

# A perspective on women and leadership in the South African judiciary

2015 SAJHR 655

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## I Introduction

On 11 December 2014, President Jacob Zuma appointed Mahube Molemela J as the judge president of the Free State division of the High Court. This was a momentous occasion, as she is the second female judge president in the country.<sup>1</sup> During the interviews for the position, National Council of Provinces (NCoP) chairperson, Thandie Modise, took exception to a statement by Mojalefa Rampai J, who said there were not enough seasoned and chiselled women to take up that leadership position.<sup>2</sup> Modise expressed concern at the reference to the lack of chiselled and seasoned women, averring that it reminded her of the 1970s when the apartheid era viewed blacks as lacking in training and not being good enough. She declared that if there was no deliberate action from the Judicial Service Commission (JSC), it would take another ten years to find these 'chiselled women'. Modise was strongly refuting the assumption that there are no competent women who are available to take up leadership positions in the judiciary. A common perception is that there have not been enough women putting themselves forward for judicial vacancies and that this in turn, has resulted in a lack of capable women who are ready to lead. This note seeks to dispel this notion by arguing the lack of women in leadership is as a result of the attitudes of the JSC and not because women are absent from the list of leadership aspirants.

The role of the JSC<sup>3</sup> in transforming the judiciary as espoused in s 174(2) of the Constitution of the Republic of South Africa, 1996 cannot be underestimated.<sup>4</sup> Transformation in and of itself has various interpretations. Cathi Albertyn and Beth Goldblatt define it as a complete reconstruction of the state and society, including a redistribution of power and resources along

2015 SAJHR 656

egalitarian lines.<sup>5</sup> In the judicial context, amongst others, transformation requires changes in the way judges are appointed, a change in the demographic of judges and a change in underlying attitudes of the judiciary, to see them embracing the principles of a fundamentally new legal order.<sup>6</sup> I would add two additional aspects required of judicial transformation. First, that judges have a conscious awareness of the constitutional values of equality, dignity and non-discrimination, and that they model the transformative nature of our Constitution. An incorrectly interpreted Constitution that does not promote human dignity, equality, social justice and fundamental human rights, is of no use to its citizens. Second, that judges as individuals are independent-minded, steadfast in their protection of the Constitution, without being swayed by outside interference or their own personal prejudices. Transformation therefore becomes less about mere representation and more about ensuring the pool from which to acquire candidates with the earlier mentioned attributes is widened.

While this note focuses on women and leadership, it is worth stating there has been a genuine drive to improve the racial demographics on the superior courts.<sup>7</sup> In 1994, only 1.8 per cent of the judges were black<sup>8</sup> and now, 64 per cent are black. The first black chief justice, Ismail Mohammed, was only appointed in 1998, the same year as the first black judge president.<sup>9</sup> There has never been any doubt about the need to have a more racially transformed bench since the advent of democracy, yet a more equitable gender representation has not elicited the same passion. The female representation on the bench has increased from one in 1994 to 81<sup>10</sup> at present and a third of the black judges currently are women.<sup>11</sup> However, it is my view that the JSC process has fallen short of the goals of gender diversity. The obvious reason for the paucity of women would be that there are not enough qualified women, which in truth, is part of the legacy of apartheid. Penelope Andrews<sup>12</sup> explains that the systemic disadvantage that apartheid imposed on black women deprived them of access to resources and education, which meant black women were late entrants into the judicial sphere. Closely related to this, is the fact that the legal profession is dominated by white males and therefore is not amenable to attracting a huge number of women.<sup>13</sup> This invariably means there are fewer women than men in the potential pool for judicial appointments, so racial diversity will happen faster than gender diversity.

2015 SAJHR 657

An unapparent reason for the paucity I would add, is that race is sometimes pitted against gender. A memorable example of this arose during the JSC interviews in October 2012 when the chief justice questioned why there was such intense publicity on gender transformation when racial transformation was still an issue.<sup>14</sup> This question, though startling for some in attendance, was merely a reminder of how intersectionality is ignored. The intersectionality of race and gender and the effects it has on women is rarely a topic highlighted in debates on judicial appointments and in the legal profession as a whole. Women of all races, particularly black women continue to encounter discrimination in their professional and private lives. Thus, if black people are still lagging behind in respect of professional ascension in government and the private sector, it is worse for black women who continue to be marginalised on the basis of race and gender.<sup>15</sup> Very few critics have engaged in the deeper substantive issues that are at stake, especially for previously disadvantaged women.<sup>16</sup> There is an absence of discussion about the effects of the intersectionality of discrimination. This, coupled with societal attitudes that are deeply patriarchal, results in what is sometimes a half-hearted attempt to transform the judiciary. The JSC spokesperson, Advocate Dumisa Ntsebeza SC, though has defended the efforts of the JSC in this regard by stating:

No judicial system that holds sacrosanct values of equality between the sexes is going to remain white and black male without having white and black women sufficiently swelling the ranks of the judiciary.<sup>17</sup>

He submits that, even though the JSC can never claim to get it right all the time,<sup>18</sup> they should be left alone to do the job at hand.<sup>19</sup> I reject the notion that the JSC should never be questioned on how and who they appoint, but critics of the JSC have wrongly focused on describing the transformation agenda as one that pits merit against race and gender objectives.<sup>20</sup> On numerous occasions, the JSC has stated there is a lack of suitably qualified female candidates being nominated and role players have been urged to nominate suitably qualified

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2015 SAJHR 658

candidates.<sup>21</sup> Yet despite the JSC's efforts to work with what is presented to them,<sup>22</sup> the leadership landscape in the superior courts still leaves much to be desired. For the purposes of this argument, the definition of leadership or a leader in the judiciary primarily relates to ascension. While I recognise that one can be a leader without ascending in rank, the numerous opportunities provided to judicial leaders to determine the future of the courts, drive a transformative vision and implement changes, can only result from ascension in position. The absence of women in leadership is not an uncommon phenomenon, as there are few women leaders in other areas of governance and in the private sector.<sup>23</sup> Nevertheless, in the judiciary this absence prompts an enquiry into whether the existing vacuum has been created because there are no women candidates coming forward for the positions or because women candidates find themselves facing a discriminatory system. Retired judge, Louis Harms,<sup>24</sup> stated that the requirements for racial and gender composition have led to the unfortunate and often unfair division of judicial appointees between 'transformation judges' and 'others'.<sup>25</sup> Unfortunately, he is not alone in his thinking and while this view is problematic for various reasons,<sup>26</sup> what is often ignored is that women are judged on different standards.<sup>27</sup>

## II The JSC's assessment of potential leaders

In September 2010, the JSC published the criteria used when considering candidates for judicial appointments.<sup>28</sup> This was a helpful and long-awaited initiative that fostered a better understanding of the interview process, particularly, as the last guidelines had been issued in 1998 under the late chief justice, Ismail Mahomed. To date, no criteria regarding leadership positions have been published and hence, there are divergent views on what qualities are required to be a successful judicial leader. I sought guidance from people in leadership positions in the legal community, including the judiciary, academia

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2015 SAJHR 659

and judicial officers' organisations, to help inform this discussion and to provide an inside perspective of what is required of those who want to lead.<sup>29</sup>

One of the questions posed to the judges interviewed concerned the nature of experience required to be a judge president (JP) or deputy judge president (DJP), as it is currently a particularly contentious issue.<sup>30</sup> John Hlophe, JP of the Western Cape division states that a fair amount of experience is required to be a suitable JP in the High Court. This includes relevant experience on the bench and in other judicial professions such as advocates and attorneys where one would have made a mark.<sup>31</sup> Vivienne Lawack believes a good leader must know how to garner people around a common vision and must be able to transform both the leader and the

led for the good of a bigger purpose while being a good proponent of transformative leadership. <sup>32</sup> Jeanette Traverso DJP also of the Western Cape opines that a judge in leadership must, in addition to other attributes, be able to mentor junior judges and acting judges; and while age may matter, experience and maturity are crucial factors. <sup>33</sup> For Nazeem Joemath, it is the ability to listen to colleagues, not being autocratic, leading by example and in most cases having the faith of one's juniors, that makes one a good leader. <sup>34</sup>

There are currently 21 judges occupying leadership positions in 15 divisions of the courts around the country. <sup>35</sup> Currently of the 21, there are four women, Mahube Molemela JP of the Free State, Monica Leeuw JP of the North West, Mandisa Maya Deputy of the Supreme Court of Appeal and Jeanette Traverso DJP of the Western Cape High Court. In the period 2010 to 2014, of the 161 judges who have been appointed, 46 have been women. In the same period, the JSC interviewed for 15 leadership positions with nine of the interviewed being women. Only two were appointed. The statistics of shortlisted candidates refute allegations that there are not enough women putting themselves forward for vacancies. They also present a curious situation. Judges nominated for leadership positions are automatically shortlisted because they have already

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2015 SAJHR 660

proved they meet the competency requirements for the bench. Hence, if already competent enough to be a judge, how do the JSC interviews sift the leaders from the non-leaders? What is the JSC looking for when it picks one candidate over another?

An inspection of the questions asked in interviews for leadership positions in the 2010 to 2014 period may shed some light. <sup>36</sup> The top five questions asked in the named period relate to a candidate's experience, relationship with colleagues, challenges facing the particular court in question, the lack of women in the judiciary, and backlogs of cases. <sup>37</sup>

In respect to *experience*, questions have ranged from what type of experience the applicant has that would make them a good candidate, to how the said experience would be useful in their division. <sup>38</sup>

A candidate's *relationship with colleagues* on the bench has proved to sometimes be a sensitive but crucial matter. In some circumstances, the question involving colleagues has been put very bluntly to a candidate, as was the case with Madondo J in his second interview for the DJP of KwaZulu-Natal held in October 2012. <sup>39</sup> The JSC enquired of Madondo J whether he had the respect and confidence of colleagues, because most colleagues seemed to support Achmat Jappie J, the other candidate being interviewed for the position.

A third important consideration has been whether the candidate is aware of the specific *challenges facing their courts*. The JSC seeks to assess how they would handle the particular challenges faced in their division and how they plan to address them. At the core of these questions is whether the candidate has a vision for the court and whether it is feasible.

The *lack of women in the judiciary* is a fourth item, though this area has only received the much-needed concern in the latter part of the 2010 to 2014 period. Previously, it had been enough to question candidates about the role of the judiciary in transformation and what challenges were facing women judges. In the past two years, questions have placed greater emphasis on suggestions from candidates; on how to improve the pool of women, whether female judges should be preferred over male judges in the interests of transformation and what role they had played in advancing the development of previously disadvantaged persons, including women.

Lastly, all candidates have been interrogated on the issue of *backlog* of cases and reserved judgments. Of particular interest has been whether the judge in question has outstanding judgments, what they felt the challenges were regarding reserved judgments, and how they perceive the case-flow management system to be working.

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2015 SAJHR 661

### III What lies beneath the interview process

#### (a) Using acting appointments as a means of disqualification

One can surmise from the above that the JSC is looking for candidates who have a proven track record, both in the legal community and on the bench. They desire somebody who has a vision not only for court administration but also one that tackles challenges, such as the scarcity of women on the bench, in innovative and effective ways. A prospective leader must not only have the admiration of his/her colleagues but must also be respectful towards all and create an environment of collegiality. This is how they sift leaders from non-leaders and yet these

attributes, while not common to everyone, are not uncommon to women. Men do not have innate abilities that make them more suited to the task than women. Critics would argue that because women are still the primary caregivers in most instances, they would be unable to cope with the responsibilities of the court.<sup>40</sup> Yet, Traverso DJP believes this is no longer the case, because judges with small children do not apply for leadership positions. Most make themselves available when their children are grown up.<sup>41</sup> Hlophe JP echoes this sentiment about children and referred to Traverso DJP as an example of a very competent woman who has run the court successfully. Hence he sees no reason why women would not be able to carry the mantle of leadership successfully.<sup>42</sup>

Acting experience or the lack thereof has been used as a means to disqualify women from leadership positions until the appointment of Molemela J. Women are lagging behind in respect of acting opportunities<sup>43</sup> with leadership being particularly worse.<sup>44</sup> In her interview for the Free State JP position in the October 2014 interview session Mocumie J, enquired from the JSC why she needed to have acted as a JP to be appointed, when the chief justice himself had not been required to have acting experience when he was appointed as a JP.<sup>45</sup> This question was prompted by a continued insinuation from some of the commissioners that with no acting experience, a candidate would probably not be able to handle the responsibilities of leadership. Even so, JPs and their deputies have been previously appointed from men who have not had acting experience in those positions.<sup>46</sup> This dichotomy has created the impression

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#### 2015 SAJHR 662

that different rules have been applied when women are being considered for leadership, with the unspoken thought being that women need the 'training' while men do not.

If one surveys the acting opportunities that have arisen in the past five years, only Mlambo JP in Gauteng has given women a chance to act in leadership when a position became available.<sup>47</sup> All the acting leadership positions that arose in instances when a position was available went to men,<sup>48</sup> including the position of the deputy president of the SCA when it was vacant between October 2014 and September 2015.<sup>49</sup> A difficulty for women is that the judiciary has long existing practices, and seeking an acting appointment at one's own initiative is not one of them. It is not customary for judges to request to act in a leadership position, which invariably results in a requirement which is discriminatory towards women. A good illustration of the practical implication of this is the circumstance of former judge Anna-Marie de Vos who interviewed for the position of DJP of North Gauteng in 2005. Then-JP Bernard Ngoepe, had promised both her and her male colleague Jeremiah Shongwe J,<sup>50</sup> an equal opportunity to act as DJP before the JSC interviews. De Vos J's colleague got his turn to act and she did not, placing her at a blatant disadvantage and resulting in his eventual appointment.<sup>51</sup> She could not request that Ngoepe fulfil his promise because a judge has to wait to be picked by the JP of their division or another to act, and research has shown that this is increasingly not happening. Yet the JSC still values acting experience.<sup>52</sup>

Requiring women, albeit informally, to have had acting experience for leadership positions is not only unfair on women, but also appears to be a deliberate obstacle to their ascension.<sup>53</sup> Molemela (now JP) candidly expressed the predicament that women find themselves in by making pertinent statements before the JSC commissioners in her October 2014 interview. She compared the way that racial and gender transformation has been dealt with in regard to the issue of acting experience. She stated that when racial transformation happened in the Free State division, the JSC overlooked seniority and lack of acting experience in order to appoint a black candidate.<sup>54</sup> In essence,

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#### 2015 SAJHR 663

Molemela JP was asking the JSC why they seemed reluctant to overlook the preference for acting experience in order to advance gender transformation in leadership positions as they had done previously in a bid to promote racial transformation.<sup>55</sup> Molemela JP in her statement highlighted the problem that this note addresses. The problem is not the absence of women putting themselves forward. It is in fact the attitude of the JSC commissioners that determines whether women are appointed to leadership positions or not. Therefore, acting experience has long been a hurdle for women.<sup>56</sup> I am of the opinion that the nature of the experience required in leadership is multifaceted and cannot be derived from acting experience alone.<sup>57</sup> It is derived from exposure to several aspects of one's life which breed hard work, diligence, a vision for one's court, a harmonious approach to problems, organisational skills, and a desire to lead by example. Whether we admit it or not, judges are a product of their experiences,<sup>58</sup> and men and women foster particular attributes that would make them good leaders. These attributes are not innate in a specific sex and hence the appointment of Molemela JP with no acting experience is encouraging, but regrettably it has been the exception to the rule. One has to wait and see if this

pattern continues. <sup>59</sup>

Lord Neuberger MR with reference to the judicial system in the United Kingdom makes the following argument:

if ... women are not less good judges than men, why are 80% or 90% of judges male? It suggests, purely on a statistical basis, that we do not have the best people because there must be some women out there who are better than the less good men who are judges.

This theory begs the question of whether in passing on women in the past few years, the JSC has appointed the best people for the job? If the best people are viewed to be primarily men, who mostly have acting experience, then the definition of the 'best' people in itself is discriminatory and problematic. Surely there must be some women who have not been considered who are better than the 'good' men who are in leadership?

## **(b) Two additional issues for consideration**

First, when acting experience is not the differentiator between male and female candidates, others have been found. Fikile Mokgohloa J was interviewed for the position of the KwaZulu-Natal DJP in 2012. <sup>60</sup> Her obstacle was of a

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**2015 SAJHR 664**

different nature, but with familiar discriminatory undertones. Mokgohloa J's nomination had overwhelming support from a number of her colleagues, which would ordinarily be considered as a positive indication by the JSC. Instead, some commissioners were of the view that this majority support in comparison to Mjabuliseni Madondo J, was evidence of a divided bench, and this was not a good omen. While Madondo J had a gruelling interview that included questions about his attitude to his work ethics, Mokgohloa J was clearly highly regarded by Chimani Patel JP <sup>61</sup> who spoke candidly about how impressed he was with her work ethic. Despite an overall recognition that Mokgohloa J was an accomplished and capable candidate, the position was left vacant. This is in stark contrast to the example I provided earlier of Jappie J and Madondo J, who were interviewed in October of the same year. Jappie J's popularity was not considered to be a disadvantage at all in his interview and he was appointed.

The second issue is that the JSC has placed an increased importance on the position that women occupy in their respective legal pools when they are being considered for appointment. Candidates who have held some form of directorship in a firm, who are senior counsels (SCs), and those who have been in leadership while in the magistracy have been looked at more favourably than those who have not. While this may appear theoretically sound, consider the following facts. Previously, judges used to be drawn from academia, the advocates' and attorneys' profession, and the magistracy with the first two pools being preferred. It has been 11 years since a judge was appointed from academia <sup>62</sup> and while advocates still seem to be the preferred candidates, there has been more recognition of magistrates and attorneys. <sup>63</sup> In academia, the professoriate is the highest level of one's career and yet nationally only 34 of the 4,000 professors are women. <sup>64</sup> When Professor Lawack commenced her deanship at Nelson Mandela Metropolitan University in 2008, she was the second female dean of law in the entire country. Now there are seven of a possible 18. <sup>65</sup> In the advocates' profession, SCs are the most sought after both by clients and the JSC. As of August 2014, of the 451 SCs nationally, a mere 27 were women. <sup>66</sup>

The attorneys' profession fares no better in regard to corporate law firms. A 2013 survey commissioned by the Law Society, showed, amongst others, that 45 per cent of all salary partners, 53 per cent of all equity partners, and 68 per cent of all managing partners at the upper reaches of law firms were white and male. <sup>67</sup> Women were the majority at the lower levels of the law firms but only

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**2015 SAJHR 665**

35.8 per cent were directors over a spread of 51 law firms. <sup>68</sup> In the magistracy, four of nine of the regional court presidents <sup>69</sup> are women and 36 per cent of all leadership positions across the courts are held by women, with African women being in the majority. <sup>70</sup> Irrespective of which pool we are looking at, the result is the same. Women have found it difficult to ascend to the upper echelons of their professions and these difficulties are rarely considered in the interviews. Henceforth, women who may have held important positions but have not ascended the ranks of their professions may find that this is not enough to prove they have the requisite leadership qualities for the purposes of the JSC interviews. <sup>71</sup>

## **IV Conclusion**

Thandie Modise rightly stated that the JSC has to be pro-active in ensuring the leadership structure incorporates women. There will be vacancies arising for the DCJ and DJP of the Western Cape in 2016. Thus, this matter is more topical now than ever and it is not the time to desire 'chiselled' and 'seasoned' women, when this definition arises from differential treatment between men and women. There is no doubt that every candidate for a leadership position should have the requirements I set out earlier in order to lead the courts and enhance the efficiency of the justice system. These requirements, I reiterate, are not exclusive to men. Having women in leadership does not sacrifice transformation for merit, for the two are not mutually exclusive. A desired outcome would be that the JSC commissioners start to place less emphasis on acting experience for leadership positions and acknowledge the fact that many women are not being given acting exposure. If they are truly erstwhile in ensuring that our judicial landscape is really gender representative, then they have to eliminate the elevation of practises that are an obstacle towards women.

Trying to ensure equality is futile if substantive equality is not recognised, especially in regard to the disadvantages faced by women in trying to ascend in their respective legal careers. Having leaders who were in the top echelons of their profession would be helpful but should not be mandatory. It will be a long time before the legal pools reflect more women in senior positions, therefore a continued focus on seniority will only harm the bid to have more women leaders in the judiciary. Apart from being great judges and leaders, women can add a new dimension to the work of male leaders. This new dimension could be as a result of different styles of leadership informed by women's life experiences, which are often different from men. Perhaps, it could be a different way of resolving administrative matters or discord

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2015 SAJHR 666

amongst colleagues that uses a novel approach to arrive at a similar solution that a male leader would have come to.

Retired US federal Judge Deneel Tacha argues that the advent of women in leadership positions in the judiciary promotes a more open discussion of life's issues such as family, responsibilities, concerns and pressures amongst judges.<sup>72</sup> Such an open discussion can only contribute to the well-being of judges and create a more harmonious environment, which will attract more women to leadership and ensure a diversity of leaders that are more reflective of society. This diversity goes beyond gender and also incorporates class, religion and other factors. Morné Olivier argues that transformation is not just about changing the face and look of the judiciary; it is also about a deeper substantive change.<sup>73</sup> This change must shift from an apartheid-era executive-mindedness, to a transformative, value-laden and constitution-based adjudication. This is the type of transformation that the JSC has been constitutionally mandated to advance and that it needs vigorously to ensure includes women in leadership.

Finally, having more women in leadership is greatly symbolic. It creates a different landscape for young women, especially those from previously disadvantaged backgrounds, who 21 years into democracy still struggle to aspire to positions of influence. It portrays a judicial system that has shifted from the past not only in adjudication but also in representation of judges on the bench and in leadership. This would be a worthwhile marker for a judicial system that holds sacrosanct values of equality between the sexes.

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1 The first is Monica Leeuw J who was appointed as North-West judge president in April 2012.

2 This was in response to a question from Premier Ace Magashule about whether it would make sense to appoint a woman junior to Rampai as the judge president.

3 Act 9 of 1994.

4 In this note, I refer to judges only, that is the judicial officers in superior courts and not the magistracy.

5 C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1994) 14 *SAJHR* 248, 249.

6 M Qesson & M du Plessis 'Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary' (2008) 24 *SAJHR* 187, 192.

7 This refers to the Constitutional Court, Supreme Court of Appeal (SCA) and High Courts.

8 This refers to people previously designated as African, Coloured and Indian.

9 Retired Judge Bernard Ngoepe.

10 As of January 2015.

11 56 women of the 153 black judges.

12 P Andrews 'The South African Judicial Appointment Process' (2006) 44 *Osgoode Hall LJ* 565, 570.

13 Ibid.

14 His statements followed intense public criticism after Justice Maya was not appointed to the Constitutional Court in August of the same year.

- 15 M Mokhele 'Reflections of Black Women Academics at South African Universities: A Narrative Case Study' (2013) 4 *Mediterranean J of Social Sciences* 611, 612.
- 16 Those who have are mostly academics, see Andrews (note 12 above) 595; and RB Cowan 'Women's Representation on the Courts in the Republic of South Africa' (2006) 6 *Univ of Maryland LJ of Race, Religion, Gender and Class* 291.
- 17 D Ntsebeza 'Transformation of the Judiciary: The Role of the Judicial Service Commission' the Fifth Annual Griffiths and Victoria Mxenge Memorial Lecture Nelson Mandela Metropolitan University (24 April 2014) <<http://law.nmmu.ac.za/law/media/Store/documents/mxenge%202014/Mxenge-Lecture-Adv-Ntsebeza.pdf>>.
- 18 See former JSC commissioner, Izak Smuts, whose views are reflected in 'Transformation and The Judicial Service Commission – Discussion Paper for the JSC' (April 2013) <<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=368104&sn=Marketingweb+detail>>.
- 19 Ntsebeza (note 17 above) 19.
- 20 Advocate Paul Hoffman and the Helen Suzman Foundation have implied as much in their articles and reports respectively.
- 21 K O'Reilly 'Is the Call for Gender Transformation in the Judiciary being Heeded?' (2013) *De Rebus* 8 <<http://www.saflii.org/za/journals/DEREBUS/2013/53.html>>.
- 22 Women now make up 33 per cent of the judges nationally, while in 1994 they made up 0.01 per cent.
- 23 See K April, S Dreyer & E Blass 'Gender Impediments to the South African Executive Boardroom' (2007) 31 *SA J of Labour Relations* 51.
- 24 Former deputy president of the SCA.
- 25 LTC Harms 'Transparency and Accountability in the Judicial Appointment Process' paper delivered at the 12th Annual International Judicial Conference, Bucharest, Romania (21 May 2004) <<http://www.sabar.co.za/law-journals/2010/august/2010-august-vol023-no2-pp36-38.pdf>>.
- 26 One of which is that, it implies transformation candidates are prima facie incompetent or incapable thus creating an 'us' versus 'them' paradigm.
- 27 In personal observation of the JSC interviews over the past three years I have noted numerous areas where women candidates are treated differently from their male colleagues. Three particular areas are discussed in the body of this article.
- 28 JCS criteria (September 2010) <<http://www.justice.gov.za/saiawj/saiawj-jsc-criteria.pdf>>.
- 29 Interview requests were sent to six heads of court (five of whom my organisation had previous contact with) from across the country. Only two agreed to be interviewed. The other interviewees who are not heads of court were selected because of their involvement in transformation projects that are assisting women in the judiciary and the legal profession.
- 30 There were between six to ten questions put to interviewees depending on how much time they had available. The questions asked, amongst others, were: What in your opinion and whom makes a good leader? What nature of experience is required? What challenges do you as women face? and Should acting experience be a requirement for appointment to a leadership position? The interviewees were at liberty to respond to particular questions only, if they were so inclined, and to add extra information than originally sought.
- 31 Telephonic interview with Hlophe JP (24 June 2014).
- 32 Currently the deputy vice chancellor of Academics at the University of Western Cape, she was the dean of law at the Nelson Mandela Metropolitan University when I interviewed her telephonically (9 June 2014) and has actively mentored female law professionals.
- 33 Telephonic interview with Jeanette Traverso DJP (27 June 2014).
- 34 President of the Judicial Officers Association of South Africa interviewed telephonically (3 July 2014). He had previously spoken about the importance of equipping and supporting female magistrates at a legal sector meeting co-hosted by DGRU and Sonke Gender Justice in Port Elizabeth (29 March 2014).
- 35 They oversee 239 judges of which 81 are women.
- 36 The DGRU has been monitoring and reporting on all JSC interviews since 2010.
- 37 These are mentioned in no particular order.
- 38 Lately, this experience has also related to questions around seniority of the candidate in comparison to the other colleagues shortlisted.
- 39 JSC interview in Cape Town (16 October).
- 40 Previous JSC sittings before 2010 are said to have asked candidates how they would straddle care-giving and the bench. One such interview was with former Justice Kate O'Regan's in 1993 for the Constitutional Court, see <<http://www.courtingjustice.com/JudicialSelection.html>>.
- 41 Traverso interview (note 33 above).
- 42 Hlophe interview (note 31 above).
- 43 Statistics obtained directly from the Department of Justice and Constitutional Development showed that in 2014, only 18 per cent of the acting opportunities available in superior courts went to women.
- 44 Leeuw JP was fortunate enough to have acted when she was appointed as JP for the North West province but she was the sole candidate for the position she interviewed for, see <<http://www.bdlive.co.za/articles/2010/04/22/sa-gets-first-woman-judge-president>>.
- 45 This was in response to a statement from the chief justice that if they had competent women before them, they would not shy away from appointing them.
- 46 Chief Justice Mogoeng Mogoeng had never acted before he became a JP in the Northern Cape and neither had Hlophe J when he was appointed in the Western Cape.
- 47 This would include instances when JPs or DJPs are on leave, such as when Masipa J acted as the DJP of South Gauteng from July to August 2014 in place of Mojapelo DJP.
- 48 These include JP and DJP of KwaZulu-Natal in 2010 and 2013 respectively, DJP in North Gauteng in 2013, the Free State JP position in 2014, and the North West JP position in the latter part of 2014 and JP of KwaZulu-Natal currently.
- 49 Kenneth Mthiyane J retired in September 2014 and Justice Mahomed Navsa was acting in his stead.

- 50 See <<http://www.courtingjustice.com/JudicialSelection.html>>.
- 51 Her interview was also noteworthy because one of the JSC commissioners, Advocate Silas Nkanunu, questioned the impact of her sexual orientation. See S Adams 'Pretoria Judges are Sexist, says de Vos' (1 October 2005) <<http://www.courtingjustice.com/JudicialSelection.html>>.
- 52 I was present at the JSC interviews for the Free State JP position when the judges from that court expressed surprise as to why Erasmus J was brought in from the Western Cape division to act as JP for the first quarter of 2014. This they said, this was despite the fact there were capable women and men in the division.
- 53 As the JSC did to the two women vying for the Free State JP position in the October 2014 interviews.
- 54 This was in reference to the appointment of former JP Hendrick Musi in 2008.
- 55 JSC Free State JP interview (7 October 2014).
- 56 I acknowledge the exception of Masipa J who had been acting in Limpopo as a JP but was not appointed after the April 2015 round of JSC interviews. Judging from the questions from commissioners, her advancement in age appeared to have played a determining role.
- 57 This is different from appointment to the High Court as aspirants are new to the role and need acting experience for exposure.
- 58 See J Hasnas 'The Myth of the Rule of Law' (1995) *Wisconsin LR* 199 where it is argued that normative predispositions of the decision-makers, rather than the law itself, determine the outcome of cases.
- 59 The appointment of Maya J in 2015 differs from the examples given above because she was the sole presidential nominee for the position of DP for the SCA position.
- 60 Interviewed by the JSC alongside Isaac Madondo J in Cape Town (19 April 2012).
- 61 Patel J resigned from his position as JP at the end of December 2014.
- 62 Despite the fact that great jurisprudential minds such as Justices Kate O'Regan, Yvonne Mokgoro and Carol Lewis came from academia.
- 63 In the last two years, the number of magistrates and attorneys being appointed has increased.
- 64 Amounting to 8.5 per cent.
- 65 As of August 2013.
- 66 This is out of a total pool of 2,571 advocates with 25 per cent being women.
- 67 Plus 94 'Project Law: Demographic Survey of Large Corporate Law Firms, South Africa' (May 2013) <[http://www.lssa.org.za/upload/Project%20Law\\_Report\\_20130520\\_Final\\_Revised.pdf](http://www.lssa.org.za/upload/Project%20Law_Report_20130520_Final_Revised.pdf)>.
- 68 Ibid.
- 69 These are the equivalent of heads of court in the superior courts.
- 70 Statistics obtained from the Magistrates Commission as at August 2014.
- 71 There have been instances where women have achieved the required status but are not appointed for other reasons. A case in point is that of Letty Melopa-Sethosa J who was previously an SC and interviewed for the position of DJP of the North Gauteng High Court in April 2013.
- 72 D Tacha "'W' Stories: Women in Leadership Positions in the Judiciary' (1994) 97 *West Virginia LR* 583, 683.
- 73 M Olivier 'A Perspective on Gender Transformation of the South African Judiciary' (2013) 130 *SALJ* 448, 451.
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