>70</sup> Email response to DGRU questionnaire (copy on file with authors).

<sup>71</sup> Email response to question whether the BLA provides the JSC with input on non-members (copy on file with authors).

<sup>72</sup> Documents emailed to Rudo Chitapi on 9 September 2015.

<sup>73</sup> Item (iii) of the Preamble of the SAC-IAWJ Constitution.

<sup>74</sup> S 1.4.

The organisation has a membership of 200, and while the majority are women, there are a few male judicial officers who subscribe to the objectives of the Chapter and who are members.<sup>75</sup> Of the seventeen nominees included in our study, fifteen were past or present members and two were non-members. Only one nominee in the particular interviews under discussion was male, though they have nominated others.<sup>76</sup>

The organisation does state that it would nominate a male candidate if he subscribes to the objectives of the Chapter. An example was the nomination of Mr T Maumela for the position of Judge of the Gauteng High Court at the JSC's October 2011 sitting.<sup>77</sup> The motivation to nominate Mr Maumela stemmed from his strong gender rights background and history of working with women's organisations, delivering papers on gender-based violence, and facilitating equality training.<sup>78</sup> However, the organisation is unapologetic about mostly nominating women.<sup>79</sup> Not only does this approach assist women to participate in the judiciary, which is one of the SAC-IAWJ's primary objectives, but it recognises that challenges existed and still do exist which place women on the back foot. Hence, the organisation takes the view that even if one could argue that its nominating procedure constitutes discrimination, it is fair discrimination.

Our analysis of the nomination letters reveals that the SAC-IAWJ has generally focused on nominees' contributions in terms of human rights work, involvement in the governance of the legal profession, and commitment to transformation on the bench and in the profession, particularly commitment to the advancement of women. Unlike other nominators, which state the achievements and successes of nominees generally, the SAC-IAWJ has paid particular attention to the nominees' track records in these identified areas. This approach in the SAC-IAWJ's nomination letters is consistent with the organisation's objectives and their constitutional values. It also underscores the belief that respect for human rights is a vital element of our new democracy, and that judges should clearly identify as those who have a history of advancing human rights on behalf of the vulnerable.

Finally, much like the BLA, when the SAC-IAWJ members desire nominations for judicial vacancies, they forward their details and CVs to the Executive. The SAC-IAWJ goes a step further than the BLA:

"In respect of senior positions where no member has requested a nomination the executive or at times senior members of the Chapter would advise on a particular candidate (female) to be considered and nominated, subject to their acceptance thereof. Time permitting, further inputs and comments are requested from members in the provinces, particularly those provinces where the candidate is situated. The relevant information would pertain to the candidate's experience (judgements, sitting in boards, areas of interest, etc.), their community involvement, particularly on issues of women and transformation, any adverse information that may affect their suitability for appointment, etc. The only communication with potential candidates pertains to the receipt of the above-mentioned

<sup>75</sup> In response to our questionnaire completed by the SAC-IAWJ secretary, Vuyo Noncembu.

<sup>76</sup> Lebotsang Bosielo J was nominated by the SAC-IAWJ for a vacancy on the Constitutional Court in 2016.

<sup>77</sup> The SAC-IAWJ has also previously supported the nominations of Mr Mziwonke David Hinxa, the Chief Magistrate in the Free State, and Mr David Makhoba, a Regional Magistrate in Pretoria.

<sup>78</sup> Details contained in nomination letter from the SAC-IAWJ.

<sup>79</sup> In conversation with an anonymous judge who was a past member of the Executive Committee.

information and the forwarding of the nomination letter. The executive makes the final decision on whether or not to nominate a candidate.”<sup>80</sup>

Our research has revealed that the SAC-IAWJ has not only recognised the paucity of women in leadership and apex court positions, but has taken practical steps to approach women candidates for nomination. For example, the organisation has previously approached former SAC-IAWJ presidents Mandisa Maya J and Connie Mocomie J to nominate them for positions on the Constitutional Court in June 2012 and the Supreme Court of Appeal in April 2016, respectively.<sup>81</sup> It has also nominated former member Leona Theron J for the Constitutional Court in July 2015 and April 2017, and current Deputy Judge President Patricia Goliath for the Western Cape Deputy Judge President’s position in April 2016.

In the absence of a completed questionnaire from NADEL, AFT or SAWLA, the authors have two brief comments. First, in the NADEL nomination letters, there is a focus on the nominees’ commitment to protecting the rights of the poor, vulnerable and oppressed. In some nominations however, NADEL has not provided any motivation at all for the appointment of their nominees, other than restating the nominees’ academic qualifications and their records of positions held in the past.<sup>82</sup> Second, unlike the SAC-IAWJ, SAWLA only nominates women.<sup>83</sup> SAWLA has also generally focused on the candidate’s human rights record, any involvement in the governance of the legal profession, and the presence of a demonstrated commitment to transformation on the bench and in the profession. It goes without saying that a candidate’s contribution to the advancement of women has been a critical focus when nominating candidates. In regards to AFT, there is currently insufficient information available for a detailed analysis of their nominations.

#### 4 The gendered dimension of nominations and appointments

It has been observed that gender equity on the bench remains a considerable challenge. This is the result of a number of factors, including, but not limited to, challenges women face in the legal profession, patriarchy, discrimination, and the attitude of the JSC towards women.<sup>84</sup> Whilst the SAC-IAWJ has made efforts to ensure women participate meaningfully in the judiciary, some obstacles still exist for women with judicial aspirations. As mentioned earlier, the nomination process allows for different stakeholders to participate in the important procedure of judicial selection and affirm the expertise and competencies of their peers. This approach is not objectionable, but in this section, we seek to highlight how the process can also prove to be disadvantageous to women.

<sup>80</sup> Response to DGRU questionnaire (copy on file with authors).

<sup>81</sup> Mocomie J was also nominated for the position of Free State Judge President in April and October 2014.

<sup>82</sup> An example is the nomination of Mr Francis Kganyago for appointment to the Limpopo High Court in the April 2016 interviews.

<sup>83</sup> Based on the data obtained for this survey.

<sup>84</sup> See R Cowan “Women’s Representation on the Courts in the Republic of South Africa” (2006) 6 *U Md LJ Race Relig Gender & Class* 291; P Andrews “Commentary: The South African Judicial Appointment Process” (2006) 44 *Osgoode Hall Law Journal* 565.

Despite the inclusion of women in the legal profession in general, negative perceptions of women's capabilities and competence still exist. Research has shown that perceptions of women's capabilities not only prevent them from obtaining higher positions in the advocates profession, the attorneys profession and in the magistracy, but they also prevent them from acquiring good work experience.<sup>85</sup> Mostly women of colour, with African women being the least acknowledged, face the perceptions of competency, or the lack thereof.<sup>86</sup> For attorneys and advocates, the absence of experience in specialised areas of law and/or matters of significant weight, leaves a number of women seemingly not 'ready' for judicial appointment.<sup>87</sup> Similarly, a lack of exposure to complex commercial adjudication for many magistrates will be a hindrance to many women aspiring to higher judicial office. Thus, if you are a woman member of the BLA, for example, you will not get the nod from the organisation if you do not have the required experience that it believes is important for a judge to have (this is evidenced by the BLA's procedure described above). So here, the power of a nomination, or the lack thereof, becomes crucial, as it determines whether an aspirant judge will get 'one foot in the door'.

A second point to note regarding the gender dynamics of work experience, is that it would be plausible to assume that there would be less women available to nominate than there are men. Yet, if the SAC-IAWJ and SAWLA are excluded, of the other leading nominators, two others nominated more women than men. AFT and ARMSA both nominated seven women out of their ten candidates. Yet only 23% of the BLA nominees were women (15 out of 65), and only 29% of NADEL's nominees were women (14 out of 49). One third of JOASA's nominees were women (2 out of 6). If AFT and ARMSA were able to nominate more women than men, this is a clear indication that there are qualified women available. However, the BLA, NADEL and JOASA could argue that despite the availability of qualified women, they are not represented enough in their membership: thus, they work with the candidates available.<sup>88</sup> In the absence of gender disaggregated membership data from the four organisations, it would be difficult to assess whether this is true or whether these three organisations are failing their women members by mostly nominating men.<sup>89</sup>

A third issue of great significance is acting judicial appointments. Acting appointments are used when there is a vacancy in a court that is yet to be filled by the appointment of a permanent judge, or when a judge has gone on long leave. Section 175 (2) of the Constitution empowers the Minister of Justice and Constitutional Development to appoint acting judges after consulting

<sup>85</sup> See generally Masengu (2016) *International Journal of the Legal Profession* 305-319.

<sup>86</sup> See 305-319; E Bonthuys "Gender and Race in South African Judicial Appointments" (2015) 23 *Feminist Legal Studies* 127-148.

<sup>87</sup> Such as constitutional law cases, marine law and mining law.

<sup>88</sup> It has been said in JSC interviews that women are not always willing to be nominated and shy away from the process. However, men always make this comment.

<sup>89</sup> The Commission for Gender Equality in its draft investigative report on "The Slow Pace of Gender Transformation in the Judiciary" has also noted the lack of disaggregated data from legal professional organisations. Draft Report issued in September 2015 (copy on file with authors).



the senior judge of the court. Previously, the 1998 Mahomed guidelines<sup>90</sup> required candidates for judicial appointment to have, among other qualities, appropriate potential, so that intensive training could compensate for any lack of technical experience.<sup>91</sup> In 2010, the JSC issued further criteria which retained experience and appropriate potential as requisite qualities.<sup>92</sup> However, potential alone is not enough. Acting experience has become a *de facto* requirement for permanent judicial appointment at the high court level. The JSC's questionnaire for nominated candidates specifically asks candidates whether they have any acting experience, and requires them to state the period of time that they acted in a particular court.<sup>93</sup>

Advocate Milton Seligson SC, a former member of the JSC who sat on the JSC's sifting committee, has stated that in shortlisting candidates for appointment:

"[An] important requirement developed by the Commission is that an applicant must have acted as a judge in that court, and delivered a satisfactory level of performance, measured both qualitatively with reference to judgments delivered, and the comments of the permanent judges who have worked with the candidate, and in terms of the level of diligence displayed in producing judgments, and not having delayed unduly in handing down reserved judgments."<sup>94</sup>

We do not dispute that acting experience gives one exposure to the quantity and quality of work one would undertake as a judge, and allows one to make an informed decision about whether the judicial career is worth pursuing. The challenge with acting appointments is the manner in which they are made. The process is opaque, with no existing uniform guidelines on how each court should go about selecting acting judges.<sup>95</sup> We collated statistics of acting judicial appointments in the period 2008-2012 and 2014 in eighteen different types and divisions of courts.<sup>96</sup> Only the Northern Cape High Court in Kimberley had a majority (64%) of women as acting judges. In all the others, less than 50% of the acting positions were held by women, including the Constitutional Court (20%) and Supreme Court of Appeal (25%), and most of the courts fell below 20%.<sup>97</sup> In light of these figures, it is obvious that

<sup>90</sup> Drafted in 1998 under the leadership of Ismail Mahomed CJ (as he then was), these guidelines were an attempt by the JSC to supplement the criteria used in making judicial appointments (beyond those expressly listed in the Constitution). See Judicial Service Commission "Report on Activities of the Judicial Service Commission for the year ended 30 June 1999" (undated) *Department of Justice and Constitutional Development* <[www.justice.gov.za/reportfiles/1999reports/1999\\_judicial%20service%20comm.htm](http://www.justice.gov.za/reportfiles/1999reports/1999_judicial%20service%20comm.htm)> (accessed 22-11-2016).

<sup>91</sup> Mahomed Guidelines, see Judicial Service Commission "Report on Activities" (undated) *Department of Justice and Constitutional Development*.

<sup>92</sup> For an analysis of these criteria, see C Albertyn "Judicial Diversity" in C Hoexter & M Olivier (eds) *The Judiciary in South Africa* (2014) 245-87 281. For the 2010 criteria, see Judicial Service Commission "Summary of the criteria used by the Judicial Service Commission when considering candidates for judicial appointments" (2010) *Constitutional Court* <<http://www.constitutionalcourt.org.za/site/Admin/Criteria-for-Judicial-appointment.pdf>> (accessed 01-05-2017).

<sup>93</sup> Judicial Service Commission "Questionnaire for Candidates for Judicial Appointment" section 2 question 9 (undated) *Constitutional Court* <<http://www.constitutionalcourt.org.za/site/Admin/QUESTIONNAIRE-FOR-JUDICIAL-APPOINTMENT-OCTOBER-2010.pdf>> (accessed 01-05-2017).

<sup>94</sup> Unpublished paper by Milton Seligson SC, 02-11-2009 (copy on file with authors).

<sup>95</sup> For more detail on this see T Masengu & A Tilley "Is the Appointment of Acting Judges Transparent?" (2015) 553 *De Rebus Lawyers Journal* 24-26.

<sup>96</sup> This includes the Constitutional Court, Supreme Court of Appeal, and large High Courts such as the Gauteng- and Western Cape division.

<sup>97</sup> Statistics collated from information granted by the Department of Justice and Constitutional Development.

women are less likely to be appointed as permanent judges, because they do not have acting experience, and are thus less likely to be nominated for judicial positions.<sup>98</sup> Therefore, women are again handicapped even before they can be considered for nomination.

Finally, though the numbers may not provide definitive evidence for the importance of the identity of a candidate's nominator, there is nevertheless a sense in which the nominator's identity does matter. While we make no inference as to a causal link between the nominators and the success of the nominees, we do know that particular nominators make a good impression on the JSC. For instance, we have noticed that many JSC commissioners are impressed when a candidate is nominated by a retired Constitutional Court justice, or well-respected advocate.<sup>99</sup> Reach and influence will play a role in how a candidate is assessed, and given the current circumstances in the legal profession, women will frequently have less reach and influence than male candidates. There is evidence of this in our data, as we found that individual nominators nominated 240 men, but only 79 women, while the nominations by organisations did not have such a stark difference.<sup>100</sup>

Women are more likely to be nominated by professional organisations than they are by individuals, but what happens if you are not part of an organisation? The absence of membership of a professional organisation can also be an Achilles heel, as experienced by Advocate Diane Davis, who was questioned by more than one commissioner over her lack of involvement in any of the organisations we have mentioned in this article.<sup>101</sup> She was unsuccessful in two attempts to be appointed to the Western Cape High Court. While her lack of professional membership may have played no role at all in her case, it was clear in the interviews that she was frowned upon for being what one commissioner described as a "lone island".<sup>102</sup> Having observed subsequent interviews, the authors have realised that membership of any of the listed organisations is considered to be a means to prove that one is not only alive to the various challenges in South Africa, but that one seeks to identify with similar like-minded people and contribute to the broader transformative agenda.

## 5 Conclusion

The data obtained does not suggest that the identity of the nominator makes a significant difference to a candidate's prospects of success. None of the organisations or individuals who regularly nominate candidates for appointment have a success rate of much more than 50%. This is, we would suggest, a generally positive sign for the judicial appointments process. It

<sup>98</sup> The exceptions to the "acting requirement" have been one appointment made to the Supreme Court of Appeal and three to the Constitutional Court.

<sup>99</sup> Noticed in Dhaya Pillay J's interview for the Constitutional Court, when she was nominated by retired justice Zac Yacoob, and in the interviews of those nominated by Advocate Tokota.

<sup>100</sup> 130 men and 108 women were nominated by organisations, respectively.

<sup>101</sup> Interview for a position on the Western Cape High Court in October 2013, held in Cape Town (no interview transcript available; *Judges Matter* only begun producing transcripts from 2015 onwards).

<sup>102</sup> JSC interview of Diane Davis, 8 October 2013, held in Cape Town (no interview transcript available).

suggests that the JSC does not abrogate its role in selection by effectively delegating decision-making to nominating organisations. This is probably a healthy situation. The JSC should avoid creating a situation in which membership of certain organisations, or favour with senior membership, is sought out solely for the purpose of career advancement. Some higher ratios of successful nominations were observed among individual nominators. However, as this result was drawn from a much smaller number of nominations compared to the leading organisations, it is difficult to draw too many conclusions from this. It was noted that as an aggregated group, both judges and advocates had a lower ratio of successful nominations than might have been expected. Whilst this may be seen as a healthy sign for the appointments process, for the reasons already described, it may also raise concerns that those who are at least theoretically best placed to gauge a candidate's suitability for appointment to the bench, are not being heard as they should.

The data and other aspects of this research do indicate, however, that the organised legal profession plays an important role in the appointments process. The BLA and NADEL, as leading organisations for previously disadvantaged lawyers, are playing their part in nominating candidates so as to level the playing field for candidates of colour. The data also shows that SAWLA, and particularly the SAC-IAWJ, take their role in transforming the judiciary seriously despite, or perhaps because of, the challenges faced by their members. The factors taken into account by these organisations in deciding to nominate candidates show that, while demographic transformation will always be important, there is recognition of a need to look at broader attributes, including leadership skills, and a commitment to human rights and social justice. In the past two years, we have been encouraged by the appointment of four women to leadership positions, including the appointment of South Africa's first ever woman President of the Supreme Court of Appeal, Mandisa Maya J. We also acknowledge the increased number of women being appointed to the high court bench. However, there continues to be gender disparity in who gets nominated and who eventually becomes a permanent judge in South Africa.

## SUMMARY

The South African system of judicial appointments includes an important, but easily overlooked, feature whereby prospective judges must be nominated for appointment. This article examines the nomination procedure, to assess the impact of nominations on the appointment process.

The article deals with three central issues: whether the identity of the nominator impacts on a candidate's chances of appointment; the attention given by nominating organisations to the need for demographic transformation of the judiciary when making nominations and what other factors influence a decision to nominate; and the gendered nature of nominations and judicial appointment in general.

It is argued that in terms of numbers, the identity of a nominator does not appear to make a significant difference to a candidate's prospects of appointment. Contrary to what might have been expected, the "success rates" of judges and advocates who nominate candidates is collectively relatively low. However, it is argued that the identity of a nominator is nevertheless important in other respects, such as the perceived prestige of the nominator. Furthermore, candidates who are not involved in significant legal professional organisations may be disadvantaged.

The article further surveys the reasons for nominations given by leading nominators, as well as the process followed in making nominations, and assess these in light of transformative goals. The

organisations surveyed appear closely attuned to these goals. The article concludes with a discussion of the challenges facing the quest for gender equality in the judiciary, such as perceptions of lack of competence and a lack of quality work that often bedevil women lawyers, which impact on the likelihood of female candidates being nominated for judicial appointment. The importance of acting as a judge, and the relative lack of opportunities provided for women to do so, is also discussed. A failure by some leading organisations to nominate female candidates regularly is also noted.