Towards an algorithmic model of judicial appointment: The necessity for radical revision of the Judicial Service Commission's interview procedures

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OPSOMMING

Nader aan 'n algoritmiese model van regterlike aanstellings: Die noodsaak vir radikale hersiening van die Regterlike Dienskommissie se onderhoudsvoering-prosedure

Die beskerming van die onafhanklikheid van die regbank begin met die proses waarvolgens regters aangestel word. In Julie 2012 het voormalige hoofregter Pius Langa gewaarsku dat die samestelling en werk van die Regterlike Dienskommissie (RDK) – die grondwetlike liggaam wat verantwoordelik is vir die aanbeveling van regters vir aanstelling in al die hoër howe van Suid-Afrika – die publiek se vertroue in die regbank moet verseker. Ongelukkig, tot 'n toenemende mate, versuim die RDK om vertroue in te boesem dat dit wel in die beste belang van 'n onafhanklike regbank optree. Die RDK het vasgeval in omstredenheid en ervaar 'n legitimiteitskrisis. 'n Belangrike punt van kritiek teen die RDK, en die fokus van hierdie bydrae, is die blatante onregverdigheid in die RDK se onderhoudsprosedures, insluitende die gebrek aan deursigtigheid in die RDK se keuringskriteria en evaluasieprosesse. Hierdie bydrae stel ten doel om die onderhoudsprosedure van die RDK te meet teen insigte verkry uit dekades van navorsing op die gebiede van industriële-, organisatoriese- en kliniese sielkunde oor die voorspellings-akkuraatheid van "ongestruktureerde" en "gestruktureerde" onderhoude. Dit behoef geen betoog dat die RDK se onderhoudsprosedure hoogs ongestruktureerd is nie. Nie alleen is die resultaat van navorsing konsekwent dat ongestruktureerde onderhoude so gebrekkig is in die voorspelling van toekomstige werksprestasie as om feitlik nutteloos te wees nie, maar boonop benadeel sodanige onderhoude voorspellings-akkuraatheid wesenlik. Die tipiese ongestruktureerde onderhoud is vatbaar vir 'n verskeidenheid van vooroordele in die insameling van inligting, oordeel en besluitneming. Ek argumenteer dat, tensy die RDK se onderhoudsprosedures radikaal gewysig word om 'n "gestruktureerde" onderhoudsformaat aan te neem, die RDK se huidige legitimiteitskrisis net sal verdiep, met potensiële rampspoedige gevolge vir die gehalte en onafhanklikheid van die regbank.

"To distrust the judiciary marks the beginning of the end of society" – Honoré Balzac.[1]

1 INTRODUCTION

A former chief justice of South Africa described the independence of the judiciary as the "ultimate shield against the incremental and invisible corrosion of our

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1 Balzac *Splendeurs et misères des courtisanes* (1968) 367.

moral universe".[2] "Subvert that independence", Mahomed CJ warned, "and you subvert the very foundations of a constitutional democracy".[3] Guaranteed human rights mean little, after all, if judges are not visibly independent and committed to uphold the law without fear or favour. Protecting judicial independence – that "delicate, yet vital part of any constitutional democracy"[4] – starts with the process of appointing judges. Dieter Grimm rightly states that "(t)he recruitment of judges is the exposed flank of judicial independence".[5]

In July 2012 another former Chief Justice, Pius Langa, cautioned that the composition and work of the Judicial Service Commission (JSC) – the constitutional body tasked with recommending judges for appointment to all the higher courts of South Africa – should ensure public confidence in the resulting judiciary.[6] The stature of our courts and the quality of the work that they produce can only be as good as the judges who serve on the bench. A quiescent and timorous judiciary, unable or unwilling to act independently, would lose public confidence, its decisions would soon lose respect, and with that would go the rule of law. At its worst – as under *apartheid* – judicial decisions reached under the improper influence of parties, such the executive, could provide a false patina of legitimacy to tyranny.[7]

Unfortunately, however, to an increasing degree, the JSC has failed to inspire confidence that it is acting in the best interests of an independent judiciary. In fact, quite the contrary.[8] Former Constitutional Court Justice, Johann Kriegler, believes that the manner in which the JSC has exercised its primary function of recommending candidates for judicial appointment has *increased* the threat to the independence of the judiciary.[9]

The JSC has become mired in controversy and suffers a crisis of legitimacy.[10] Some commentators criticise the JSC as significantly influenced – if not outright dominated – by party politics.[11] Others claim that a "partisan takeover" of the JSC by commissioners loyal to the ruling party has taken place.[12] As a result, the

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2 Mahomed "The independence of the judiciary" 1998 *SALJ* 666.

3 *Ibid.*

4 Calland "A chief justice who doesn't write appointed by a president who doesn't read" *The Con* (2013-09-02) http://bit.ly/2fnQjuy (accessed on 21 July 2016).

5 Grimm "Constitutions, constitutional courts and constitutional interpretation at the interface of law and politics" in Iancu (ed) *The law/politics distinction in contemporary public law adjudication* (2009) 25.

6 "Delivering justice: Symposium series – part three: Constitutional jurisprudence" *Helen Suzman Foundation* (2012-07-09) http://bit.ly/2fOWzKy (accessed on 9 September 2016). Calland (fn 4 above) describes the JSC as "the gatekeeper to the bench".

7 Lord Clarke "Selecting judges: Merit, moral courage, judgment and diversity" December 2010 *Advocate* 33.

8 Schafer "ANC caucus on JSC deterring good judicial applicants – DA" (2012-03-11) http://bit.ly/2fMI9ch (accessed on 27 July 2016).

9 Kriegler "Can judicial independence survive transformation?" Public lecture delivered at the Wits School of Law (18 August 2009) *Constitutionally Speaking* (2009-09-02) http://bit.ly/2fJcKZp (accessed on 1 August 2016).

10 See Du Preez "Is the Judicial Services Commission serving the best interest of South Africa, the Constitution and an independent judiciary?" *FW De Klerk Foundation* (2013-12-18) available at http://www.fwdeklerk.org (accessed on 27 July 2016).

11 Forsyth "The failure of institutions: The South African Judicial Services Commission and the Hlophe saga" in Shetreet and Forsyth (eds) *The culture of judicial independence: Conceptual foundations and practical challenges* (2012) 73.

12 Calland "Are judges in SA under threat or do they complain too much?" *Mail & Guardian* (2015-08-21) http://bit.ly/2fOr5WI (accessed on 8 September 2016).

JSC has become "increasingly political and executive-minded in its functioning",[13] and is pursuing "a party-political agenda in the selection of judges".[14] Others accuse the JSC of overemphasising the issue of the racial transformation of the judiciary in the selection process. This has prompted the JSC to reject exceptional candidates with impeccable records as human rights lawyers,[15] thus leaving "a trail of wasted forensic talent in its wake".[16] Others believe that "transformation" is merely a smokescreen for a sinister agenda to appoint conformist, executive-minded judges "who will not rock the boat, and who will be deferential"[17] in cases dealing with government policy, instead of those who are "the most skilled, independent and progressive".[18] The JSC has also twice received a public thrashing from the Supreme Court of Appeal, which has set aside decisions of the JSC for acting "irrationally".[19]

A major point of criticism against the JSC, and the focus of this contribution, is the blatant unfairness in its interview procedures, including the lack of transparency in its selection criteria and evaluation processes.[20] Richard Calland and Chris Oxtoby of the Democratic Governance and Rights Unit at the University of Cape Town believe that the JSC has long suffered from inconsistent levels of scrutiny being applied to different candidates. They attribute this to factors such as the JSC's failure to keep interviews to a consistent time-frame, and more fundamentally to an apparent lack of a clear vision of what attributes commissioners are seeking to identify in candidates.[21]

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13 Tolsi "Is the JSC courting favourites?" *Mail & Guardian* (2012-04-26) http://bit.ly/2eU40Rw (accessed on 22 July 2016).

14 Olivier "The selection and appointment of judges" in Hoexter and Olivier (eds) *The judiciary in South Africa* (2014) 169.

15 These candidates' commitment to the values of the Constitution are beyond reproach. Malan "Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa" 2014 *PELJ* 1974.

16 On 12 April 2013 JSC commissioner Izak Smuts SC resigned from the JSC over what he termed its "disturbing" appointment record in rejecting candidates with "intellectual forensic excellence steeped in the values of the Constitution" – such as Azhar Cachalia, Geoff Budlender, Willem van der Linde, Jeremy Gauntlett, Torquil Paterson and Clive Plasket – in favour of patently inferior candidates. Smuts "Why I'm resigning from the JSC" *Politicsweb* (2013-04-12) http://bit.ly/2f5f2RD (accessed on 21 July 2016).

17 Budlender "Transforming the judiciary: The politics of the judiciary in a democratic South Africa" 2005 *SALJ* 722.

18 "Which white judges?" *City Press* (2013-04-21) http://bit.ly/2fo1Eea (accessed on 8 September 2016). Calland "JSC attitude opens door to conservatism" *Mail & Guardian* (2013-04-12) http://bit.ly/2fnYlDR (accessed on 13 September 2016) writes that the ruling party wants "obedient judges who 'know the limits of judicial power'".

19 *Freedom Under Law v Acting Chairperson of the Judicial Service Commission* 2011 3 SA 549 (SCA) (the court ruled that the JSC's decision not to conduct a formal inquiry into alleged gross misconduct by the Judge President of the Western Cape was irrational and, therefore, unconstitutional); *Judicial Service Commission v Cape Bar Council* 2013 1 SA 170(SCA) (the court held that the JSC's decision to leave two vacancies on the bench of the Western Cape High Court unfilled instead of recommending clearly suitable and competent white male judges, was irrational, and therefore incompatible with the principle of legality and the rule of law).

20 See Cohen *Judicial selection in South Africa* Democratic Governance and Rights Unit Working Paper Series (2010) 5.

21 Calland and Oxtoby "Rational, consistent process for choosing judges needed" *Business Day Live* (2013-04-18) http://bit.ly/2eU9VG3 (accessed on 8 September 2016).

At almost every session of the JSC there are more vacancies than candidates willing to be considered for judicial appointment. The primary reason for this dearth of candidates seems to be the unwillingness of potential candidates – "the leading legal lights, black and white"[22] – to subject themselves to the JSC's flawed selection process – a "process that they no longer trust or regard as credible and decent".[23]

For example, the vacancy on the Constitutional Court created by Chief Justice Ngcobo's retirement in 2011 remained unfilled for approximately one year. The JSC had to make three attempts, including "two sets of re-advertising and plenty of behind-the-scenes-cajoling",[24] to finally get the requisite number of four candidates for the interviews that were held in June 2012.[25] Most recently, in March 2016, in what a journalist described as "a pattern [that] . . . has developed",[26] the JSC had to re-advertise to fill a vacancy on the Constitutional Court after failing to get enough nominations.[27] On this paucity of willing candidates for what is considered the apex of any legal career, Calland comments:[28]

> "The Constitutional Court used to be the jewel in South Africa's new democratic firmament. Being on the court was regarded as one of the best legal jobs in the world. Now it is hard to get good people even to apply to be on it."

This contribution seeks to bring to bear on the interview procedures of the JSC insights from decades of industrial, organisational and clinical psychology research into the predictive accuracy of "unstructured" and "structured" employment interviews. It is argued that, unless the JSC radically transforms its interview procedures, its current crisis of legitimacy will only deepen, with potentially disastrous consequences for the quality and independence of the judiciary.

2   JSC INTERVIEW PROCESS

Initially, the JSC's decision to hold interviews of candidates for judicial selection in public were widely acclaimed and heralded for their transparency.[29] However, starting in 2005, the public interviews have increasingly become a lightning rod for criticism, as the JSC displayed a lack of consistency in the nature and number of questions asked of candidates, the length of the interviews and the degree of probing that commissioners undertake.[30]

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22 Rickard "How biased commission picks judges" *The Star* (2012-06-12) http://bit.ly/2fOrU1K (accessed on 5 September 2016).
23 Ramphele and Dawood "Crisis in choosing judges need active citizenship" *Business Day Live* (2012-05-17) http://bit.ly/2fOTb2b (accessed on 2 August 2016).
24 Calland fn 4 above.
25 Oxtoby "New appointments to the Constitutional Court 2009–2012" 2013 *SALJ* 219.
26 Rabkin "Four on short list for post in highest court" *Business Day Live* (2016-08-31) http://bit.ly/2ePM4UF (accessed on 31 August 2016).
27 *Ibid.*
28 Calland fn 4 above. Likewise, in 2012, despite six vacancies existing on the North and South Gauteng High Court benches, the JSC was able to nominate only five candidates, resulting in only three appointments. Tolsi fn 13 above; Rabkin "Not enough candidates for judgeships – JSC" *Business Day Live* (2012-04-25) http://bit.ly/2ePLmXu (accessed on 28 July 2016). During the April 2014 session of the JSC, only six candidates were interviewed for eleven vacancies on the Labour Appeals Court. Oxtoby "The ambiguity of 'separation of powers'" *Mail & Guardian* (2014-10-16) http://bit.ly/2fOT1I5 (accessed on 27 July 2016).
29 Cohen (2010) 95.
30 Malleson "Assessing the performance of the judicial services commission" 1999 *SALJ* 44.

Commentators and observers have uncharitably described the JSC's public interviews as a "charade",[31] "fascinating . . . on some kind of Schadenfreude reality-TV level",[32] "beset by acrimony and controversy",[33] a "sham",[34] and a "tragicomic farce".[35] The JSC interviews of some judicial candidates have been characterised as "intrusive and occasionally aggressive",[36] a "grilling",[37] "prolonged and gruelling",[38] "highly embarrassing to watch",[39] an "interrogat[ion]",[40] a "castiga[tion]",[41] "a barrage of angry questions",[42] "a rough ride",[43] "brutal",[44] "harassment",[45] "harsh and hostile",[46] "tortious" and "cringe-worthy",[47] being "dragged through the mud",[48] and "not to elicit an answer, but to humiliate and to hector".[49] By contrast, other candidates' interviews are "perfunctory . . . lasting only a few minutes",[50] "brief, cordial and rather affable",[51] "jolly",[52] "rather anodyne and unchallenging",[53] "superficial",[54] "short and bland",[55] "convivial exchange[s]",[56] "pleasant affairs",[57] with some JSC commissioners aligned with the ruling party "serv[ing] up some gentle patsy questions"[58] to favoured candidates.

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31 "White men can't judge" *City Press* (2013-04-07) http://bit.ly/2fOpHDK (accessed on 22 July 2016).

32 Oxtoby fn 28 above.

33 *Ibid.*

34 Democratic Governance and Rights Unit *Submission and research report on the judicial records of nominees for appointment to the High Court, Electoral Court and Labour Court* (October 2012) 4.

35 McKaiser "Tragicomedy revealed more about JSC than about judges" *Business Day Live* (2009-09-22) http://bit.ly/2fOSLsG (accessed on 7 September 2016).

36 Corder "Appointment, discipline and removal of judges in South Africa" in Lee (ed) *Judiciaries in comparative perspective* (2011) 104.

37 Malan 2014 *PELJ* 1974; Rickard fn 22 above; Calland fn 4 above.

38 Malan 2014 *PELJ* 1974.

39 Rickard fn 22 above.

40 Harms "Transparency and accountability in the judicial appointment process" August 2010 *Advocate* 37.

41 *City Press* fn 18 above.

42 Calland fn 4 above.

43 Tolsi fn 13 above.

44 Tolsi "JSC conflict laid bare by inconsistency" *Mail & Guardian* (2013-04-12) http://bit.ly/2fOolZD (accessed on 27 July 2016).

45 Kriegler fn 9 above.

46 *Courting justice – judicial selection process* (undated) http://bit.ly/2fo3ATR (accessed on 30 August 2016).

47 Rabkin "Trying time for aspirant judges" *Business Day Live* (2010-10-01) http://bit.ly/2fo5p3i (accessed on 2 August 2016).

48 Kriegler fn 9 above.

49 *Ibid.*

50 Calland fn 4 above.

51 Malan 2014 *PELJ* 1975.

52 Tolsi fn 44 above.

53 Olivier (2014) 176.

54 Malleson 1999 *SALJ* 43.

55 Calland fn 4 above.

56 Tolsi "JSC defends transformation imperatives for judiciary" *Mail & Guardian* (2013-04-09) http://bit.ly/2fo0gIF (accessed on 2 August 2016).

57 Rabkin fn 47 above.

58 Calland fn 4 above.

The Democratic Governance and Rights Unit has similarly criticised the JSC for "asking questions of questionable relevance, and for a lack of focused questioning".[59] Commissioners often frame questions to candidates in very broad terms – such as asking for candidates' views on issues such as separation of powers, access to justice and transformation – which, in turn, force candidates to answer in equally broad terms. Such questions are practically useless in assessing candidates' suitability for judicial appointment.[60] Judge Dennis Davis comments:[61]

> "Rarely are questions framed so as to afford a candidate the opportunity to explain his or her approach to adjudication, conception of the important constitutional values and the candidates' general judicial philosophy . . . [A] principled intellectual engagement rarely, if ever, occurs and the public are left almost none the wiser about the broad judicial philosophy of those who are elevated to a very powerful office."

An observer to the September 2009 session of the JSC interviews said: "The day's interviews did not adequately test the candidates' fitness for judicial office. The proceeding instead demonstrated the political bias of the ANC-aligned members in particular."[62]

The lack of consistency in both the depth and length of questioning has undermined the legitimacy of the JSC appointment process, because it adds credence to claims that not all candidates are treated fairly or even-handedly by the JSC.[63] The disparate and patently unfair treatment meted out by the JSC in its interviews is nowhere better exemplified than in the interviews of judges Clive Plasket and Nigel Willis, both white males, in April 2013 for nomination to the Supreme Court of Appeal. These interviews exposed "egregious" impropriety in the JSC procedures.[64]

At his interview Plasket J faced "a barrage of angry questions" for almost two hours about the transformation issue and the 2012 Supreme Court of Appeal judgment holding that the JSC's failure to nominate appropriately-qualified white candidates to fill two vacancies on the Western Cape High Court bench was "irrational".[65] The "unrelenting pressure" on Plasket J was so uncomfortable that his wife was twice compelled to leave the room.[66] At the conclusion of his interview, Plasket J stated tellingly:[67]

> "I realise that most of the questions I faced today have had very little to do with my competence as a judge. They've been on other issues . . . I was hoping to have been asked about my competence and my long track record as a judge."

Indeed, there had not been a single question about his human rights record, his approximately 60 reported judgments, or his judicial philosophy.[68]

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59 Democratic Governance and Rights Unit (October 2012) 4.

60 *Idem* 5.

61 Davis "Judicial appointments in South Africa" December 2010 *Advocate* 41.

62 McKaiser fn 35 above.

63 Cohen (2010) 89; Olivier (2014) 174.

64 Calland fn 4 above.

65 *Ibid.*

66 *Ibid.*

67 As quoted in Mokone "Merit must trump race, says judge" *Times Live* (2013-04-10) http://bit.ly/2fJfpCk (accessed on 27 July 2016); Calland fn 4 above.

68 Calland fn 4 above.

By stark contrast, the JSC cordially received Willis J. In a relaxed and "jolly"[69] interview that barely lasted 45 minutes, the commissioners engaged in "light-hearted banter" with the candidate.[70] The JSC did not ask Willis J a single question on either the transformation issue or the 2012 Supreme Court of Appeal judgment. In fact, commissioner Dumisa Ntsebeza, who had relentlessly cross-examined Plasket J on transformation, did not ask Willis J a single question. This appears to not only be unfair, but also potentially irrational, and thus legally assailable.[71]

It is "obviously undesirable and may be procedurally unfair" for some interviews to be very short and others to be lengthy, particularly in those instances in which candidates are vying for the same position.[72] Moreover, cursory interviews strengthen the perception that appointments are decided beforehand, and that the interview is a "sham". This perception – regardless of its veracity – is "highly problematic as it undermines the credibility of [the] JSC and indeed the judiciary".[73]

There are regular reports of short interviews.[74] One observer described the April 2012 JSC interviews for positions on the Eastern and Northern Cape High Courts as an exercise in "judicial speed dating".[75] Interviews for the four vacancies on the Eastern Cape High Court were concluded in 90 minutes, when originally an hour had been allocated for each interview.[76] The interview of attorney Zolani Dukada (an apparent favourite) lasted all of four minutes.[77]

At the April 2014 session of the JSC, one candidate's interview lasted only 10 minutes, and another's 15 minutes, both for appointment to the Supreme Court of Appeal. According to Oxtoby, the JSC itself is fuelling the perception that "the real deals are made outside the publicly observed process, the interviews simply giving the veneer of open-mindedness and fair contestation".[78] The perfunctory manner in which the JSC deals with some candidates is an insult to the both the candidates and the process.[79] Candidates deserve nothing less than the courtesy of a sufficiently full and testing interview to provide a meaningful picture as to each candidate's suitability for appointment.[80]

The farcical quality of the JSC interview process is enhanced by the fact that commissioners, themselves, appear to put little stock in the interviews. At the Kliptown hearings that lasted for three days in September 2009, the JSC, to the surprise of observers, announced its shortlist of seven candidates only approximately

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69 Tolsi fn 44 above.

70 Calland fn 18 above.

71 Calland and Oxtoby fn 21 above.

72 Olivier (2014) 181.

73 Democratic Governance and Rights Unit (October 2012) 4.

74 During the April 2012 interview round an entire hour had been set aside for each interview, but the interviews of the four candidates for the Eastern Cape High Court took only 90 minutes altogether. Olivier (2014) 181.

75 Tolsi "Politicians grill 'outspoken' judges" *Mail & Guardian* (2012-04-20) http://bit.ly/2eUdV9p (accessed on 5 September 2016).

76 Democratic Governance and Rights Unit (October 2012) 4.

77 Oxtoby fn 28 above.

78 *Ibid.*

79 Ramphele and Dawood fn 23 above.

80 See Malleson 1999 *SALJ* 36.

twenty minutes after the conclusion of the last interview.[81] Cohen comments that:[82]

> "[I]t is difficult to see how, in the space of an hour, any meaningful discussion could have taken place about the relative strengths and merits of the candidates in light of suitable criteria . . . It is not unreasonable to speculate that the interview process played only a limited role and that JSC members had caucused heavily before the deliberative process took place."

In fact, during an interview on E.tv news, advocate Marumo Moerane SC, spokesperson for the JSC, confirmed that "[w]e did not go into the merits and demerits" of the 15 Constitutional Court candidates who did not make the shortlist of seven.[83]

A journalist who regularly writes about the judicial appointment procedures of the JSC, Carmel Rickard, echoes this sentiment. She believes that, "from the Minister of Justice down", many questions "tend to show blatant bias and a pre-determined intention to destroy or boost" a candidate's chances, rather than to establish "with an open mind" who the best candidate would be.[84] Many of the best candidates refuse to be nominated for consideration because of a growing perception that caucusing and back-room trading among the commissioners have reached such levels that a fair and equal interview process is all but impossible.[85]

3   LACK OF CLEAR GUIDELINES

Another issue at the heart of the unequal treatment of candidates by the JSC is the lack of clear standards to assess the suitability and competence of candidates for judicial appointment.[86]

Not even when challenged in court could the JSC provide a coherent and consistent explanation of its voting procedures.[87] The only reason that the JSC could advance for not recommending certain candidates for appointment was that they did not receive enough votes. The JSC claimed that it could not be expected to give more detailed reasons for failing to recommend certain candidates, because commissioners voted by secret ballot.[88] The Supreme Court of Appeal adamantly disagreed, and held that the JSC was under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates for judicial appointment. The JSC's response that a particular candidate did not receive enough votes in fact amounted to no reason at all. Thus, in light of the availability of suitable candidates, the failure of the JSC not to fill two vacancies on the bench of the Western Cape High Court was irrational and unlawful.[89]

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81 A member of parliament, who sat as a commissioner on the JSC at that time, said: "It was clear that the ANC had already long decided who was going to be put forward to the president." Calland fn 4 above.

82 Cohen (2010) 99.

83 This astonishing statement by Moerane prompted a journalist to remark, rather acerbically: "The least the commission could have done was to fake procedural fairness by pretending to have adequate discussion." McKaiser "Less than 60 minutes to affirm growing mistrust of the JSC" *Business Day Live* (2009-09-25) http://bit.ly/2fJjs1D (accessed on 29 August 2016).

84 Rickard fn 22 above.

85 *Ibid.*

86 Calland and Oxtoby fn 21 above.

87 Calland fn 4 above. See *Judicial Service Commission v Cape Bar Council* (fn 19 above).

88 *Idem* para 42.

89 *Idem* para 51.

Inexplicably, the JSC's reaction to the rebuke from the Supreme Court of Appeal was to do nothing at all. To date the JSC has refused to change its voting procedures in any way. This raises serious procedural questions. If commissioners continue to vote by secret ballot, how will the JSC be able to give reasons for a decision not to recommend a particular candidate? Will the JSC simply continue its current practice of not recording the reasons for its failure to recommend a particular candidate, and then, when called upon to give reasons, to seemingly construct such reasons *ex post facto*?[90]

In March 2013, former Constitutional Court Justice, Zak Jacoob, lamented what he called the "flawed" approach used by the JSC when appointing judges. Yacoob J expressed doubt that the Constitution ever envisioned a process according to which commissioners could vote subjectively for the candidate they prefer, regardless of any objective evaluation.[91] He urged the JSC to adopt comprehensive guidelines, which it should apply with "discipline and care".[92] In his interview for a vacancy on the Supreme Court of Appeal in April 2013, Judge Clive Plasket likewise stated that the JSC's selection criteria must be rational; and for the process to be rational there must be ascertainable criteria that are applied in a predictable way.[93]

Even the *National development plan 2030* acknowledges that, "[u]nfortunately there is little or no consensus in the Judicial Service Commission . . . about the qualities and attributes needed for the bench", and suggests that the JSC should elaborate additional guiding principles "to build consensus on the qualities and attributes of the 'ideal South African judge'".[94]

However, some commentators believe that the JSC's lack of selection criteria is deliberate and that it hides a nefarious agenda. The JSC's "inexplicable failure" on numerous occasions to recommend candidates of the highest calibre[95] for judicial appointment has not only confounded many in the South African legal community.[96] In May 2012, Sir Jeffey Jowell QC stated:[97]

> "[A] number of those whose applications for judicial office were rejected are lawyers of the very highest ability not only in terms of their analytical skills but in terms of their wider qualities and commitment to equality and human dignity. Many of them are greatly respected internationally and it is with disbelief that their failure to be appointed has been viewed."

A leading South African silk, whom the JSC has on four separate occasions refused to nominate for appointment, has referred to the JSC's "continuing disregard for discernible judicial excellence".[98]

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90 See letter from RB Cloete, of Matsepes Incorporated, to Sello Chiloane, Judicial Service Commission (2012-11-05) http://bit.ly/2g7pwnm (accessed on 14 September 2016).

91 "Yacoob laments 'subjective' judicial appointments" *City Press* (2013-03-07) http://bit.ly/2g7hCdI (accessed on 28 July 2016).

92 *City Press* fn 31 above. Cathi Albertyn echoed Yacoob J's comments, stating that there should be a set of guidelines for the JSC to follow when appointing judges. She continued: "We need to have clear, defined criteria and we need to be confident that the politicians (who serve on the JSC) are acting in terms of those criteria." *City Press* fn 91 above.

93 Tolsi fn 44 above.

94 *National development plan 2030* 453 http://www.info.gov.za (accessed on 14 September 2016).

95 Olivier (2014) 172.

96 *Idem* 183.

97 "The appointment and accountability of judges" reproduced in Helen Suzman Foundation *Delivering justice: The appointment and accountability of judges* (undated) 14.

98 Gauntlett "The sounds of silence" 2011 *TSAR* 228.

The increasing perception is that the decision to nominate a particular candidate, or not, is heavily caucused behind closed doors by a powerful voting bloc aligned to the ruling party, resulting in favoured candidates and *fait accompli* appointments.[99] This stands in sharp contrast to the JSC during the first five years of its existence, when then-commissioner, Wim Trengove SC, said: "[T]he culture was that you voted your conscience, not your constituency, for the truly best candidates – we didn't caucus behind closed doors or lobbied."[100]

Marius Olivier is of the opinion that "nothing short of a radical change in the composition of the JSC will suffice to displace the current perception that its decision-making is directed by a powerful ANC-aligned bloc".[101] There have indeed been many calls for reducing the number of politicians as commissioners on the JSC.[102] However, changing the composition of the JSC requires a Constitutional amendment.

There is another solution – an infinitely simpler solution that would not require a Constitutional amendment[103] – and that is for the JSC to radically revise its interview procedures. This will remove one of the major objections, if not *the* major objection, of suitable judicial candidates willing to be nominated for appointment.

4   "UNSTRUCTURED" AND "STRUCTURED" INTERVIEWS

The employment interview has been defined as "a face-to-face interaction conducted to determine the qualifications of a given individual for a particular open position".[104] Thus, stripped of its pomp and circumstance – the luxury hotel setting and the assembly of luminaries from the judiciary, government and the press – the JSC interviews of prospective judicial candidates are nothing more than employment interviews.

Industrial and organisational psychologists generally distinguish between two types of interviews – "unstructured" and "structured" interviews.[105] As the name suggests, unstructured interviews (by far the most prevalent type of employment interview) are characterised by a lack of any standard format for the interview process itself, which is very much left to the judgment of the interviewers.[106] There is also no consistency in the length of interviews with different candidates. Moreover, different candidates are asked quite different questions, and the direction of questioning is determined predominantly by interviewers' personal preferences.[107]

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 99 Tolsi fn 13 above.
100 According to Trengove the impression was unmistakable that "the political component of the ANC [on the JSC] wields far greater influence than in the first five years". *Ibid.*
101 Olivier (2014) 172.
102 "Call for fewer politicians on JSC" (2012-02-07) http://bit.ly/2etOOfc (accessed on 27 July 2016). The *National Development Plan 2030* has also acknowledged the need to reform the JSC as a matter of government policy. It notes (453) that the JSC "is argued to be too large to function effectively, and is hamstrung by political interests".
103 S 178(1) of the Constitution provides that the JSC "may determine its own procedure, but decisions of the Commission must be supported by a majority of its members".
104 Huffcutt and Youncourt "Employment interviews" in Whetzel and Wheaton (eds) *Applied measurement: Industrial psychology in human resource management* (2007) 182.
105 Gladwell "The new-boy network" *Gladwell.com* (2000-05-29) http://bit.ly/2fOv9Xl (accessed on 5 August 2016).
106 Taylor and O'Driscoll *Structured employment interviewing* (1995) 4.
107 *Ibid.*

In unstructured interviews, interviewers are guided by their personal, often idiosyncratic views of what qualities are required for the position.[108] The gathering of information and the subsequent judgment and choice of applicants are highly subjective and influenced by vague impressions of a candidate's overall "fit".[109]

On the other hand, "structure" in the interview process is characterised by (i) job-relatedness of the interview; (ii) standardisation of the process; and (iii) structured use of data to evaluate each candidate.[110] The first step in a structured interview process is to conduct a job analysis to determine what knowledge, skills and abilities are required to perform the tasks required in the position.[111] Then, based on this analysis, interview questions and rating scales are crafted to measure these knowledge, skills and abilities.[112] It is critical that the questions be based exclusively on job duties and responsibilities.[113]

The actual conduct of the structured interview is highly standardised in that each candidate is asked the same questions.[114] At the highest level of structure, this means that the exact same questions are asked of each candidate in the exact same order. However, a second level of structure is also possible, which in the research literature has been found to be equally valid: the same basic set of questions are asked of each candidate, but some flexibility is allowed to tailor the interview to different candidates, or to pursue interesting lines of discussion.[115]

Structured interviews are also characterised by "better types of questions",[116] which include situational questions (what would you do if?), experience-based questions (what did you do when?),[117] background questions (what work experience have you had with?), and job knowledge questions (what factors should you consider?).[118] Structured interviews are generally longer than unstructured interviews and use a larger number of questions.[119]

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108 Dipboye "Structured and unstructured interviews: Beyond the job-fit model" 1994 *Research in Personnel and Human Resources Management* 81.

109 *Ibid.*

110 Macan "The employment interview: A review of current studies and directions for future research" 2009 *Human Resource Management R* 205.

111 Dipboye 1994 *Research in Personnel and Human Resources Management* 90.

112 *Ibid.*

113 Pursell, Campion and Gaylord "Structured interviewing: Avoiding selection problems" 1980 *Personnel Journal* 908.

114 Levashina *et al* "The structured employment interview: Narrative and quantitative review of the research literature" 2014 *Personnel Psychology* 244.

115 Campion, Palmer and Campion "A review of structure in the selection interview" 1997 *Personnel Psychology* 662 664.

116 Levashina *et al* 2014 *Personnel Psychology* 244.

117 Judge, Higgins and Cable "The employment interview: A review of recent research and recommendations for future research" 2000 *Human Resource Management R* 388. Situational questions are based on goal-setting theory and rely on the assumption that intentions predict future behaviour. As such, situational questions ask candidates what they would do in hypothetical job-related situations. Conversely, past-behaviour questions are based on the premise that past behaviour predicts future behaviour. As such, past-behaviour questions ask candidates to describe what they have done in past job-related situations. Levashina *et al* 2014 *Personnel Psychology* 266–267.

118 Campion, Palmer and Campion 1997 *Personnel Psychology* 668.

119 *Idem* 670.

A key element of the interview structure is establishing a standard process for evaluation.[120] To evaluate responses, the interviewers match candidates' responses during the interviews with anchored rating scales tailored to each question.[121] Anchored rating scales could consist of, among others, (i) example answers or illustrations (not the exact answer the candidate is expected to give, but examples of answers that the candidate might give); and (ii) descriptions or definitions of answers that describe the quality of the answer narratively.[122] Anchored rating scales also contain evaluations of the candidates' answers matched to a 5-point scale, for example (1=excellent; 2=good; 3=satisfactory; 4=marginal; and 5=poor).

Another critical feature of structured interviews is the extensive training of interviewers. However, this is less a component of the structured interview itself, than a prerequisite for ensuring that the other components are implemented correctly.[123] In the structured interview it is also important to use the same interviewers across all candidates.[124]

Probably the most controversial characteristic[125] of structured interviews is that, in comparing or rating the candidates vying for the same position after all the interviews have been conducted, the selection committee uses statistical, rather than clinical, predictions.[126] This issue is addressed below.

5   JSC SHOULD ADOPT A STRUCTURED INTERVIEW FORMAT

From this analysis of structured and unstructured interviews, few would argue that JSC interviews are highly unstructured. In JSC interviews there is absolutely no consistency in the length of the interviews, the questions asked of candidates or the depth of probing into any particular issue. There is also a high degree of subjectivity in the subsequent judgment and choice of candidates.

The employment interview has been one of the most widely-used selection methods in the past century.[127] Its ubiquity has prompted some to suggest that "it is rare, even unthinkable, for someone to be hired without some type of interview".[128] However, since the advent of our constitutional democracy, the JSC could have saved itself countless hours and millions of Rands of taxpayer revenue, and could have spared many a candidate the humiliation of appearing before it only to be rejected ultimately, by not having held interviews at all. That is because unstructured interviews are virtually worthless in predicting whether a

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120 Macan 2009 *Human Resource Management R* 206.
121 Campion, Palmer and Campion 2014 *Personnel Psychology* 673.
122 *Idem* 676.
123 *Idem* 684.
124 Levashina *et al* 2014 *Personnel Psychology* 245.
125 There are other characteristics of the structured interview that are not strictly relevant to the context of the interviews conducted by the JSC. For the sake of thoroughness, these are: (i) limiting prompting, follow-up, and elaboration on questions; (ii) controlling ancillary information; (iii) not allowing questions from the applicant until after the interview; (iv) taking notes; and (v) not discussing applicants or answers between interviews. *Idem* 245–246.
126 *Idem* 245.
127 *Idem* 241.
128 Huffcut and Culbertson "Interviews" in Zedeck (ed) *APA handbook of industrial and organizational psychology* (2010) 185.

candidate will succeed in the position. In fact, in the 100-year history of published research on employment interviewing,[129] few conclusions have been more widely supported than the idea that structured interviews are much more reliable and valid than unstructured interviews, because they substantially reduce the subjectivity and inconsistency inherent to unstructured interviews.[130]

Several large-scale field studies have provided numerous examples of the "embarrassingly poor" predictive validity of unstructured interviews for screening decisions.[131] For example, in 1979 an act of legislature unexpectedly forced the University of Texas Medical School to admit 50 more applicants late in the admission season. These additional applicants had initially been rejected for admission, based largely on impressions from *unstructured* interviews during which the interviewers were free to ask different questions of different applicants in whatever way the interviewers saw fit. The expense of having faculty members interview every applicant seemed to have been wasted. At the conclusion of medical training and one post-graduate year of residency, there were no meaningful differences between the initially rejected and initially accepted groups of students in terms of attrition, academic performance, clinical performance or honours earned.[132]

More disturbingly, however, not only have unstructured interviews consistently been shown to be such inferior predictors of future job performance as to be virtually useless, they actually *hurt* predictive accuracy.[133] The typical unstructured interview is vulnerable to a variety of biases in information gathering, judgment and decision-making.[134]

At the heart of the interview are verbal and non-verbal exchanges that occur as interviewers gather information about candidates. The intent behind structured interviews is to remove any effects of the interviewer's behaviour, so that what the interview then ultimately reveals is a genuine reflection of who the applicant is, instead of the way in which the interviewer conducted the session.[135] By

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129 Dating back to Scott "The scientific selection of salesmen" October 1915 *Advertising and Selling* 5–6 94–96.

130 Twelve meta-analyses have been conducted on this topic, and they have consistently found strong evidence for the superiority of structured interviews compared to unstructured interviews. See sources cited in Levashina *et al* 2014 *Personnel Psychology* 242. See also Campion, Palmer and Campion 1997 *Personnel Psychology* 684; McDaniel *et al* "The validity of employment interviews: A comprehensive review and meta-analysis" 1994 *J of Applied Psychology* 599–616.

131 Dana, Dawes and Peterson "Belief in the unstructured interview: The persistence of an illusion" 2013 *Judgment and Decision Making* 512.

132 Devaul *et al* "Medical school performance of initially rejected candidates" 1987 *J of the American Medical Association* 952–963. In a similar study, researchers compared a group of 24 applicants who were interviewed and accepted at Yale Medical School but decided to attend other medical schools, with a group of 27 applicants who attended the same medical schools, but had been rejected by Yale following an unstructured interview and committee deliberation. In comparing the two groups, researchers found no relationship between admission decisions and performance during medical school. Millstein *et al* "Admission decisions and performance during menial school" 1981 *J of Medical Education* 77–82.

133 Dana, Dawes and Peterson 2013 *Judgment and Decision Making* 513.

134 For additional information on the fallibility of human decision-making and judgment, especially in the legal context, see Gravett "The myth of rationality: Cognitive biases and heuristics in judicial decision-making" 2017 *SALJ* (forthcoming).

135 Dipboye 1994 *Research in Personnel and Human Resources Management* 83.

contrast, the absence of any restraints in unstructured interviews may encourage a variety of biases on the part of the interviewer. Thus, what interviewers "see" on the part of candidates can become the product of the way in which they conduct the interview, rather than the candidates' traits and qualifications.[136]

One type of bias that might intrude on the unstructured interview procedure is the tendency of interviewers' opinion of applicants to "leak" into their non-verbal and paralinguistic behaviour. Consequently, how well candidates fare in the interview reflects to a meaningful degree the interviewers' own behaviour. Candidates appear to perform better in the interview and provide more information when interviewers show support and positive regard to the candidates in their non-verbal and paralinguistic behaviour.[137] Thus, the interviewers' conduct of the session might influence both the quality as well as the quantity of the information gathered.

Unstructured interviews can also hurt predictive accuracy because exposure to irrelevant information is known to dilute the impact of valuable information. Unstructured interviews expose interviewers to so many casual observations about candidates that have little or unknown diagnostic value, that interviewers cannot help but get much more information than they can actually use. However, rather than simply ignoring irrelevant cues, research on the "dilution effect" shows that extraneous information actually reduces reliance on valuable information.[138]

Interviewers in unstructured interviews also give more weight to negative information than to positive information. Research suggests that it takes more than twice as much positive as negative information to change an interviewer's initial impressions of a candidate.[139]

Candidates' appearance, including facial attractiveness, cosmetics and attire, has been shown to influence interviewers' selection decisions at all phases of the unstructured interview process.[140] Candidates are also viewed as more qualified if they show positive, responsive verbal and non-verbal behaviour, including enthusiasm, warmth, good eye contact, smiling, head-nodding, voice modulation, energy, hand gestures and vocal expressiveness. Thus, in unstructured interviews, style is usually found to count for more than objective information on the candidates.[141]

In unstructured interviews, interviewers make decisions very rapidly. Research has shown that, on average, interviewers reach final decisions about a candidate after only *four minutes* of a 30-minute interview. First impressions about candidates seem to be particularly powerful because interviewers engage in hypothesis confirmation strategies that are designed to confirm their initial impressions.[142] This is referred to as the "halo effect".[143]

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136 *Ibid.*
137 *Idem* 84.
138 Dana, Dawes and Peterson 2013 *Judgment and Decision Making* 513.
139 Rowe "Unfavourable information and interview decisions" in Elder and Ferris (eds) *The employment interview: Theory, research, and practice* (1989) 77–89.
140 Judge, Higgins and Cable 2000 *Human Resource Management R* 384; Dipboye 1994 *Research in Personnel and Human Resources Management* 86.
141 *Ibid.*
142 Dougherty, Turban and Callender "Confirming first impressions in the employment interview: A field study of interviewer behaviour" 1994 *J of Applied Psychology* 659–665.
143 Kahneman *Thinking, fast and slow* (2011) 231.

Too much irrelevant information gathered during unstructured interviews leads to unwarranted confidence in the process on the part of interviewers, because of a psychological phenomenon referred to as "sense-making".[144] People seek to impose order on events to such an extent that they often see patterns in random sequences.[145] As such, interviewers readily translate even the most tangential interview data into a "good story" about the candidate. If a candidate gives a response that is inconsistent with the interviewer's impression, the unstructured interview gives the interviewer too much freedom to dynamically reformulate that impression and build a coherent story of the candidate's responses, perhaps by asking follow-up questions until hearing a set of responses that confirm an impression.[146]

The ability to "sense make" allows unstructured interviewers to believe that they understand the candidate, almost regardless of the information that they receive. Unfortunately, a feeling of understanding – while reassuring and confidence-inspiring – is completely unrelated to accuracy in the interpersonal predictive context. In fact, while the accuracy of prediction declines with increases in the redundancy and amount of information available to those making the predictions, the confidence of these individuals in their own predictions tends to increase.[147] This leads to people feeling confident in the validity of unstructured interview impressions even if they are worthless.[148]

In sum, not only do unstructured interviews have no predictive validity, they actually degrade the quality of the decisions of interviewers. It has consistently been proven that selection committees make better decisions – that is, predict candidates' future job performance better – on the basis of dossiers alone, than on the basis of dossiers and unstructured interviews.[149] Should the JSC refuse to revise its interview procedures to adopt a structured format, it would be much better off not conducting interviews at all.

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144 Dana, Dawes and Peterson 2013 *Judgment and decision making* 513.

145 See Gilovich *How we know what isn't so: The fallibility of human reason in everyday life* (1991).

146 Dana, Dawes and Peterson 2013 *Judgment and decision making* 513. Without structure, interviewers might not ask questions intended to disconfirm these impressions, because people are inclined to seek information that confirms their hypotheses or avoid what might disconfirm them. See Sanbonmatsu *et al* "Selective hypothesis testing" 1998 *Psychonomic Bulletin & R* 197–220.

147 See Hall, Arris and Todorov "The illusion of knowledge: When more information reduces accuracy and increases confidence" 2007 *Organizational Behaviour and Human Decision Processes* 277–290. See also Oskamp "Overconfidence in case study judgments" (1965) *J of Consulting Psychology* 261–265 who found that accuracy did not increase significantly with increasing information, but confidence increased steadily and significantly.

148 Dana, Dawes and Peterson 2013 *Judgment and Decision Making* 514. "You *do* end feeling as though you have a richer impression of the [interviewee] than that gleaned from the stark facts of a resume. But there's no evidence that interviews prompt better decisions." Willingham "Why job interviews don't work" (2013-10-21) *Science and Education Blog* http://bit.ly/2eU7fs7 (accessed on 4 August 2016).

149 See Wiesner and Cronshaw "A meta-analytic investigation of the impact of interview format and degree of structure on the validity of the employment interview" 1988 *J of Occupational and Organizational Psychology* 275–290; Hunter and Hunter "Validity and utility of alternative predictors of job performance" 1984 *Psychological Bulletin* 72–88.

6   ADDRESSING THE OBJECTIONS TO THE STRUCTURED INTERVIEW PROCESS

Studies of human resource executives suggest that they believe more in the validity of unstructured interviews than other screening methods, even when they are aware that the evidence clearly shows structured interviews to be superior.[150] Malcolm Gladwell explains why, unsurprisingly, interview specialists have found it "extraordinarily difficult" to persuade employers to adopt structured interviews:[151]

> "It just doesn't feel right. For most of us, hiring someone is essentially a romantic process, in which the job interview functions as a desexualized version of a date. We are looking for someone with whom we have a certain chemistry, even if the coupling that results ends in tears and the pursuer and the pursued turn out to have nothing in common. We want the unlimited promise of a love affair. The structured interview, by contrast, seems to offer only the dry logic and practicality of an arranged marriage."

It is probably this same sense of discomfort that prompted Malleson, in the context of JSC interviews, to state that the use of standardised questions "would clearly be inappropriate".[152] Likewise, Cohen asserts that "[b]ecause candidates all have different backgrounds, qualities and experiences, it cannot be expected that each candidate will be subjected to the same set of questions".[153]

These assumptions can be challenged. In the structured interview process, the questions are constructed to be narrowly and strictly job-related. Thus, the thrust of structured interview questions is to determine whether candidates – regardless of background and experience – possess the knowledge, skills and attributes required for judicial office. Moreover, if standardised questions work well for hiring in other industries, why not for the judiciary? Clearly, standardised questions would be vastly superior to the current JSC interview format. It is not suggested that each candidate be asked the exact same set of questions. However, each candidate should be asked the same *basic* set of questions, with limited flexibility allowed to tailor the interview to different candidates with different sets of professional experiences, or to pursue interesting lines of discussion.

Moreover, as has clearly been demonstrated in the JSC's interviews of judicial candidates, with unstructured interviews there is a tendency for interviewers to probe candidates for qualities that the interviewers either prefer or dislike, and then to justify their hiring decisions based on these qualities. Therefore, standardised questioning is one of the prerequisites for treating judicial candidates fairly and equally during the interview. The greater the scope of subjectivity in the questioning of candidates, the greater the opportunity for discrimination.

Probably the biggest objection to the structured interview process is the requirement that the selection committee uses statistical, rather than clinical, predictions in comparing or rating the candidates. In 1954 a psychologist, Paul Meehl, reviewed the results of 20 studies that had analysed whether *clinical* predictions based on the subjective impressions of trained professionals were more

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150 See Highouse "Stubborn reliance on intuition and subjectivity in employee selection" 2008 *Industrial and Organizational Psychology: Perspectives on Science and Practice* 333–342.

151 Gladwell fn 15 above.

152 Malleson 1999 *SALJ* 44.

153 Cohen (2010) 91.

accurate than *statistical* predictions made by combining a few scores or ratings according to a predetermined rule.[154] The results of Meehl's "disturbing little book",[155] and that of approximately 200 studies since, reporting on comparisons of clinical and statistical predictions, have been consistent – algorithms (statistical prediction) have shown significant better accuracy than human judgment (clinical prediction).[156]

Why are human expertise and judgment inferior to algorithms? One reason is that humans are "incorrigibly inconsistent" in making summary judgments of complex information.[157] When asked to evaluate the same information twice, they frequently give different answers. The extent of the inconsistency is often portentous. Experienced radiologists who evaluate chest X-rays as "normal" or "abnormal" contradict themselves 20% of the time when they see the image on separate occasions. A review of 41 separate studies of the reliability of judgments made by auditors, pathologists, psychologists, organisational managers and other professionals suggests that this level of inconsistency is representative, even when a case is re-evaluated within a few minutes.[158] As the Nobel-prize winning psychologist, Daniel Kahneman, points out: "Unreliable judgment cannot be valid predictors of anything."

This widespread inconsistency probably is the result of the fact that unnoticed *stimuli* in our environment have a substantial influence on people's thoughts and actions. These influences fluctuate from moment to moment.[159] Because people have scant direct knowledge of the content of their own minds, they will never know that they might have made a different judgment or reached a different decision under very slightly different circumstances.[160]

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154 Meehl *Clinical versus statistical prediction: A theoretical analysis and review of the evidence* (1954).

155 This is how Meehl referred to his book years later, after it had provoked "shock and disbelief" among his fellow clinical psychologists. Kahneman (2011) 222 223.

156 Dana, Dawes and Peterson 2013 *Judgment and Decision Making* 512–513; Grove *et al* "Clinical versus mechanical prediction: A meta-analysis" 2000 *Psychological Assessment* 19–30. Kahneman (2011) 223 writes: "The range of predicted outcomes has expanded to cover medical variables such as the longevity of cancer patients, the length of hospital stays, the diagnosis of cardiac disease, and the susceptibility of babies to sudden infant death syndrome; economic measures such as the prospect of success for a new business, the evaluation of credit risks by banks, and the future career satisfaction of workers; questions of interest to government agencies, including assessments of the suitability of foster parents, the odds of recidivism among juvenile offenders, and the likelihood of other forms of violent behaviour; and miscellaneous outcomes such as the evaluation of scientific presentations, the winners of football games, and the future prices of Bordeaux wine. Each of these domains entails a significant degree of uncertainty and unpredictability. We describe them as "low validity environments." In every case, the accuracy of experts was matched or exceeded by a simple algorithm." As Meehl pointed out with justifiable pride 30 years after the publication of his book: "There is no controversy in social science which shows such a large body of qualitatively diverse studies coming out so uniformly in the same direction as this one." As quoted *ibid*.

157 *Idem* 224.

158 See Shanteau "Psychological characteristics and strategies of expert decision makers" 1988 *Acta Psychologica* 203–215.

159 Kahneman (2011) 225.

160 *Ibid.*

"The research suggests a surprising conclusion" states Kahneman: "[T]o max-imize predictive accuracy, final decisions should be left to formulas."[161] Based on the medical school admissions research described above, Kahneman con-cludes that conducting an interview is likely to diminish the accuracy of a selec-tion procedure, especially if the interviewers also then make the final admission decisions. Because interviewers are overconfident in their intuitions, they will assign too much weight to other sources of information.[162]

In her analysis of judicial selection in South Africa, Cohen states: "It . . . needs to be acknowledged that there is no algorithm that can be applied to test whether a candidate will be a good judge."[163] This statement begs the question: Why not? From the mere fact that no one has gone through the trouble of formulating a set of criteria of the "ideal South African judge" against which candidates for judi-cial office could be measured, it certainly does not follow that it cannot be done. Cohen's statement seems to be reflective of the general knee-jerk "aversion to algorithms" with which Meehl's colleagues responded to his ideas.[164] The hostil-ity and disbelief that they displayed illustrated that they were clearly in the grip of an illusion of skill in terms of their ability to make long-term predictions.

Just as clinical psychologists are required to make long-term predictions about their patients' future, JSC commissioners have to make long-term predictions about candidates' successful careers on the bench. Not surprisingly, then, the idea that a mechanical combination of a few variables could outperform the sub-tle complexity of human judgment strikes experienced psychologists – and is likely to strike professional politicians, lawyers, and judges on the JSC – as obviously wrong. This attitude is understandable. When a human competes with a machine, such as chess genius Gary Kasparov duelling with the computer, Deep Blue, our sympathies lie with our fellow human. The aversion to algo-rithms that make decisions that affect humans is rooted in the strong preference that many people have for the natural over the synthetic or artificial.[165]

However, it bears repeating that, contrary to conventional wisdom, even a simple algorithm "that is constructed on the back of an envelope is . . . certainly good enough to outdo expert judgment".[166] A classic illustration of this principle is the simple algorithm that has saved the lives of literally hundreds of thousands of infants. Until the anaesthesiologist, Virginia Apgar, intervened in 1953, phy-sicians and midwives relied on their clinical judgment to determine whether a new-born was in distress. Different practitioners focused on different cues – for example, breathing problems, or how soon the baby cried – but, without a stand-ardised procedure, they regularly missed danger signs and many infants died. One day, in response to a question over breakfast by one of her residents about how she would systematically assess a new-born, Dr Apgar jotted down five var-iables (heart rate, respiration, reflex, muscle tone and colour) and three scores (0, 1, or 2 depending on the robustness of each sign). Apgar then started to assess infants according to this algorithm one minute after birth.

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161 *Ibid.*
162 *Ibid.*
163 Cohen (2010) 3 61.
164 Kahneman (2011) 227.
165 *Idem* 228.
166 *Idem* 226.

A baby with a total score of 8 or above was likely to be pink, squirming, crying, grimacing, with a pulse of 100 or more, and thus not in distress. A baby with a score of 4 or below was likely to be bluish, flaccid, passive, with a slow or weak pulse, and thus in need of immediate intervention. Applying the Apgar score, delivery room personnel finally had a consistent formula for determining whether infants were in distress. The Apgar algorithm still is used every day in thousands of hospital delivery rooms across the world, and has been credited as an important contribution to reducing infant mortality.[167]

I do not suggest that criteria for the selection of the "ideal South African judge" will be as easy to formulate or as simple to apply as the Apgar algorithm. However, it is worth the effort to try. The alternative is a JSC whose deliberations, according to a former commissioner, are "about intuition. Ultimately you have to go with your gut on who will make a good judge or not".[168] Surely, when the integrity and independence of the judiciary are at stake, we can come up with superior selection criteria than commissioners' "intuition" and "gut".

The essential first step in revising the JSC's interview procedures to be more structured, is to conduct a job analysis to determine the knowledge, skills and abilities that those seeking judicial office should possess. It is based on this analysis that a basic set of questions could then be prepared to measure these knowledge, skills and abilities. The fundamental question in the job analysis would be, in the words of the *National development plan 2030*: What are the qualities and attributes of the "ideal South African judge"?

As set forth above, many have spoken of the need for, but no one has attempted to formulate, clear criteria that could form the basis of a basic set of standard questions to assess the suitability and competence of judicial candidates. Whether the JSC's lack of transparency and accountability in respect of the general criteria for selection is because of the fact that it is paralysed by differing opinions among commissioners about the qualities and attributes of the "ideal South African judge", or whether it is to hide an insidious, politically-driven agenda, it is clear that the JSC lacks the institutional will to undertake this task.

The reluctance on the part of legal academics, practitioners and judges to formulate criteria seems to be driven by a perception that the task of identifying the qualities we seek in our judges is a daunting one; one that would require consideration of the "numerous qualities that are relevant to judicial office" and the "many types of personality that might make a good judge".[169] In other words, the objection seems to be that the variables are simply too numerous and the job of a judge simply too complex to be reduced to a manageable set of qualities.

However, if the social science research over the last 60 years regarding the accuracy of statistical versus clinical prediction has taught us anything, it is that we do not need to have regard to *every single one* of the multitude of possible qualities that would make a good judge. We literally need to consider a handful of *essential* qualities, and provided we pick the right handful, we should be able to predict a judicial candidate's success on the bench with far greater accuracy than the JSC could ever have in its 20 year existence.

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167 Finster and Wood "The Apgar score has survived the test of time" 2005 *Anesthesiology* 855–857.
168 Tolsi fn 44 above.
169 Cohen (2010) 3.

The time is long overdue to engage in robust public debate towards a consensus on the *essential* attributes that the JSC should look for when nominating judicial candidates for appointment.

7   CONCLUSION

The process of the selection of judges must procedurally treat all candidates equally and fairly, and be carried out in accordance with proper criteria that are publicly known.[170] Unfortunately, the current interview procedures of the JSC fall manifestly short of this goal. The JSC reminds one of the Wizard of Oz. It touts its public interviews for their transparency. But, on closer inspection – these interviews, because of their procedural unfairness and substantive shallowness – amount to nothing more than a show of smoke and mirrors. Moreover, when it comes to the selection criteria that the JSC applies and its deliberative process, no one is allowed to peek behind the curtain.

Unless the JSC can find consensus on a structured interview procedure that ensures a consistent, fair and sufficiently rigorous evaluation of candidates, including clear and publicly known criteria against which to assess candidates' suitability, its reputation and credibility will suffer even more, to the point where its processes will lack all legitimacy. The resulting risk to the rule of law and the strength and quality of the judiciary cannot be overstated.

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170 Lord Clarke December 2010 *Advocate* 35 39.