REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: **16170/24**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

2 June 2025
DATE

[redacted]
SIGNATURE

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	
MANDLAKAYISE JOHN HLOPHE	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
JUDICIAL SERVICE COMMISSION	Third Respondent
UMKHONTO WESIZWE	Fourth Respondent
ALL OTHER PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	Fifth Respondent

and in the matter between:

Case No. **16463/2024**

FREEDOM UNDER LAW (RF) NPC	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
THE JUDICIAL SERVICE COMMISSION	Second Respondent
MANDLAKAYISE JOHN HLOPHE	Third Respondent
ALL OTHER PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	Fourth Respondent

and in the matter between:

Case No: 16771/2024

CORRUPTION WATCH NPC	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
THE JUDICIAL SERVICE COMMISSION	Second Respondent
MANDLAKAYISE JOHN HLOPHE	Third Respondent
ALL OTHER PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	Fourth Respondent

Judgment handed down electronically by circulation to the parties' legal representatives via email, and released to SAFLII and by uploading it on CaseLines. The date and time for hand down is deemed to be 10:00 on 2 June 2025.

Constitution – section 178(1)(h) – distinction between nomination and designation – National Assembly has discretionary powers to designate representatives – an impeached judge who continues to undermine the judiciary is not a fit and proper candidate to serve on the Judicial Services Commission.

JUDGMENT

Mbhele AJP, **Basson** and **Mudau JJ: (THE COURT)**

The Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission*[1] stated –

> "[32] The importance of the judiciary in our constitutional democratic project cannot be overemphasised:
>
> > 'The judiciary is essential to the maintenance of constitutional democracy. By exercising judicial control over governmental power and keeping it within its constitutional bounds, the judiciary is able to hold the legislature and executive to account in the courts and thus secure the rule of law and the protection of human rights.'[2]

Introduction

[1] On 21 February 2024, Dr Mandlakayise John Hlophe ("Dr Hlophe")[3] became the first judge in democratic South Africa to be removed from office by the National Assembly ("NA") for gross misconduct in that he attempted to interfere with the administration of justice by attempting to influence two Constitutional Court judges (Justice Nkabinde and Acting Justice Jafta) to decide a pending matter in favour of former President Jacob Zuma, thereby violating

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[1] [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) ("*Helen Suzman Foundation*").
[2] Hoexter and Olivier *The Judiciary in South Africa* (Juta & Co Ltd, Cape Town 2014) at xxvii. As former Chief Justice Ngcobo has remarked, the role played by the judiciary is of far-reaching importance: "The judicial branch is responsible not only for resolving disputes between private parties, but also for resolving disputes between government and private parties and even disputes between different branches or sectors of government. It has the responsibility to protect individuals from government overreaching, and it plays an important role in our country's constitutional balance of powers." (Ngcobo "Sustaining Public Confidence in the Judiciary: An Essential Condition for Realising the Judicial Role" (2011) 128 SALJ 5 at 9).
[3] Dr Hlophe was appointed a judge in the Cape Provincial Division in 1995 and elevated to Judge President of the Division in 2000.

their oaths of office. This was also the first time in our constitutional history that the NA was called upon to exercise its powers under 177(1)(b) of the Constitution of the Republic of South Africa.[4]

[2] The events culminating in the removal of Dr Hlophe are a matter of public record and need not be recounted in detail. It suffices to briefly outline certain background facts relevant to the matter before this Court.[5]

[3] The Judicial Services Commission ("JSC") referred a complaint lodged by all the Justices of the Constitutional Court, led by Chief Justice Langa and Deputy Chief Justice Moseneke, to its Judicial Conduct Tribunal ("JTC").[6]

[4] Upon consideration, the JTC[7] concluded in its Tribunal Decision that Dr Hlophe was guilty of gross misconduct, finding that his conduct breached section 165 of the Constitution in that Dr Hlophe had, "improperly attempted to influence the two Justices of the Constitutional Court to violate their oaths of office". It further concluded that Dr Hlophe's conduct "seriously threatened and interfered with the independence, impartiality, dignity and effectiveness of the Constitutional Court", and "threatened public confidence in the judicial system."[8]

[5] Pursuant to section 20 of the Judicial Service Commission Act,[9] the JSC considered the JCT's report and conclusions. By a majority vote, the JSC concurred with the Tribunal's findings and concluded that Dr Hlophe's conduct constituted gross misconduct as contemplated in section 177(1)(a) of the Constitution. The JSC further found that Dr Hlophe's conduct amounted to an attempt to defeat or obstruct the administration of justice, which seriously interfered with the judiciary's constitutionally protected independence.

[6] On 21 February 2024, the NA resolved, by an overwhelming majority, to remove Dr Hlophe from judicial office for gross misconduct.

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[4] Act 108 of 1996 ("the Constitution").
[5] We have drawn extensively from heads of argument prepared by counsel for the respective parties, for which we express appreciation particularly on costs.
[6] Since 2008, when the complaint was made to the JSC, the process has been marred by litigation. We do not intend to refer to that process in detail, as it is a matter of public record.
[7] Tribunal Decision dated 9 April 2021.
[8] Tribunal Decision at para 123. Dr Hlophe's application to review and set aside the finding of the JSC that he was guilty of gross misconduct was dismissed by a Full Bench of the High Court in *Hlophe v Judicial Service Commission and Others* [2022] ZAGPJHC 276; [2022] 3 All SA 87 (GJ).
[9] Act 9 of 1994.

[7] Finally, on 1 March 2024, after a 16-year protracted legal process costing the taxpayer approximately R10 million, the President of the Republic removed Dr Hlophe from office in terms of section 177 of the Constitution.

[8] Dr Hlophe then joined the Umkhonto Wesiswe Party ("MK"), which is the official opposition, as the DA entered the Government of National Unity. The Democratic Alliance ("DA") says it reserves the right to challenge the process by which Dr Hlophe was made an MP in a separate process, but, for purposes of this matter, the DA accepts that Dr Hlophe was lawfully elected to the NA.

[9] On 9 July 2024, the NA designated six Members of Parliament ("MPs"), which included Dr Hlophe, to serve on the JSC in terms of section 178(1)(h) of the Constitution. It is this designation that forms the basis for the current dispute. We shall return to a more detailed analysis of the interpretation of this section.

The parties

[10] There are four[10] applications challenging the lawfulness of the designation of Dr Hlophe, three of which are before this Court -

(a) Democratic Alliance v Hlophe and Others ("the DA application").

(b) Freedom Under Law (RF) NP v Speaker and Others (the "FUL application").

(c) Corruption Watch v Speaker of the National Assembly and Others ("the Corruption Watch application").

The applicants

[11] The DA is the applicant in case no. 16170/2024 and is a registered political party holding 87 seats in the NA. The applicant in case no. 16771/2024 is Corruption Watch NPC ("Corruption Watch"), a non-profit company incorporated in accordance with the laws of the Republic of South Africa. The applicant in case no. 16463/2024 is Freedom Under Law NPC

[10] The fourth application, *Afriforum v Speaker and Others* ("*the Afriforum* application"), is not before us.

("FUL"), a non-profit company incorporated and registered in terms of section 21 of the Companies Act.[11]

[12] Dr Hlophe and MK complained that Corruption Watch acted inappropriately in instituting a separate application, alleging that this constituted an unsustainable abuse of process. Corruption Watch disputes this allegation, asserting that it maintains no political or business alignment, and that joining forces with the DA as a co-applicant would have been inconsistent with its mandate and purpose. We agree. First, Corruption Watch advances additional grounds of review that the DA does not pursue. Second, it would not have been appropriate for Corruption Watch to intervene in the proceedings brought by FUL, given that Corruption Watch sought interim relief pending the outcome of the present review (Part B), whereas FUL sought final relief from the outset. Third, none of the opposing respondents has demonstrated any prejudice or inconvenience to the Court arising from Corruption Watch's decision to proceed by way of a separate application.

The Respondents

[13] Although their citations differ in the different applications, the following respondents are cited in all three applications: (i) Dr Mandlakayise John Hlophe ("Dr Hlophe"), a former Judge of the High Court and the former Judge President of this Division who is currently a member of the political party Umkhonto Wesizwe ("MK"). (ii) The Speaker of the National Assembly ("the Speaker"), cited in her official capacity as the representative of the NA. In each of the three matters before us, the Speaker filed an explanatory affidavit outlining the basis of her non-opposition and made written and oral submissions before this Court. The Speaker has adopted a neutral stance and indicated that she abides by the decision of this Court and submitted that no order should therefore be made against the NA. (iii) The Judicial Services Commission ("JSC"). No relief is sought against the JSC - it is cited solely for any interest it may have in the matter. The JSC also filed a notice to abide. (iv) Umkhonto Wesizwe ("MK"), a political party represented in the NA, is cited on the basis that it nominated Dr Hlophe to be designated to serve on the JSC. (v) The remaining respondents are the 16 political parties represented in the NA cited for any interest they may have in these

[11] Act 61 of 1973.

proceedings. No relief is sought against those political parties. Only Dr Hlophe and the MK party oppose this application.

Litigation history

Full Court: Part A

[14] On 27 September 2024, three urgent, unconsolidated applications were brought by the DA (case no: 16170/24), Corruption Watch (case no: 16771/2024), and FUL (case no: 16463/24), challenging the NA's decision to designate Dr Hlophe as one of its six representatives on the JSC in terms of section 178(1)(h) of the Constitution. They were heard simultaneously by a Full Court (Baqwa, Daffue, and Collis JJ).

[15] The DA and Corruption Watch sought interim relief under Part A of their applications, interdicting Dr Hlophe from participating as a member of the JSC pending the outcome of Part B (the present proceedings). FUL sought final relief through judicial review, seeking an order: first, declaring the NA's decision unconstitutional and invalid; and second, reviewing and setting aside the decision and remitting the matter to the NA for reconsideration. The relief sought by the DA and Corruption Watch is broader in scope than that sought by FUL.

[16] The Full Court granted the interim interdicts sought by the DA and Corruption Watch and postponed FUL's application.[12] In its order, the Court directed that FUL's application be heard simultaneously with Part B of the DA and Corruption Watch applications.

Preliminary issues

Locus Standi (DA, FUL and Corruption Watch)

[17] Dr Hlophe and MK took issue with the applicants' standing to bring these applications. Specifically, they claim that Corruption Watch does not have standing to bring this review and they repeat its challenge to FUL's standing as it did in Part A. MK also claims that the various applications were nothing more than an abuse of process, in that the applicants have instituted the present proceedings without legitimate intentions.

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[12] The Full Court's judgment has been reported as *Democratic Alliance v Hlophe and Others; Corruption Watch v Hlophe and Others; Freedom Under Law v Hlophe and Others* [2024] ZAWCHC 282;2025 (1) SA 169 (WCC) (*Democratic Alliance v Hlophe*).

[18] The DA disputes these allegations and submits that the DA is committed to the rule of law and to upholding of South Africa's democratic Constitution. The DA brings this application in its own interest, its members' interests, and the public interest. In *Democratic Alliance v The Acting National Director of Public Prosecutions*,[13] the SCA held that, because political parties represent the public, they are obliged to ensure that institutions such as the National Prosecuting Authority (and, by implication, the NA) act in accordance with constitutional and legal prescripts, and to engage in litigation where there is a failure to do so.

[19] Corruption Watch referred to its Memorandum of Incorporation and submitted that its mandate is to combat corruption and promote transparency, integrity, and accountability within the private and public sectors. Similar to the DA, Corruption Watch instituted this application in its own interest in terms of section 38(a) of the Constitution. In addition, the application was brought in the public interest, as contemplated in section 38(d) of the Constitution, given the undeniable public interest in the composition and functioning of the JSC.[14]

[20] FUL explains that it brought this application in its own interest and in the public interest. FUL points out that its purpose is, amongst others, to promote democracy under the law, advance the understanding and respect for the rule of law and the principle of legality, and secure and strengthen the independence of the judiciary. As part of this mandate, it monitors the judiciary and the courts as the primary promoters and protectors of the rule of law within South Africa's constitutional democracy. In *Hlophe v Freedom Under Law in re: Freedom Under Law v Hlophe; Moseneke and Others v Hlophe in re: Hlophe v Judicial Services Commission and Others*,[15] the Full Court held that Dr Hlophe's objections to FUL's standing were "meritless", "misconceived" and "in the face of common sense".

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[13] [2012] ZASCA 15; 2012 (3) SA 486 (SCA); 2012 (6) BCLR 613 (SCA): "[44] All political parties participating in parliament must necessarily have an interest in ensuring that public power is exercised in accordance with constitutional and legal prescripts and that the rule of law is upheld. They represent constituents that collectively make up the electorate. They effectively represent the public in parliament. It is in the public interest and of direct concern to political parties participating in parliament that an institution such as the National Prosecuting Authority (NPA) act in accordance with constitutional and legal prescripts. It can hardly be argued that citizenry in general would be concerned to ensure that there was no favouritism in decisions relating to prosecutions. Few members of political parties or members of the public have the ability, resources or inclination to bring a review application of the kind under discussion."

[14] We address the public's interest in the functions of the JSC in greater detail below.

[15] [2021] ZAGPJHC 743 ; 2022 (2) SA 523 (GJ), [2022] 1 All SA 721 (GJ) at para [46].

[21] By necessary implication, these findings extend to the objections raised by Dr Hlophe and the MK Party against the DA and Corruption Watch in the present matters.

[22] The common-law requirements for legal standing have been substantially broadened by section 38 of the Constitution. Section 38 of the Constitution of South Africa gives people the right to take legal action if they believe their rights in the Bill of Rights have been violated. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*,[16] O'Regan J described the courts' new role in a constitutional democracy as follows:

> "[t]his role requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact."[17]

[23] In concluding that the applicants have legal standing to bring these applications, we have also taken note of the view of the Constitutional Court in *Albutt v Centre for the Study of Violence and Reconciliation and Others*,[18] wherein it was confirmed that a much broader approach to legal standing is taken, particularly when it comes to the violation of rights in the Bill of Rights. We are therefore satisfied that the applicants have demonstrated that the interests of justice and considerations of public interest justify this Court's scrutiny of the impugned decision. Furthermore, considerations of expediency require that the matter be heard and determined by this Court without delay. In the premises, all three applicants have the requisite standing to bring these applications, both in their individual capacity and in the public interest.

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[16] [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 1 BCLR 1 (CC).

[17] *Id* at para [230].

[18] [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC): "[33] The concession that the NGOs have standing was properly made. Our Constitution adopts a broad approach to standing, in particular, when it comes to the violation of rights in the Bill of Rights. This is apparent from the standing accorded to persons who act in the public interest. This ground is much broader than the other grounds of standing contained in s 38. The NGOs have standing on at least two grounds.
[34] First, they are litigating in the public interest under s 38(d) of the Constitution. The NGOs contend that the exclusion of victims from participation in the special dispensation process violates the Constitution, in particular, the rule of law. They submit that, as civic organisations concerned with victims of political violence, they have an interest in ensuring compliance with the Constitution and the rule of law. Second, they are litigating in the interest of the victims under s 38(c). The victims whose interests the NGOs represent were unable to seek relief themselves because they were unaware that applications for pardons affecting them were being considered. The process followed by the President made no provision for the victims to be made aware of the applications for pardons, nor to be given the opportunity to make representations."

Is the dispute still alive?

[24] On 6 October 2024, Dr Hlophe resigned from the JSC, raising the question whether the issues before this Court are still alive.

[25] According to FUL, the issues now before court in the review application remain alive notwithstanding Dr Hlophe's resignation. FUL submits that the NA has followed an incorrect and unlawful practice which fettered the discretion afforded to the NA when it designated Dr Hlophe without exercising a discretion regarding his suitability to serve as a member of the JSC.

[26] The Speaker agrees that the matter remains alive and relevant, notwithstanding Dr Hlophe's resignation. She points out that the NA has not yet designated an alternate to replace Dr Hlophe and that the NA is still responsible for designating an additional member to the JSC from among the ranks of opposition parties. She also accepts that any future debate regarding the suitability of a nominee must be guided by a proper interpretation of section 178(1)(h) of the Constitution. She accordingly welcomes judicial clarity on the meaning and scope of this provision, particularly as it pertains to the requirement of "suitability" of MP's designated under it. She also emphasises that such clarity is crucial, given the likelihood of further litigation arising from the NA's future designation of Dr Hlophe, which the MK Party has already indicated it intends to do. Dr Hlophe also agrees that his resignation does not have any bearing on the issues raised in Part B and that the issues remain alive for adjudication.

[27] We are satisfied that the matter is not moot. The fact that Dr Hlophe is no longer a member of the JSC means, as pointed out by the Speaker, that a further designation will need to occur in the future. Any future designation process by the NA must take place with this Court's guidance on whether the NA had a discretion to consider the fitness of a nominee for designation in terms of section 178(1)(h) of the Constitution and whether it had acted lawfully or unlawfully when it designated Dr Hlophe for appointment to the JSC without exercising such discretion. Without such guidance, the NA risks repeating an unconstitutional process that not only undermines the integrity of the JSC but ultimately the legitimacy of the judiciary itself.

The dispute

[28] The matter before us concerns two narrow questions:

(a) Firstly, whether NA properly exercised its right and duty to consider whether Dr Hlophe was suitable for designation to the JSC.

(b) Secondly, is Dr Hlophe, who had just recently been removed from the judicial office for gross misconduct and continues to denigrate and denounce the judicial system, suitable to be appointed to the JSC.

[29] This matter does not concern whether a person removed as a judge may sit as an MP, nor whether an impeached judge could never serve on the JSC in any circumstances. It focuses on the peculiar facts surrounding Dr Hlophe's designation as a member of the JSC.

[30] The applicants submit that the NA's decision to designate amounts to administrative action under the Promotion of Administrative Justice Act (PAJA).[19] Although the relief sought by the parties differs, they all rely on the following grounds of review:

(a) The NA committed a material error of law: It failed to properly exercise its discretion under section 178(1)(h) of the Constitution when it designated Dr Hlophe to serve on the JSC, acting on the mistaken belief that his position as an MP and his nomination by the MK Party compelled his designation. In fact, the NA did not realise that it had discretion at all.

(b) In designating Dr Hlophe to the JSC, the NA ignored and undermined the constitutional duty placed on it by section 165(4) of the Constitution to protect the integrity and legitimacy of courts. Not only will the public's respect for the judiciary be affected by Dr Hlophe's appointment, but his designation also constitutes an attack on our constitutional democracy as a whole.

(c) The NA considered various irrelevant considerations and failed to consider relevant and material factors in reaching its decision. In particular, it proceeded on the erroneous assumption that all MPs are inherently suitable and eligible for designation to the JSC, and that the Constitution imposes no specific criteria applicable to a nominee regarding their fitness to serve on

[19] Act 3 of 2000 ("PAJA").

the JSC.

(d) The decision to designate Dr Hlophe - a judge recently impeached for gross misconduct - is unreasonable and irrational. The purpose of the JSC is to foster public confidence and respect for the judiciary and the rule of law. Designating an impeached judge who has demonstrated a complete disregard for the judiciary's integrity, to participate in appointing judges undermines this purpose. We return to a more detailed consideration of each of these grounds.

The orders sought

[31] Amplified by the joint minute, the DA seeks two orders: In its amended notice of motion, the DA seeks a review of the decision by the NA to designate Dr Hlophe as one of its representatives to the JSC. The DA further seeks a declaration that the NA may not designate Dr Hlophe to serve on the JSC. The DA further seeks a punitive costs award against Dr Hlophe and MK considering the unjustifiable and scandalous attacks on the DA and this Court.[20] In its application, FUL seeks a review of the NA's decision to designate Dr. Hlophe as one of its representatives for the JSC. FUL also seeks a declaration that the NA may not designate Dr. Hlophe to serve on the JSC and an order remitting the matter back to the NA for reconsideration. Similarly, Corruption Watch seeks a review of the decision by the NA to designate Dr. Hlophe as one of its representatives to the JSC. Like the DA and FUL, Corruption Watch seeks a declaration that the NA may not in the future designate Dr. Hlophe to serve on the JSC.

[32] On 10 December 2024, Corruption Watch filed a Notice of Application (to the extent necessary) that its non-compliance with rule 28 of the Uniform Rules of Court is condoned and that it be granted leave to amend Part B of its Notice of Motion. The supplementary relief now sought by Corruption Watch is for a declarator that the NA cannot designate Dr Hlophe to sit on the JSC.[21]

[33] Dr Hlophe does not object to the admission of Corruption Watch's supplementary

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[20] They have accused the DA of pursuing the litigation only because it is racist and described it as a "lynching". They have accused this Court of being "incompetent, politically driven and compromised".
[21] We address this issue in greater detail below.

affidavit and does not oppose the introduction of additional relief being sought. He does, however, oppose the grant of the relief itself.

[34] MK claims that it is prejudiced by the supplementary affidavit and amended relief. However, its contention that Corruption Watch failed to seek condonation for non-compliance with rule 28 is incorrect. We are not persuaded that MK has suffered any prejudice. The allegations contained in Corruption Watch's founding affidavit have been available to MK since 30 July 2024, and an adequate opportunity has been provided to address both the supplementary affidavit and the amended relief now sought. Accordingly, the Notice of Application dated 10 December 2024 is granted.

Designation of Dr Hlophe to the JSC in terms of section 178(1)(h) of the Constitution

[35] The Speaker explains how the process of designation unfolded. In 2024, in exercising its powers in terms of section 178 of the Constitution, the NA determined which parties were entitled to representation on the JSC. It determined that the ANC was entitled to two representatives on the JSC, the DA one, MK one, the EFF and ActionSA also with one representative each. Once political parties have submitted their nominations, the NA will then proceed to the process of designation in terms of section 178(1)(h) of the Constitution. Section 178(1)(h) of the Constitution is located in Chapter 8 of the Constitution and deals with "Courts and Administration of Justice". It reads as follows:

> "There is a Judicial Service Commission consisting of -
> ...
> (h) Six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly".

[36] A clear distinction must therefore be drawn between the nomination and designation processes. The former is a purely political process, whereas the latter is a process whereby the NA exercises public power conferred on it in section 178(1)(h) of the Constitution to designate for appointment to the JSC. In doing so, the NA must act reasonably and rationally. Whereas no party takes issue with the principle that Dr Hlophe was not barred from *nomination* and that no specific criteria are set for an MP to be nominated by a political party, we disagree with the Speaker's contention that no specific "fit and proper" criteria apply to a designee.

Designation process

[37] The Speaker explains that the designation of nominees to serve on the JSC is conducted in accordance with the Rules of the National Assembly. The General Rules govern motions placed before the NA for a decision.[22] A motion passes by way of majority support by the political party, as is standard practice in a democratic Parliament. She explains that nominations of MPs by their respective political parties are usually an uncontested and uneventful process, and, until these court proceedings, a motion of designation in terms of section 178(1)(h) of the Constitution has never been challenged.

DA Objection

[38] When Dr Hlophe was nominated, the NA, for the first time, received objections, both internally and externally. The DA,[23] objected thereto as follows:

> "The JSC plays a central role in the appointment of judges. Bearing in mind the extensive powers vested in the judiciary under the Constitution, it is no exaggeration to say that the work of the JSC is therefore crucial to the rule of law and constitutional democracy in South Africa.
>
> It is in the context of the importance of the work of the JSC, and well documented failures in how it has performed its role, that we raise concern about the prospective designation of Dr Hlophe.
>
> It is well known that Dr Hlophe was removed from his previous office as a judge for gross misconduct, having been found to have attempted to influence judges of the Constitutional Court to decide a politically sensitive case relating to former President and now member of the MK Party, Mr. JG Zuma. The finding of gross misconduct was made by the JSC itself, and confirmed by the Courts, which dismissed Dr Hlophe's claims that the JSC had acted ultra vires, had acted unconstitutionally, and that it lacked impartiality.
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> Designating an individual to the JSC who has been found by the very body in question to have committed gross misconduct and has been removed from a position as a judicial officer to play a role in the selection of other judicial officers would be completely

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[22] Rules of the National Assembly, 9th Edition, 26 May 2016 ("NA Rules").
[23] The FF+, the ACDP, the IFP, ActionSA, Rise Mzansi and BOSA all appeared to support the DA when the objection was raised.

inappropriate. It would be irrational and, in our view, susceptible to legal challenge, and it would undermine public confidence in the judicial appointments process, and thereby in the judiciary.

We accordingly urge Parliament not to vote to designate Dr Hlophe as a member of the JSC, in order to protect the integrity of the JSC, the judicial appointments process, and the judiciary".[24]

[39] The DA thus relied on two points:

(a) Firstly, the decision to designate a nominee to serve on the JSC is not merely a political one but the exercise of public power aimed at contributing to the establishment of the JSC. The NA is therefore required to act reasonably and rationally. The DA contended that the decision to designate Dr Hlophe just months after the NA had impeached him, was not rational.

(b) Secondly, the DA contended that there was a real risk that, if Dr Hlophe were designated to serve on the JSC, many applicants to be interviewed by the JSC would object and apply for the recusal of Dr Hlophe. This may potentially disrupt the interview conducted by the JSC and result in endless review processes.

MK and Dr Hlophe's response regarding the designation

[40] The arguments raised in favour of the designation of Dr Hlophe were the following:

(a) MK and the EFF submitted that Dr Hlophe is eminently qualified to serve on the JSC because he has a doctorate in law and had served as a judge.

(b) The Constitution does not provide specific qualification criteria for designation to the JSC other than being a member of the NA. MK reasoned that –

"The Constitution does not contain an inherent qualification requirement for members to sit on the JSC. Since members who qualify to be appointed to the JSC are already members of parliament and therefore bound by their oath of office. The Constitution, in its wisdom, does not regulate the qualification of members to sit in

[24] ActionSA, UDM, Build One South Africa made similar statements cautioning against the designation of Dr Hlophe.

the JSC. The existing Constitution's scholarship on the makeup of the JSC endorses the appointment of politicians to the JSC."[25]

[41] The MK relied on established Rules and Practices of Parliament and contended that the NA cannot deviate from the existing practice without an amendment to the Constitution or the NA's Rules.

External objections

[42] FUL and other non-governmental organisations,[26] also raised similar objections. In response, the Speaker stated as follows:

> "I have taken note of the contents of your correspondence. As you will be aware, Section 178(1)(h) of the Constitution (1996) requires that the composition of the JSC must include 'six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly'. The Constitution therefore only includes two requirements in relation to the designation of persons by the Assembly: firstly, that the person be a member of the Assembly and, secondly, that half of the persons so designated be drawn from the opposition benches. There are no further criteria.
>
> In the context above, it should be noted that there is no specific requirement that a member of Parliament be *'fit and proper'*. This is no doubt in part because the inclusion of public representatives on the JSC is premised on the fact that these persons represent the electorate rather than because of any special or specific expertise or capabilities, as is the case with other legal experts and members of the judiciary, who serve on-the JSC. In the matter at hand, Dr Hlophe is a duly sworn in member of the Assembly who is lawfully occupying a seat in Parliament. In addition, as a member of the uMkhonto Wesizwe Party (MK), he is also a member of the opposition. For the reasons expressed, there is no legal impediment which would prevent Dr Hlophe from serving on the JSC.
>
> Notwithstanding the above, members of Parliament are duty bound to act in an ethical manner. Clause 4 of Schedule 2 of the Constitution requires all members to take an oath or solemnly affirm their faithfulness to the Republic of South Africa, their commitment to respect, obey and uphold the Constitution and to perform their functions to the best of their ability.

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[25] Other parties such as the EFF, Al-Jama-ah, UAT also supported the nomination of Dr Hlophe.
[26] In a letter dated 9 July 2024.

Furthermore, members of Parliament must comply with the *Code of Ethical Conduct and Disclosure of members' Interests for Assembly and Permanent Council* Members ('Ethics Code').

Ultimately, the decision to designate Dr Hlophe, or any other member, to the JSC will rest with the collective of the National Assembly".

[43] Three points emerge from the Speaker's response:

(a) There is no restriction on who may be nominated from the ranks of MPs for designation to serve on the JSC. The only criterion for nomination is that the nominee must be an MP.

(b) There is no specific "fit and proper" criterion for a designee.

(c) The ultimate decision rests with the collective of the NA.

[44] These points will be addressed in more detail, as they go to the heart of the matter.

Designation on 9 July 2024

[45] On 9 July 2024, despite the objections of the DA and other external parties and following previous parliamentary practice in terms of which nominees were merely designated without question, the NA voted in support of the motion to designate all six nominees, including Dr Hlophe, to serve on the JSC in terms of section 178(1)(h) of the Constitution. Only the DA, the FF+, and the ACDP voted against Dr Hlophe's designation.

[46] On the facts before us, the NA had failed to appreciate that it had the discretion to designate and therefore failed to exercise that discretion. The NA merely acted in accordance with established parliamentary practice, whereby all nominations were accepted. It should also be pointed out that, while it may have been the established practice of the NA in the past to accept nominations submitted by political parties, the practice developed in a context in which no nominated MP had previously been removed from judicial office for misconduct. The circumstances surrounding this particular nomination were, therefore, unique and exceptional.

Rules of NA

[47] Regarding the role of the relevant Rules of the NA, the Speaker explains that there was a departure from the previous convention of simply accepting the nominations to the extent that the designation of Dr Hlophe was put to a vote. The NA was divided, with some MPs expressing the view that the suitability of a nominee (regardless of academic qualifications) for the task of serving on the JSC was pertinent, whilst others took the view that there was no bar to any member of the NA being designated to the JSC. The majority then voted in favour of his designation, and the motion carried.

[48] Both MK and Dr Hlophe rely on the fact that his nomination followed an established practice – allegedly provided for in the Rules of the NA - whereby nominations by political parties were accepted as a matter of course. MK contends that Corruption Watch should have challenged what it contends is an "unwritten rule" of the NA.

[49] We disagree as this submission loses sight of Rule 9(2) of the Rules of the NA, which states that –

> "Conventions and practices must be consistent with the provisions of the Constitution, these rules, orders of the House, rulings, and directives and guidelines of the Rules Committee."

[50] The interpretation of the convention/practice advanced by MK and Dr Hlophe is plainly inconsistent with the provisions of section 178(1)(h) of the Constitution, which requires the NA to independently exercise its discretion in determining whom to designate to the JSC. The NA may not abdicate this constitutional responsibility by simply deferring to the dictates of a political party, as occurred in the present case.

[51] Dr Hlophe also says the NA has "exclusive cognisance" or "exclusive jurisdiction over how its proceedings are to be conducted, and the conduct of these proceedings is not subject to examination elsewhere". Corruption Watch correctly submits that this argument is fundamentally flawed. The NA has failed to discharge its constitutional responsibility. The designation of Members of Parliament to the JSC is not a mere internal process of the NA; it constitutes a public decision with significant constitutional implications. Such a designation directly affects the composition of the JSC, which plays a pivotal role in appointing judges and, by extension, safeguarding the integrity and independence of the judiciary. In any event, Dr Hlophe's contention is wrong as a matter of law. Under our Constitutional order, the lawfulness of Parliament's proceedings is subject to judicial review. Our Courts have set aside

the proceedings of Parliament on numerous occasions.[27]

[52] However, whether such a practice or convention is valid regarding the appointment of Parliamentary committees generally is irrelevant to this case. In any event, the JSC is *not* a Parliamentary committee – it is a body established by the Constitution, consisting of members from several different sources, and not only from members of parliament.

Section 178(1)(h) of the Constitution

[53] The interpretation of section 178(1)(h) goes to the heart of the matter. The Speaker is correct that nothing in the wording of section 178(1)(h) of the Constitution specifically constrains the power of the NA to designate other than to require that half of the members must be from opposition parties. Conversely, nothing in this section prescribes that the NA must merely designate whichever MPs the various political parties nominated. The power to designate is afforded to the NA, not political parties. The power to designate does not permit the NA to act as a mere rubber stamp for nominations advanced by political parties, which the NA readily conceded.

[54] Despite accepting that the role of the NA under section 178(1)(h) of the Constitution is not to merely "rubberstamp" a nomination by any one political party, this is precisely what occurred. The facts show that the NA laboured under the mistaken belief that it had no choice but to follow the NA Rules and that the Constitution left them with no choice but to designate (in other words, "rubberstamp") those nominated by the various political parties.

[55] The NA may not abdicate to any other person, body, or political party (as it has done in this matter) its power to designate members to the JSC. In *Hofmeyr v Minister of Justice and Another*,[28] the court made it clear that an official vested with a discretionary power may not abdicate a discretionary power:

> "[A] discretionary power vested in one official must be exercised by that official (or his

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[27] See for example, *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) *Mazibuko NO v Sisulu and Others NNO* [2013] ZACC 28;2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) and *Speaker of the National Assembly v Public Protector and Others* [2022] ZACC 1; 2022 (3) SA 1 (CC); 2022 (6) BCLR 744 (CC).

[28] 1992 (3) SA 108 (C) at 117E-G. This matter was confirmed on appeal. See: *Minister of Justice v Hofmeyr* (240/91) [1993] ZASCA 40; 1993 (3) SA 131 (AD); [1993] 2 All SA 232 (A)

lawful delegate) and that, although where appropriate he may consult others and obtain their advice, he must exercise his own discretion and not abdicate it in favour of someone else; he must not ... 'pass the buck' or act under the dictation of another and, if he does, the decision which flows therefrom is unlawful and a nullity."

[56] The power to designate is constrained only by the Constitution and other provisions and principles in the Constitution. They are the following:

(a) The NA must act rationally. This is a requirement of the principle of legality. Rational action must be rationally connected to the *purpose* for which the power is exercised.

(b) Section 165(4) of the Constitution clearly requires that the NA "must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

(c) The NA must act lawfully. If it acts based on a material error of law, it acts unlawfully and contrary to the principle of legality.

Section 165 of the Constitution

[57] Section 178(1)(h) must be read with due regard to the powers conferred on the courts and the obligations placed on organs of state in terms of section 165 of the Constitution.

[58] Section 165 entrusts the courts with considerable power and responsibility: Judges have the power to develop, interpret, and apply the law and declare laws passed by Parliament and the executive's conduct unconstitutional.[29] This section further affirms the independence and impartiality of the courts and provides for the institutional protection for all courts.[30] In terms of section 165(4) of the Constitution, Organs of State, such as the NA, are constitutionally required to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility, and effectiveness. It follows that a decision of the NA will be unlawful and unconstitutional if it runs against the requirements in section 165(4). This section reads as follows in relevant part:

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[29] *Sachs v Dönges NO* 1950 (2) SA 265 (A) at 312; *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at paras 60 - 62.
[30] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 18 (*Van Rooyen*).

"(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.[31]

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies".

The Judicial Services Commission

[59] A strong and independent judiciary, as contemplated by section 165 of the Constitution, is vital to maintaining our constitutional democracy.[32] The JSC is established in terms of section 178 of the Constitution as the constitutional body responsible for recommending judicial candidates for appointment (and removal) by the President.[33] As such, it fulfills a function of "singular importance".[34]

[60] Section 178 of the Constitution provides for a broadly-based selection panel that will provide a check and balance to the executive's power to make such appointments. The composition of the JSC as prescribed by section 178 is thus deliberately designed to promote the democratic legitimacy and effectiveness of the courts within our legal system of separation of powers with checks and balances.[35] This was also confirmed by the Full Court in *Hlophe v Judicial Service Commission*:[36]

"[32] It is true that section 178 was crafted with obvious care. As noted in *Premier*

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[31] Emphasis Added.

[32] *Helen Suzman Foundation* (above n1) at para 32.

[33] Section 178(4) of the Constitution.

[34] *Helen Suzman Foundation* (above n1) at para 37.

[35] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) ("*First Certification case*"):

"[124] Appointment of Judges by the Executive or a combination of the Executive and Parliament would not be inconsistent with the CPs. The JSC contains significant representation from the Judiciary, the legal professions and political parties of the opposition. It participates in the appointment of the Chief Justice, the President of the Constitutional Court and the Constitutional Court Judges, and it selects the Judges of all other courts. As an institution it provides a broadly based selection panel for appointments to the Judiciary and provides a check and balance to the power of the Executive to make such appointments. In the absence of any obligation to establish such a body, the fact that it could have been constituted differently, with greater representation being given to the legal profession and the Judiciary, is irrelevant. Its composition was a political choice which has been made by the CA within the framework of the CPs."

[36] *Hlophe v Judicial Service Commission* (above n8) at para 32.

(WCC):

". . . [I]t is clear to me that the JSC has been constructed in a structured and careful manner.

. . . The Constitution gives its considered attention to persons who sit on the JSC when it is called upon to determine, *inter alia*, matters relating to judicial misconduct."

And in *JSC v Cape Bar (SCA)*, the SCA stated that:

"I believe it is clear from section 178 of the Constitution that the JSC has been created in a structured and careful manner.""[37]

[61] Public confidence in the judiciary's composition and administration of justice is vital. This was emphasised by the Constitutional Court in *Van Rooyen*[38] as follows:

"[32] That the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be doubted. The reasons for this are made clear by the Canadian jurisprudence on the subject, particularly in *Valente v The Queen* where Le Dain J held that:

'Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal be perceived as independent and impartial, and that the test for independence should include that perception.' [39]

The jurisprudence of the European Court of Human Rights also supports the principle that appearances must be considered when dealing with the independence of courts."

[62] In similar terms, the Constitutional Court in *Glenister v President of the Republic of South Africa and Others*[40] referring to its decision in *Van Rooyen*,[41] emphasised the importance of public perception and confidence in the independence of the judiciary:

"This Court has indicated that 'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. This was said in

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[37] Footnotes omitted.
[38] *Van Rooyen* (above n30) at para 32.
[39] Emphasis added.
[40] [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 207.
[41] *Van Rooyen* (above n30) at para 32 the Constitutional Court endorsed the finding in *Valente v The Queen* (1986) 24 DLR (4th) 161 (SCC) at 172 that the test for independence should include the public.

connection with the appointment procedures and security of tenure of magistrates. By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence."

Appointment criteria for judges

[63] To fulfil its constitutional mandate to safeguard our constitutional democracy and to promote a strong and independent judiciary, the JSC must ensure that only suitably qualified, fit, and proper individuals are appointed to judicial office.[42] The relevant part of section 174 reads as follows:

"(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African Citizen.

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa, must be considered when judicial officers are appointed."

[64] The legitimacy of the judicial appointment process is further integral to the judiciary's moral authority and integrity, and maintaining public confidence in the institution.[43] To this end, commissioners must rigorously assess each candidate's fitness and propriety, including their integrity, dignity, humility, judgment, character, honesty, and trustworthiness.

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[42] Section 174(1) of the Constitution. See also the JSC's Summary and Explanation of the Criteria and Guidelines used by the Judicial Service Commission when considering Candidates for Judicial Appointment.

[43] *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (*Mamabolo)*at para 16: "It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights - even against the state."

[65] The NA's means of achieving the purpose behind the appointment of judges was to designate Dr Hlophe as a member of the JSC.

Appointment criteria for commissioners

[66] One of the issues in dispute is whether the "fit and proper" criteria are applicable to the designation for appointment to the JSC from among MPs to serve on the JSC.

[67] We have referred to the view articulated by the Speaker, Dr Hlophe, and MK that, apart from the requirement that a designee must be drawn from MP's, there are no further criteria, and more specifically, no requirement, on a proper interpretation of section 178(1)(h), that a designee must be "fit and proper". Dr Hlophe also insists that, for as long as he remains a member of the NA, he is entitled to be nominated to serve on the JSC. MK has also unequivocally stated that it has no intention of replacing Dr Hlophe as its designated member to the JSC.

[68] Even if section 178 (1) (a) – (k) of the constitution does not explicitly prescribe to the NA that members to be designated to the JSC must be "fit and proper," we are enjoined to interpret constitutional provisions in a manner that promotes the values of an open and democratic society based on human dignity, equality and freedom.[44] Additionally, we have to consider principles such as the rule of law, integrity, and public trust. Chief Justice Dickson of the Canadian Supreme Court remarked as follows in *Hunter et al. v. Southam Inc.*[45] when dealing with interpretation of constitutional provisions:

> "The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a

[44] Section 39 of the Constitution.
[45] *Hunter et al. v. Southam Inc.* [1984] 2 SCR 145, Canadian Supreme Court case number: 17569.

last will and testament lest it become one. "

[69] The question whether 'fit and proper' criteria are applicable was addressed in *Helen Suzman Foundation*[46] by Madlanga J with reference to section 178(1)(a) – (k) of the Constitution. He emphasised the importance of ensuring that those entrusted with the responsibility of nominating and designating individuals for membership of the JSC approach this task with the requisite seriousness and diligence. Madlanga J had no difficulty in holding that the obligation to appoint only individuals who are "suitably qualified for the position" as judges equally applies to those entrusted with "nominating, designating, or electing" individuals for membership of the JSC. He also cautioned that rules that threatened the ability to appoint the best candidates as judges "would have serious consequences for the judiciary and, consequently, our constitutional democracy as a whole":[47] The Constitutional Court held that:

> "[36] In order to assess the impact of the disclosure of deliberations on the selection process properly, it is worth having a close look at who make up the JSC. Some become members of the JSC by virtue of the office they hold. These are the Chief Justice, the President of the Supreme Court of Appeal, the Cabinet member responsible for the administration of justice, and – when the JSC is considering matters relating to a specific division of the High Court – the Judge President of that division and the Premier of the province concerned. The remaining members are nominated, designated or elected by a variety of bodies and the President. They are: one Judge President designated by the Judges President; two practising advocates nominated from within the advocates' profession; two practising attorneys nominated from within the attorneys' profession; one teacher of law designated by teachers of law at South African universities; six persons designated by the National Assembly from amongst its members; four permanent delegates to the National Council of Provinces with a supporting vote of at least six provinces; four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly. All those who are nominated – and not designated or elected – are appointed by the President.
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> [37] Since courts play a crucial role in our constitutional democracy, without doubt the JSC's function of recommending appointments to the senior judiciary is of singular

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[46] *Helen Suzman Foundation* (above n1) at paras 36 - 7.

[47] *Id* at para 34.

> importance. Bearing in mind the importance of this function, I do not think it unreasonable to expect that those that bear the responsibility of nominating, designating or electing individuals for membership of the JSC will take their responsibility seriously and identify people who are suitably qualified for the position. Of course, we cannot be blind to some bad appointments to a variety of senior positions that we have witnessed in litigation that has come before the courts. But that is not reason enough to make an assumption that the JSC may well be saddled with bad appointments. As for those whom the Constitution has identified for membership by virtue of their office, I cannot second-guess the framers of the Constitution in selecting the relevant offices. If anything and barring individual shortcomings which – from time to time – do manifest themselves even in the highest and most respected of offices, these offices are eminently qualified for membership of the JSC."[48]

[70] Requiring that "those that bear the responsibility of nominating, designating or electing individuals for membership of the JSC will take their responsibility seriously and identify people who are suitably qualified for the position",[49] must mean more than simply requiring that designees for appointment to the JSC meet the basic eligibility criterion of being MPs or advocates or attorneys. It means that, to fulfil its constitutional mandate of appointing judges who will uphold the legitimacy of the judiciary and the spirit and tenets of the Constitution, the designating body (the NA) must ensure that the process for the designation and appointment of those responsible for selecting judges is subject to stringent standards. Most importantly, the NA, as the designating authority, must, in exercising its discretion, designate from among the nominees' individuals who are not only formally eligible but who are also substantively suited for appointment to the JSC. The judiciary's legitimacy depends heavily on public trust and respect. Once public trust in the judiciary is eroded, democratic foundations are broken and chaos is bound to descend.

[71] As already pointed out, designating a person who is not fit and proper to serve on the JSC undermines the constitutional imperative set out in section 165(4) of the Constitution. Such a designation not only erodes public confidence in the independence, impartiality, and dignity of the judiciary but also compromises the integrity and credibility of the JSC itself. Any act that diminishes public respect for the judiciary constitutes an affront to the foundational values of our constitutional democracy.

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[48] Emphasis added and footnotes omitted.
[49] *Helen Suzman Foundation* (above n1) at para 37.

[72] The Full Court in *Hlophe v Judicial Services Commission*,[50] in similar terms, went on to explain that "[w]hen choosing judges, the JSC acts as the selection panel of the nation. When disciplining judges, the JSC serves as the jury of the nation".[51] The Court further held:

> "[50] In summary on this point, if the JSC is to choose persons who can enjoy public credibility as fit for purpose as judges and to discipline judges for their failure to adhere to the norms of the judicial role, the JSC had to be constructed to meet democratic norms so that it could make a claim for its own public credibility in a democratic society. Its representative character is therefore an essential component of its structure, and moreover, of its mode of functioning."

[73] Other regional instruments, such as the Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers ("the Lilongwe Principles"), are also instructive when interpreting the NA's powers in terms of section 178(1)(h) of the Constitution. These principles were adopted at the Southern African Chief Justices' Forum Conference and Annual General Meeting, Lilongwe held on 30 October 2018. Some of the important principles from the Lilongwe Principles are highlighted by FUL in its founding affidavit. These include:

(a) The selection and appointment authority (of judicial officers) should be independent and impartial;[52]

(b) There is a need for adequate separation between the administration of the selection and appointment authority (the JSC) from any factors which may affect the integrity of the process.[53]

(c) Judicial independence is ensured through the integrity of the selection and appointment process along with security of tenure of judicial officers. This process enhances public confidence and trust in the administration of justice.[54]

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[50] *Hlophe v Judicial Service Commission* (above n8).
[51] *Id* at para 48.
[52] Principle (ii) the Lilongwe Principles.
[53] *Id.*
[54] Principle (i) the Lilongwe Principles.

Events after the impeachment of Dr Hlophe

[74] We have already briefly referenced the facts that led to the impeachment of Dr Hlophe. These are well-known, and it would serve no purpose to regurgitate the extensive material presented to the Judicial Tribunal and the JSC. That said, the dispute now before us must be determined not only in light of the unprecedented circumstances surrounding Dr Hlophe's impeachment, but also with reference to the events that unfolded thereafter, particularly following the delivery of the Full Court's judgment in Part A. These subsequent developments are not only pertinent to the question of Dr Hlophe's continued suitability to serve on the JSC but also bear on the issue of whether a costs order should be granted in these proceedings.

[75] Dr Hlophe does not accept the findings against him by the JCT, the JSC, the NA, and the courts and maintains that no legal process was followed to remove him from office. He further asserts that the decision to impeach him was political. He states that -

> "There was no legal process followed by the National Assembly to impeach me and the law which included holding a proper hearing to receive and evaluate the evidence was simply sacrificed at the altar of political expediency."[55]

[76] Dr Hlophe also says that the mere fact that he did not accept the findings of "the JSC, the Full Court in the Gauteng High Court Division, the NA's hasty and unconstitutional conduct does not mean that [he undermines] the judiciary". [56]

[77] After he was sworn in as an MP, he said the following in an interview with the SABC:[57]

> "The decision to impeach me was a political decision. I said it before. I was impeached and maintain that. There was no law that was ever used there. It was politics, and I do believe that the fact that I was perceived as being closely associated with President Zuma is another reason for the decision that was taken."

[78] He also claims that he was being "persecuted" and that he was "dismissed summarily from office" and "just fired and treated like a dog".[58] The same arguments had been raised

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[55] Dr Hlophe's Answering Affidavit to FUL at para 102.
[56] *Id* at para 98.
[57] 10 July 2024.
[58] FUL Founding affidavit at para 104.

before and were rejected by the Tribunal, the Portfolio Committee, and the NA.

Judgment of Wilson, J

[79] Dr Hlophe and MK also sought to circumvent the consequences of an interdict[59] in terms of which Dr Hlophe was precluded from sitting as a member of the JSC, by launching an urgent application before the Johannesburg Division of the High Court.[60] In this application, they sought to interdict the JSC from conducting the October 2024 interviews for important judicial appointments without Dr Hlophe's presence. Wilson, J, dismissed the application. Although stating that he could not deal with the scandalising of the Court in such an urgent hearing, the court, nonetheless, said the following:

> "22 FUL amplified its submissions by reference to a press release issued by MK in the aftermath of the Full Court's ruling. As Mr. Mpofu accepted, the content of that press release is deeply troubling. I will not give it credence by repeating its contents here. It is enough to say that the press release constituted a gratuitous and wholly unjustified attack on the Full Court's decision, and on the judiciary in general. It reflects poorly on MK, and upon the individuals who are responsible for drafting and issuing it. Dr. Hlophe, and former President Jacob Zuma, who is the leader of MK Party, have been invited to dissociate themselves from it. I hope that they do so.
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> 23 It may be true, as Mr. du Plessis submitted, that the press release was contemptuous and that, for that reason, the right to free expression does not extend to it. But it forms no part of my function to make that determination here. The issue of which side of the line the press release falls was not fully argued before me, and there is no reason why the contempt it may very well have constituted cannot be explored, and if necessary punished, in other proceedings".

The application for leave to appeal Part A of the Full Court

[80] After the Full Court had granted Part A in these proceedings, Dr Hlophe launched a fresh attack on the credibility of the judiciary by attacking the integrity of the presiding judges. In its unreported judgment refusing leave to appeal the judgment of the Full Court handed

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[59] On 27 September 2024, a Full Court sitting in the Western Cape interdicted and restrained Dr. Hlophe from "participating in the processes of" the JSC: *Democratic Alliance v Hlophe* (above n12).
[60] *Umkhonto Wesizwe Party and Another v Judicial Service Commission and Others* [2024] ZAGPJHC 992 at paras 22 - 3.

down in Part A, reference is made to certain remarks made by MK and Dr Hlophe after their judgment in Part A.[61] The Full Court[62] dealt with the public statements in its judgment refusing Dr Hlophe's and MK's applications for leave to appeal with punitive costs as follows:

> "42. Ms February refers to "MK Party's contemptuous statement on the part A judgment" and says "following the delivery of judgment by this court, the MK party chose to launch a vitriolic attack not only against the court, but also against non-governmental organisations that had challenged the designation of Dr Hlophe by the National Assembly."
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> 43. She describes how the statement refers to the "continued lynching of Dr Mandlakayise Hlophe" and how it went on to state "the MK Party notes the incompetent, irrational, absurd and blatantly political judgment of the Western Cape High Court, which is regrettable but not surprising."
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> 44. This wanton attack on the judiciary cannot and shall not be tolerated by our courts in the interests of preserving the rule of law and safeguarding the institutional integrity of our judicial system.
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> 45. ...
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> 46. The media statement was made by a party which forms part of the Legislature and shares the responsibilities imposed by section 165(4) of the Constitution on organs of the state including the Legislature.
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> 47. The obligations which are clearly stated in s. 165(3) leave no room for doubt regarding the obligation imposed on state organs such as Parliament and parties such as the MKP and it states: '(3) No person or organ of state may interfere with the functioning of the courts'. The publication of the said statement is an affront to these obligations.
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> 48. Ms February makes further references to the attack in the statement, which was wide-ranging and spewing venom at all the participants in the democratic project, and in that vein stated:
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> 'As history has shown, it was the racist DA, supported by the ANC of Cyril Ramaphosa

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[61] On 6 February 2025, MK lodged an out-of-time application for leave to appeal to the Constitutional Court against the Full Court's Part A judgment.

[62] *Democratic Alliance v Hlophe and Others*, unreported judgment of the Western Cape Division, Cape Town, case numbers 16170/2024, 16771/2024, 16463/2024 (20 December 2024) at paras 42-55.

that voted for the impeachment of Dr Hlophe as a judge. The same DA now colluding with Freedom Under Law and Corruption Watch – racist agents of white monopoly capital masquerading as civic organisations – who want to usurp the power of the Legislature using the Judiciary.'

49. Describing a judgment in the terms quoted above is deeply offensive, disrespectful and contemptuous. It grossly exceeds the bounds of legitimate comment and is deliberately intended to impugn the dignity and effectiveness of the court and the judiciary.

50. Instead of dealing with the facts and the law the applicants chose to attack the respondents utilising baseless and highly defamatory statements that FUL is racist and an 'an agent for white monopoly capital'. This smacks of gutter politics and can hardly be expected of an organisation that represents voters in parliament.

51. ...

52. None of Mr Zuma, Dr Hlophe and MK has publicly distanced themselves from the scandalising statements made of this Court.

53. Ms February also makes reference to the Sunday Times of 13 October 2024 where Dr Hlophe was reported as saying:

> 'We lost two successive games, and you know what happens in South Africa - you lose, you lose, you lose. I was a judge myself for 29 years. It did not surprise me when we lost, because we know the judiciary is captured. It is as simple as that.'
> This contemptuous and unsubstantiated statement implicating both the Full Court of the Western Cape High Court and Judge Wilson of the Gauteng Division and the entire judiciary was made to a national newspaper without an iota of evidence. This speaks to Dr Hlophe denigrating this Court and the judiciary at large."[63]

[81] Notwithstanding the findings of the Full Court regarding these public statements, both Dr Hlophe and MK continue to stand by those statements in their supplementary answering affidavits in these proceedings.

[82] Dr Hlophe, in *Hlophe v Judicial Services Commission*[64] relied on his right to freedom of speech to justify his utterings denigrating the judiciary. The Full Court in *Hlophe* was

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[63] Emphasis added.
[64] *Hlophe v Judicial Services Commission* (above n8) at para 130.

clearly not persuaded by the argument and said the following:

> "[130] The contention that section 16 freedom of expression rights arise at all is misconceived. There is no room to prevaricate about the role of a judge requiring the imposition of several ethical restraints to which the general public are not bound. Though everyone is at liberty to think what they like, judges are bound to conduct themselves at all times in a manner that protects and promotes the integrity of the legal process. In that context, it is not open to a judge in a private conversation to blurt out his preferences, biases or opinions to a fellow judge who, to his knowledge, is preparing a judgment on those very issues about which he has a firm view. Every ethical judge would expect the same restraint from other colleagues."

[83] Dr Hlophe not only attacked the judges who presided in Part A of these proceedings, he also criticised other judgments that have gone against him. He does not simply describe these decisions as incorrect; he, in fact labels them as "an abuse of judicial authority"[65] and says that "[i]t appears to be that there was a general political drive to have my [removal] achieved irrespective of the legalities of it".[66]

[84] Dr Hlophe further blames organisations such as FUL for his impeachment, claiming that he was "unconstitutionally removed from office through the dubious interference of organisations like the FUL."[67] Dr Hlophe further made it clear that he planned to promote in the JSC the conduct that led to his impeachment and that "I will make sure that judges are not victimised for holding private views and expressing them to their colleagues".[68]

[85] But, as pointed out by the Constitutional Court in *S v Mamabolo*,[69] there is a difference between legitimate criticism of the judiciary and scandalising the court:

> "An important distinction has in the past been drawn between reflecting on the integrity of courts, as opposed to mere reflections on their competence or the correctness of their decisions. Because of the grave implications of a loss of public confidence in the integrity of its judges, public comment calculated to bring that about has always been regarded with considerable disfavour. No one expects the courts to be infallible. They are after all human institutions. But what is expected is honesty. Therefore the crime of scandalising

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[65] Dr Hlophe's Answering Affidavit to FUL at para 120.
[66] *Id* at para 149.
[67] Dr Hlophe to FUL Part A AA at para 133.
[68] *Id* at para 135.
[69] *Mamabolo* (above n43).

is particularly concerned with the publication of comments reflecting adversely on the integrity of the judicial process or its officers."[70]

[86] It is concerning that Dr. Hlophe continues to refuse to acknowledge any wrongdoing or accept accountability, despite the adverse findings made against him by the JCT, the JSC, and the courts. He maintains that the conduct that was found to constitute gross misconduct should be permissible amongst judges. He says that: it "should not be our culture that judges are removed from judicial office because of private remarks such as those I made to the two judges"[71] and undertakes that as an MP he will be "advocating for a culture where judges freely engage with each other – which culture has been confirmed by numerous judges appearing before the JSC in which they have declared that they unreservedly assist new judges or other colleagues with their work".[72] He also undertakes to promote this culture in which "judges are freed from the fear of retribution and arbitrary removal from judicial office for remarks that they make to each other on pending matters".[73]

FUL's supplementary affidavit and supplementary replying affidavit

[87] In its supplementary affidavit and supplementary replying affidavit, FUL referred the Court to five media publications, all published after the Full Court's judgment was handed down, each containing further scandalous attacks on the judiciary.

[88] FUL accepts that some of the denigrating statements were made after the NA had decided to designate Dr Hlophe and thus were not before the NA at the time. FUL also accepts that its review is based on the facts set out in their founding affidavit and not those set out in its supplementary and supplementary replying affidavit. FUL, however submitted that it is important that these further and continued denigration of the judiciary are nonetheless relevant to this Court's broad remedial powers.[74] FUL further submitted that the evidence is relevant for at least three reasons. The first is that Dr Hlophe and MK have denied that Dr Hlophe disrespects or seeks to undermine the judiciary but, if regard is had to more recent statements, little reliance can be placed on Dr Hlophe's denials and, as FUL

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[70] *Id* at para 33.
[71] Dr Hlophe in FUL Part A AA at para 27.
[72] *Id* at para 23.
[73] Dr Hlophe answering affidavit in FUL Part A at para 25.
[74] See, for example, *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC). In particular, the Court must consider the consequences of any remedial action under section 172(1)(b).

submitted, should be rejected on the papers. Secondly, the recent public statements make it clear that Dr Hlophe has every intention to continue to denigrate the judiciary. As such, FUL submits, Dr Hlophe is unsuitable to sit on the JSC. Thirdly, FUL submits that the recent further conduct of Dr Hlophe and MK; their continuing and unrepentant attacks against the Full Court's decision in Part A; and their emphatic reaffirmation of those statements in Part B makes it clear that a punitive costs order is warranted. In one of the Press Statement[75] it is said for instance that:

> "Statement on the judgment of the Western Cape High Court in favour of the continued lynching of Dr. Mandlakayise Hlophe.
>
> MK notes the incompetent, irrational, absurd and blatantly political judgment of the Western Cape High Court, which is regrettable but not surprising.
>
> The judgment constitutes gross judicial overreach and disregards the provisions of the very constitution it purports to uphold.
>
> This constitutional stalemate is deliberately created by the incompetent, politically-driven and compromised Judiciary. This horror judgment will be subject to an immediate appeal."

[89] FUL addressed a letter to the attorneys for MK and Dr Hlophe after the first press statement stating that if MK or Dr Hlophe objected to the contents of MK's media statement then they should publicly say so. On 3 October 2024, MK's attorneys sent a letter stating that the letter of 2 October 2024 "fell through the cracks due to the current urgent proceedings" and undertaking "to take instructions" after dealing with the urgent application.

Review

The standard of review

[90] Except for MK, it is not disputed that the NA's decision to designate six members to the JSC constitutes administrative action under PAJA. In this regard section 1 of PAJA provides that administrative action comprises -

> "any decision taken, or any failure to take a decision, by-
>
> (a) an organ of state, when

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[75] FUL's supplementary affidavit.

(i) exercising power in terms of the Constitution or a provincial constitution; or

(ii) exercising public power or performing a public function in terms of any legislation;

...

which adversely affects the rights of any person and which has a direct, external legal effect..."

[91] Having regard to the facts:

(a) The NA is an organ of state.

(b) The decision to designate Dr Hlophe to the JSC was taken in terms of section 178(1)(h) of the Constitution, read with the Judicial Service Commission Act. The mere fact that the source of the power is in the Constitution does not mean that the power is not administrative in nature. Section 1(a)(i) of PAJA expressly provides that administrative action includes decisions taken by an organ of state when "exercising a power in terms of the Constitution". That could not be the case if a constitutional source was dispositive of the character of a decision.

(c) The decision adversely affects rights in that the decision has the potential to affect the rights of applicants applying for judicial positions before the JSC, as well as the constitutional rights of all South Africans.

(d) Lastly, the decision has a direct, external, legal effect of determining who will fill one of the key positions on the JSC. Although the "legislative functions of Parliament, a provincial legislature or a municipality" are excluded from the ambit of section 1 of PAJA, no provision is made for the exclusion of the administrative functions of the NA. The designation function is not a legislative function. It is a function performed by the NA in terms of section 178(1)(g) of the Constitution.

[92] The NA's function of designating six members is thus "administrative action" as defined in PAJA. The Speaker does not dispute the contention that the decision in question does not constitute a legislative function excluded from the definition of "administrative action" under PAJA and accepts that the NA's function of designating six members amounts to "administrative action" as defined therein. Dr Hlophe and MK also do not deny that the decision

amounts to administrative action.

[93] MK takes issue with the contention that PAJA applies to the review and submits that the decision to designate Dr Hlophe is only subject to review under the principle of legality. MK submits that the NA's decision is expressly excluded from PAJA because section 1(a)(dd) of PAJA applies. This is incorrect. Section 1(a)(dd) only applies to the legislative functions of the NA. MK also claims that the exclusion provided for in section 1(a)(gg) of PAJA applies to the present matter. We disagree. Section 1(a)(gg) only applies to decisions taken by the JSC in terms of any law. It does not apply to the decision of the NA to designate six of its members to the JSC. The challenge in this matter is the NA's decision – not any decision taken by the JSC.

[94] MK also argues that the NA took one "indivisible decision" to designate six persons to the JSC and that, should it be found that the decision is irrational, all six designees must be removed. We do not agree. There exists no reason why each of these nominations is dependent on the other. Consequently, nothing prevents a challenge to the designation of Dr Hlophe only. Moreover, having regard to the unusual facts of this case, there exists a rational basis for treating Dr Hlophe differently simply on the basis that he is the only representative of the NA who was designated to sit on the JSC after the NA impeached him for having committed gross misconduct and whose continued presence as a judge would undermine the public's confidence in the independence of the judiciary.

[95] Lastly, the Full Court in Part A has already dealt with the applicability of PAJA:

> "[57] We are satisfied that the NA's decision to designate six of its members to the JSC, including Dr Hlophe, amounts to administrative action under PAJA. It is an organ of State, either exercising a power in terms of the Constitution, or exercising a power or performing a public function in terms of any legislation. In exercising such power, a decision was taken which adversely affects the constitutional rights of South African citizens and has the potential to affect the rights of future applicants applying for judicial appointment. No doubt, the NA's decision was not a legislative function excluded from the definition of administrative action, an aspect which the Speaker does not take issue with. Neither Dr Hlophe, nor ATM further denies that the decision amounts to administrative action. Only MK states that PAJA is inapplicable. In any event, if PAJA might be held to be inapplicable, the review court would be entitled to

adjudicate the dispute based on the doctrine of legality in due course".[76]

[96] In conclusion, therefore, we agree with the submission that the impugned decision constitutes administrative action and is reviewable under PAJA. Moreover, the designation made by the NA clearly amounts to the exercise of public power under the Constitution and is therefore subject to the principle of legality. Each of the grounds set out below satisfies the threshold for judicial review under either PAJA or the principle of legality.

Material error in law

[97] When designating MPs to the JSC, the NA is required to consider whether they are suitable for appointment. Not only did the NA not exercise a discretion, it mistakenly laboured under the impression that it did not even have such discretion in terms of section 178(1)(h) of the Constitution. As a result, it designated Dr Hlophe without any proper consideration of his suitability, merely because his political party had nominated him. The designation of Dr Hlophe was thus based on a material error of law.

[98] The power of the NA to "designate" does not mean that it may blindly follow the dictates of any political party. It must exercise its own discretion independently. In designating members to the JSC, the NA exercises public power and must do so in a manner consistent with the Constitution and the rule of law. The following considerations support this interpretation of section 178(1)(h): Firstly, the constitutional text explicitly vests the power of designation in "the National Assembly" as an institution, not in individual political parties. The only limitation imposed is that at least three of the six designated members must be drawn from minority parties. Nothing in the Constitution authorises the NA to delegate or abdicate its responsibility to political parties. Yet, in the present instance, the NA effectively did so. Secondly, the record of the proceedings demonstrates that the NA approached the designation process as though it were appointing representatives to parliamentary committees or sub-committees. This was a fundamental error. The JSC is not a committee or subcommittee of Parliament, but an independent constitutional body entrusted with safeguarding the integrity of the judiciary.

[99] The Speaker thus erred in her view that the sole requirements for designation were that a nominee must be a member of the NA and that half of the designated members must

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[76] *Democratic Alliance v Hlophe* (above n12) at para 57.

be drawn from opposition parties. She further erred in her view that no additional criteria were applicable and, in particular, that there was no specific requirement for a nominee to be "fit and proper" to be appointed to serve on the JSC. The Constitutional Court per Madlanga, J, has made it clear that the individuals selected to sit on the JSC must be "suitably qualified" candidates. It follows that the NA should at least have considered whether Dr Hlophe is suitably qualified for appointment.

[100] In *S v Zuma*,[77] the Constitutional Court held that "the Constitution must be interpreted so as 'to give clear expression to the values it seeks to nurture'[78] and that 'a Constitution 'embodying fundamental rights should as far as its language permits be given a broad construction".[79] The Constitutional Court affirmed the proper approach to interpreting the Constitution with reference to *S v Mhlungu*[80] where the Constitutional Court held that the Constitution must be "broadly, liberally and purposively [be] interpreted so as to avoid 'the austerity of tabulated legalism'."

[101] The Constitutional Court has affirmed that a proper interpretation of the Constitution entails not only a textual analysis of its express language but also a purposive reading of the relevant provisions, viewed through the lens of "the constitutional imperatives of the rule of law, the separation of powers and judicial independence".[81]

[102] The words "fit and proper" are only used four times in the Constitution: (i) In section 174(1) in respect to the appointment of judges. (ii) Section 193(1) regarding the appointment of individuals to serve as Public Protector and other commissions created by Chapter of the Constitution. (iii) The appointment of the Auditor-General in section 193(3) of the Constitution. (iv) Section 193(3) of the Constitution deals with the appointment of commissioners for the Public Service Commission.

[103] Merely because section 178(1)(h) of the Constitution does not expressly require that a designated nominee must be fit and proper for appointment, does not imply that it would be

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[77] *Zuma and Others v The State* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) at paras 15-8, applied in *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC) at para 55.
[78] Referring to *Qozoleni v Minister of Law and Order* 1994(3) SA 625(E); 1994(1) BCLR 75(E) at 80.
[79] Referring to *S v Moagi Attorney-General v Moagi* 1982(2) Botswana LR 124 184.
[80] [1995] ZACC 4; 1995 (3) SA 867; 1995 (7) BCLR 793 (CC) at para 8.
[81] *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) at para 20.

lawful or rational to appoint individuals who are not fit and proper. Such requirement is necessarily implied through a proper interpretation of the Constitution as a whole. As already explained, the Constitutional Court in *Helen Suzman Foundation* made it clear that those designated to serve on the JSC must be fit and proper candidates. This the NA has failed to appreciate.

Section 165(4) of the Constitution: Rationality

[104] Section 178(1)(h) must also be read with section 165(4) of the Constitution, bearing in mind that the fundamental purpose of the JSC is to ensure judicial independence and to promote public confidence in the judicial appointment process by recommending for appointment only people who are fit and proper. As pointed out above, the Constitutional Court in *Helen Suzman Foundation* made it clear that bodies responsible for designating individuals to the JSC are obliged to approach this task with seriousness and ensure that only those who are suitably qualified for the position are selected from the nominees. To hold otherwise would offend against section 178(1)(h) read with 165(4) of the Constitution and consequently render them ineffective.

[105] The means adopted by the NA in designating Dr Hlophe merely because he is an MP following his nomination by MK, is not rationally connected to the constitutional purpose underlying the power conferred to it by section 178(1)(h) of the Constitution. Dr Hlophe, as indicated, was found guilty of gross misconduct and removed from judicial office. He has refused to acknowledge the impropriety of his conduct and continues to engage in scandalous attacks on the judiciary. His presence on the JSC ineluctably undermines the legitimacy of the judicial appointment process. Given his serious breach of the judicial oath, Dr Hlophe is plainly unfit to assess the suitability of candidates for judicial appointment and has exhibited a marked deficiency in the qualities essential to the office of a judicial officer.

[106] Section 165(4) of the Constitution requires state organs - in the present matter the NA - to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility, and effectiveness. The designation process in terms of section 187(1)(h) is designed to uphold the judiciary's moral authority and foster public confidence in its integrity and independence. A decision by the NA will be unlawful and unconstitutional if it frustrates, rather than assists or protects, the independence, impartiality, dignity, accessibility, and effectiveness of the courts. The designation of an individual who himself has been found to

be unfit to continue serving as a judge, to participate in the selection of judges gravely compromises the integrity of the selection process and undermines public confidence in the judiciary's ability to fulfil its constitutional mandate. The decision of the NA is unlawful and unconstitutional as it frustrates the requirements in section 165(4) of the Constitution. Accordingly, the designation of Dr Hlophe to the JSC cannot be said to advance the constitutional purpose of ensuring the appointment of fit and proper candidates to the bench. His designation was therefore irrational and therefore falls to be reviewed.

Relevant and irrelevant considerations

[107] The decision by the NA falls to be set aside on the basis that it failed to properly consider relevant considerations but instead considered various irrelevant considerations in arriving at its decision.

[108] The NA departed from the premise that no provision in the Constitution bars the designation of a member of the NA to the JSC. Dr Hlophe submitted that the fact that he was previously a judge and was removed is "totally irrelevant".

[109] As previously pointed out, this interpretation of section 178, read with section 165 of the Constitution, is untenable. The NA was obliged to consider a glaringly relevant fact, namely that the NA had recently impeached Dr Hlophe for gross misconduct. Instead, the NA considered the following irrelevant considerations:

(a) That the NA must, in terms of the NA's ordinary practice or convention, accept the decision of a political party in appointing a representative to a committee or subcommittee of the Assembly. The answer to this simply is that the practice or convention followed by the NA cannot displace what section 178(1)(h) of the Constitution requires.

(b) The JSC is not a committee or subcommittee of the NA.

(c) The only requirement is that at least three of the six candidates must be representatives of minority parties. Despite having been nominated by the respective parties, the NA must exercise discretion to designate six members of the National Assembly to the JSC.

Conclusion of the review

[110] Section 1(c) of the Constitution entrenches the rule of law as a founding value in our constitutional order and affords the courts the power to set aside any unlawful conduct by an organ of state.[82] The NA, similar to all other organs of State, is bound by the Constitution and is required to comply with the constitutional obligations it imposes. We are satisfied that the decision to designate Dr Hlophe must be reviewed and set aside on each of the grounds advanced. The NA's decision is inconsistent with section 165(4) of the Constitution. This inconsistency, in and of itself, renders the decision unlawful. The National Assembly's designation of Dr Hlophe was neither a lawful nor rational decision considering his impeachment and the reasons therefor as traversed above.

Remedy

[111] Apart from seeking a review of the decision by the NA to designate Dr Hlophe as one of its representatives to the JSC, the DA, Corruption Watch and FUL seek a declaration that the NA may not designate Dr Hlophe to serve on the JSC. FUL further seeks an order remitting the matter back to the NA for reconsideration.

[112] In exercising a discretion to grant a declaratory order, a court must do so with due regard to all relevant facts. One of the factors that the court must take into consideration is whether the applicant/s has an interest in an existing future or contingent right or obligation.[83] A court must also consider whether a declaratory order can clarify and finalise disputes that, if unresolved, may have far-reaching consequences for each party.[84] The present matter is plainly such a case.

[113] The NA has fundamentally misunderstood the nature of its power to designate six members to serve on the JSC. We concur with the submission that the constitutional principles implicated in this matter extend beyond the specific facts of the present case and will bear significantly on how the NA exercises its powers under section 178 of the Constitution in future. As submitted by FUL, the granting of declaratory relief is essential to uphold the integrity of the judicial appointment process, the independence of the judiciary,

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[82] *SA Broadcasting Corporation SOC Ltd and Another v Motsoeneng and Others* [2024] ZAGPJHC 688 ;2025 (2) SA 571 (GJ) at para 7 with reference to *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40 ;2018 (2) SA 23 (CC); 2018 (2) BCLR 240.

[83] *Cordiant Trading CC v DIMLER Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; 2005 (6) SA 205 (SCA) at para 18.

[84] *Competition Commission v Hosken Consolidated Investments Ltd and Another* [2019] ZACC 2;2019 (3) SA 1 (CC); BCLR 470 (CC) at paras 59 and 81.

and the broader public interest.

[114] The Speaker has indicated that a new designation will be required given Dr Hlophe's resignation from the JSC. She has further acknowledged that any future designation by the NA must be guided by this Court's determination on two issues: firstly, whether the NA has a discretion to assess the fitness of a nominee for designation under section 178(1)(h) of the Constitution, and, secondly, whether it acted lawfully or unlawfully in making the previous designation. We have addressed both these issues.

[115] What now remains is the question of whether this Court should grant a declaratory order to the effect that Dr Hlophe is not fit and proper to serve on the JSC, and, as a consequence, that the NA may not designate him to that position. Granting a declaratory order, which is a flexible remedy, will, in the words of the Constitutional Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*,[85] "assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values."

[116] Having regard to the specific circumstances surrounding the impeachment of Dr Hlophe and his subsequent conduct, we are satisfied that he is neither fit nor proper for designation to the JSC. As we have repeatedly emphasised, the participation of Dr Hlophe in the judicial appointments process risks eroding public confidence in the judiciary and thereby undermining its legitimacy and effectiveness. As previously stated, public disrespect for the judiciary amounts to an assault on constitutional democracy and must be firmly guarded against. Through the impeachment of Dr Hlophe, the NA has effectively already determined that his continued involvement in judicial affairs would diminish public trust.

[117] The fact that Dr Hlophe is highly qualified and the fact that he has served as a judge for many years, is not the point. The point is that he was removed from office for gross misconduct and continues to seriously threaten the independence of the judiciary. His doctorate from Cambridge and his numerous publications and time on the bench do not erase this critical fact. It is the presence of an impeached judge and the circumstances that gave rise to the impeachment that will prejudice the JSC's ability to do its work. Dr Hlophe's

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[85] [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 108. ; the Constitutional Court held: "It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated, should be observed."

academic ability does not cure this.

[118] As previously indicated, it is not necessary for us to find that no judge removed from office for gross misconduct may ever serve on the JSC. In this matter, however, we must consider the specific misconduct for which Dr Hlophe was impeached and the events that followed his impeachment. His conduct, as recorded in the judgment of the Full Court refusing leave to appeal Part A, is particularly pertinent, as it demonstrates a marked disregard for the authority and integrity of the courts. Dr Hlophe is therefore not only unfit to serve on the JSC because he was removed from judicial office for gross misconduct; he is also unfit because he has persistently sought to undermine the credibility of the JSC, the JSC's investigative processes into the allegations against him, and the judges who have presided over matters in which he was a litigant. In these circumstances, the granting of a declaratory order is justified.

[119] We should also, in passing, briefly refer to Dr Hlophe's reliance on foreign authority, which permitted persons in positions comparable to Dr Hlophe to serve on bodies comparable to the JSC. The European Court of Human Rights[86] was approached for an advisory opinion in a matter concerning the imposition of a prohibition on an individual to register as a candidate in the Seimas elections following her impeachment owing to her fleeing Lithuania in view of pending criminal proceedings. The advisory opinion was preceded by the judgment of the Lithuanian Constitutional Court which held that a prohibition that an impeached president may not hold public office, including parliamentary membership was disproportional.[87]

[120] In its advisory opinion, the European Court of Human Rights considered the circumstances under which the Lithuanian government could lawfully bar an impeached legislator (Ms. Paksas) from holding public office in the future. In brief, the European Court of Human Rights emphasized that the duration and scope of such a prohibition should be assessed primarily with reference to the nature of the functions the individual seeks to perform. The rationale for this is that the purpose of impeachment and the resulting restriction is not punitive in nature, but rather aimed at safeguarding the integrity of legislative

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[86] Advisory opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings. The advisory opinion was sought by the Lithuanian Supreme Administrative Court and is dated , 8 April 2022.
[87] *Paksas v Lithuania (34932/04)*. Judgment (Merits and Just Satisfaction) European Court of Human Rights (Grand Chamber) 6 January 2011.

institutions. Accordingly, any such prohibition must be framed principally in regard to the institutional requirements and the proper functioning of the office or body to which the person seeks admission.

[121] In reaching a conclusion, the European Court of Human Rights opined that the ban should be proportionate with due regard to all relevant circumstances including the "requirements of the proper functioning of the institution of which that person seeks to become a member, and indeed of the constitutional system and democracy as a whole in the State concerned."

[122] Apart from the fact that the European Court of Human Rights only expressed an opinion, the *Paksas* matter is distinguishable from the present matter on the facts and on the law. In that matter, the European Court of Human Rights was considering in what circumstances Lithuania could prohibit an impeached legislator from holding public office again. Here we are dealing with an impeached judge which in itself raises entirely different considerations pertaining to the importance of judicial integrity. The *Paksas* matter also does not assist Dr Hlophe from a legal point of view in light of the Court's opinion that bans on holding public office after impeachment are justified to protect the proper functioning of the institution of which that person seeks to become a member and indeed of the constitutional system and democracy as a whole in the State concerned.

Should the matter be remitted to the NA?

[123] Section 172(1)(a) of the Constitution empowers a court, when determining a constitutional matter or declaring any law or conduct inconsistent with the Constitution, to declare it invalid to the extent of that inconsistency. FUL seeks an order remitting the matter to the NA. In considering such an order, the court's discretion is guided solely by considerations of justice and equity.

[124] We have taken into account that Dr. Hlophe has since resigned from the JSC. Given our order declaring Dr. Hlophe unfit for designation in terms of section 178(1)(h) of the Constitution, a remittal would neither be just nor equitable and would not serve any practical purpose.

Costs

[125] The DA, FUL, and Corruption Watch seek costs against the respondents who oppose these applications, including the costs of two counsels. They also seek punitive costs against Dr Hlophe and MK on an attorney-client scale.

[126] Both FUL and DA rely on various public statements made by MK and Dr Hlophe, including accusations that FUL is "colluding" with the DA and has "an obsessive and fundamentalist agenda to obliterate my role in my country."

[127] FUL is further described as a "racist agents of white monopoly capital masquerading as civic organisations - who want to usurp the power of the Legislature using the Judiciary." The DA is described as "mercenaries of the white imperialist project who continue to seek to exhume and rebury Dr. Hlophe for his competence and excellence."

[128] Dr Hlophe also accuses Retired Judge Cachalia of abusing his position as a retired judge and spreading false and dishonest statements.

[129] President Mpati, Mr. Bizos, former Chief Justice Mogoeng, Mlambo JP, Kamphepe ACJ, Mbha J, and Premier Winde have all been accused of bias.[88]

[130] The judges who presided over Part A of these proceedings were also subjected to vitriolic attacks. The judgment in Part A was characterised as a "gross judicial overreach," allegedly for disregarding the very provisions of the Constitution it purported to uphold. The court was further accused of being "politically driven", and the judgment was disparagingly described as a "horror judgment".

[131] In *Minister of Cooperative Governance and Traditional Affairs v De Beer,*[89] the Supreme Court of Appeals regarded similar statements as sufficiently contemptuous that the court drew specific attention thereto in referring its judgment to the National Director of Public Prosecutions. In *Moyane v President Ramaphosa and Others*, the court similarly had this to say about unsubstantiated insults:[90]

> "[W]hen an award of costs is considered, which is within the discretion of the Court: 'It is a discretion that must be exercised judicially having regard to all relevant considerations. One

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[88] FUL's RA, at para 79.
[89] *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another* [2021] ZASCA 95; [2021] 3 All SA 723 (SCA) at para 118-9.
[90] *Moyane v President Ramaphosa and Others* [2018] ZAGPPHC 835; [2019] 1 All SA 718 (GP) at para 44.

such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolent or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case'. This principle has been applied throughout constitutional litigation and I will apply it in these proceedings. It is clear from my judgment that the conduct of the Applicant in these proceedings is particularly reprehensible. It is vexatious and abusive. Both the Office of the President and the Third Respondent have been attacked, insulted and defamed without any reasonable cause. Allegations impugning their integrity and character have been made regardless of the objective facts. Insults have been hurled at every conceivable opportunity. No reasonable or lawful grounds exist for such unwarranted attacks on the integrity of the First and Third Respondents. No cause of action has been made out for interim relief and the whole of the application is an abuse of the process of this Court. I cannot think of a single reason why this application should be classified as a bona fide attempt to secure or safeguard the Applicant's Constitutional, common law or contractual rights. I have set out the relevant considerations in my judgment and on the facts of the matter before me, there is in my view no reason whatsoever why I should not make a cost order against the Applicant. Not only is a cost order appropriate in this instance, but on the punitive scale of Attorney and client for the reasons that I have already mentioned. It is time that litigants realize that they cannot lightly make abusive allegations in Court affidavits under the mantle of safeguarding their constitutional rights, on the assumption that Court cost orders would not be granted against them. In my opinion, the facts of the matter before me clearly show that a punitive cost order against the Applicant is justified. His behaviour throughout these proceedings is abominable."[91]

[132] We agree with the submissions by FUL, the DA, and Corruption Watch that the statements made by MK and Dr Hlophe underscore their ongoing efforts to undermine the judiciary. Both his conduct and that of MK justify costs on a punitive scale.

Order

[133] In the premises, the following orders are made:

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[91] Emphasis added.

Case No. 16170/24 (Democratic Alliance v MJ Hlophe and Others)

1. The decision of the National Assembly taken on 9 July 2024 to designate the First Respondent as one of its representatives to the JSC is:

1.1 Declared unconstitutional and invalid; and

1.2 Reviewed and set aside.

2. It is declared that the National Assembly may not designate Dr. Mandlakayise John Hlophe to serve on the Judicial Services Commission in terms of section 178(1)(h) of the Constitution.

3. Dr Mandlakayise John Hlophe and the Umkhonto Wesiwe Party are ordered to pay the applicant's costs on an attorney and client scale, including the costs of two counsel on Scale C.

AND

Case no: 16771/2024 (Corruption Watch NPC v Speaker of the National Assembly and others)

1. The decision of the National Assembly taken on 9 July 2024 to designate the First Respondent as one of its representatives to the JSC is:

1.1 Declared unconstitutional and invalid; and

1.2 Reviewed and set aside.

2. It is declared that the National Assembly may not designate Dr. Mandlakayise John Hlophe to serve on the Judicial Services Commission in terms of section 178(1)(h) of the Constitution.

3. Dr Mandlakayise John Hlophe and the Umkhonto Wesiwe Party are ordered to pay the applicant's costs, including the costs reserved in Part A, on an attorney

and client scale, including the costs of two counsel on Scale C.

AND

Case No. 16463/24 (Freedom Under Law NPC v The Speaker of the National Assembly and Others)

1. The decision of the National Assembly taken on 9 July 2024 to designate the First Respondent as one of its representatives to the JSC is:

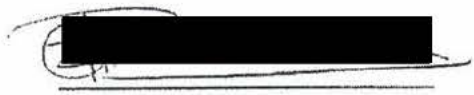
1.1 Declared unconstitutional and invalid; and

1.2 Reviewed and set aside.

2. It is declared that the National Assembly may not designate Dr. Mandlakayise John Hlophe to serve on the Judicial Services Commission in terms of section 178(1)(h) of the Constitution.

3. Dr Mandlakayise John Hlophe and the Umkhonto Wesiwe Party are ordered to pay the applicant's costs, including the costs reserved in Part A, on an attorney and client scale, including the costs of two counsel on Scale C.

MBHELE AJP
JUDGE OF THE HIGH COURT



BASSON J
JUDGE OF THE HIGH COURT

MUDAU J
JUDGE OF THE HIGH COURT

Appearances:

THE DA'S LEGAL REPRESENTATIVES

Counsel:	Ismail Jamie SC Michael Bishop Eshed Cohen
Instructed by:	Minde Schapiro and Smith Elzanne Jonker and Shannon Solomon

FUL'S LEGAL REPRESENTATIVES

Counsel:	Wim Trengove SC Max Du Plessis SC Sarah Pdfifin-Jones Stuart Scott Sechaba Mohapi
Instructed by:	Nortons inc Anton Roets

CW'S LEGAL REPRESENTATIVES

Counsel:	Geoff Budlender SC Pranisha Maharaj-Pillay Mitchell de Beer

Instructed by:	Norton Rose Fulbright Inc South Africa
	Laura Macfarlane and Jason Whyte

THE NA'S LEGAL REPRESENTATIVES

Counsel:	Adv Adila Hassim SC Adv Adiel Nacerodien
Instructed by:	The State Attorney, Cape Town

MK'S LEGAL REPRESENTATIVES

Counsel:	Dali Mpofu SC Lerato Moela Libongo Ndabula
Instructed by:	KMNS Attorneys
	Thabo Kwinana

DR HLOPHE'S LEGAL REPRESENTATIVES

Counsel:	Thabani Masuku SC M. Simelane N. Mjiyako
Instructed by:	B Xulu and Partners Incorporated Barnabas Xulu
Date of Hearing:	25 February - 27 February 2025
Date of Judgment:	2 June 2025