

The Constitutional Boundaries of Judicial Accountability: A Commentary on *Democratic Alliance v Hlophe and Others* (2025)

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Abstract

This case note critically examines the constitutional and legal consequences of appointing a judge found guilty of gross misconduct to the Judicial Service Commission (JSC) in South Africa. It focuses on the Western Cape High Court's decision in Democratic Alliance v Hlophe and Others 2025 (5) SA 166 (WCC), which held that the nomination of John Hlophe to the JSC following his impeachment was inconsistent with the Constitution. The note analyses how sections 165 and 177 of the Constitution serve as safeguards for upholding judicial independence and maintaining public trust in the judiciary. The note also considers the tension between parliamentary discretion in appointments and the need to uphold ethical standards in accountability institutions. The discussion concludes with recommendations for enhancing constitutional mechanisms to prevent individuals with compromised ethical records from serving on bodies responsible for judicial oversight.

Keywords

Constitution of South Africa, judicial accountability, judicial misconduct, Judicial Service Commission, rule of law, ethical standards, judicial independence

1. Introduction

In a judgment delivered on 27 September 2024, the Western Cape Division of the High Court ('the Cape Town High Court') granted an interim interdict against its former Judge President, Dr John Hlophe.¹ The order restrained Dr Hlophe, now serving as a Member of Parliament for the MK party, from taking part in the activities of the Judicial Service Commission ('JSC').² Judicial accountability is not merely a procedural safeguard, but also a foundational element in sustaining public trust and legitimising the judiciary's authority in a constitutional democracy.³ Genevieve Maujean has highlighted a persistent weakness in South Africa's accountability framework: an overemphasis on procedure and a lack of

1 *Democratic Alliance v Hlophe and Others* 2025 (5) SA 166 (WCC), paras 1-4.

2 *Ibid.*

3 Cameron, E 'Judicial Accountability in South Africa' (1990) 6(2) *South African Journal on Human Rights* 251-265.

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meaningful enforcement, which ultimately erodes the legitimacy of judicial institutions.⁴ These views highlight the complex relationship between preserving judicial independence and ensuring ethical oversight in South Africa's post-apartheid constitutional order. The decision in *Democratic Alliance v Hlophe and Others* marks a pivotal moment in this ongoing discourse. Judicial independence is a foundational element of South Africa's constitutional framework, articulated in section 165(2) of the Constitution, which affirms that courts operate independently and are bound only by the Constitution and the law, applying both without bias, fear or favour. As Lunga Siyo and John Mubangizi have noted, this independence extends beyond institutional autonomy to include the personal integrity of judges, who must remain insulated from undue influence in their decision-making.⁵

However, the concept of independence must be balanced by mechanisms of accountability, particularly where judicial misconduct jeopardises public confidence in the judiciary.⁶ As Roux has argued, in a dominant-party democracy, the judiciary must maintain a clear boundary between itself and political actors to retain its legitimacy.⁷ The *Hlophe* case illustrates the dangers of political influence eroding ethical norms in judicial appointments, echoing the Constitutional Court's pronouncements in the *Certification* judgment that constitutional design must include safeguards to prevent such erosion.⁸ This caution remains acutely relevant in South Africa today, given ongoing debates about the politicisation of judicial appointments and Parliament's capacity to act as a neutral guardian of judicial integrity. This case note begins by setting out the facts, issues and the body of law to which the court referred. It then examines how the court applied that law to the facts and issues, clarifying the reasoning behind its conclusion.

2. *Democratic Alliance v Hlophe and Others*: Brief facts

On 9 July 2024, Parliament designated Honourable Dr John Hlophe as one of its representatives to the JSC as he was nominated by MK. The JSC was scheduled to sit from 7 to 11 October 2024 to conduct interviews for judicial appointments.⁹ Dr Hlophe, however, had previously been impeached for gross judicial misconduct, namely for attempting to improperly influence two Justices of the Constitutional Court to act in breach of their oaths of office; this conduct led to his removal from judicial office. Despite these findings, Parliament nonetheless designated him as a JSC member.¹⁰ The Democratic Alliance ('DA') objected, contending that his participation would seriously undermine the credibility of

4 Maujean G. 2023 'Too Much Process and Too Little Accountability' Judges Matter Essay. <https://www.judgesmatter.co.za/wp-content/uploads/2023/12/Judges-Matter-Essay_Genevieve-Maujean.pdf> accessed April 2025.

5 Siyo, L & Mubangizi, JC 'The Independence of South African Judges: A Constitutional and Legislative Perspective' (2015) 18(4) *Potchefstroom Electronic Law Journal* 5.

6 Powell, CH 'Judicial Independence and the Office of the Chief Justice' (2019) 9 *Constitutional Court Review* 498.

7 Roux, T *The Politics of Principle: The First South African Constitutional Court* (Cambridge University Press, 2013) 392.

8 *Democratic Alliance v Hlophe* (note 1) para 10.

9 *Ibid* paras 1-8.

10 *Ibid* para 8.

the JSC in light of his impeachment.¹¹ Subsequently, the DA, together with Corruption Watch ('CW') and Freedom Under Law ('FUL'), launched urgent proceedings to prevent Dr Hlophe from serving on the JSC.¹²

The applicants argued that permitting an impeached individual to participate in judicial appointments created a conflict of interest and threatened the integrity of the judiciary.¹³ Both the DA and CW sought an urgent interim interdict restraining Dr Hlophe from participating in the forthcoming JSC interviews, pending a full review of the National Assembly's decision.¹⁴ The Western Cape High Court upheld the challenge, declaring the parliamentary designation irrational and constitutionally invalid.¹⁵ The judgment reaffirmed that the JSC, as a constitutional guardian of judicial integrity, must be free from political manipulation and from individuals who are ethically compromised. The court held that a judge impeached for undermining judicial independence cannot qualify as a 'fit and proper' person to serve on a body charged with overseeing the same judiciary from which he was removed.¹⁶ Ethical accountability, the court noted, must extend beyond removal from office; it must include exclusion from bodies responsible for judicial governance. Theunis Roux argued that the judiciary must maintain its separation from political institutions to preserve its independence and legitimacy, particularly in a dominant-party context like South Africa.¹⁷ Roux's observation in *The Politics of Principle* is especially relevant here. Roux argued that in dominant-party democracies such as South Africa, the judiciary's legitimacy depends on a deliberate distancing from political institutions to maintain its independence. In the context of *Democratic Alliance v Hlophe*, this means that even after formal sanctions such as impeachment, allowing an ethically compromised judge to remain within a judicial governance structure would blur the institutional boundaries that safeguard impartiality.¹⁸ This concern is echoed in the Constitutional Court's *Certification* judgment, where the court stressed the need for institutional mechanisms to prevent political influence over the judiciary.

This case note examines the legal and constitutional dimensions of the *Hlophe* judgment, focusing on the limits of parliamentary discretion under section 178 of the Constitution and its implications for the future of judicial governance and ethical accountability in South Africa.

3. The legal issues

The court was required to determine several key questions. The first issue was whether or not the High Court had jurisdiction to hear the matter, or whether it fell within the exclusive jurisdiction of the Constitutional Court under section 167(4)(e) of the Constitution.

11 Ibid.

12 Ibid.

13 Ibid.

14 Ibid.

15 Ibid paras 9-10.

16 Ibid paras 14-15.

17 Roux (note 8) 392.

18 *Democratic Alliance v Hlophe* (note 1).

The second issue was whether Parliament's decision to designate an impeached judge to the JSC was consistent with the principles of legality and rationality, as well as constitutional values. The third issue was whether the applicants had met the requirements for an interim interdict restraining Dr Hlophe from participating in the JSC, pending review proceedings. The last issue was whether Dr Hlophe's participation in the JSC would cause irreparable harm to the credibility, integrity, and legitimacy of the JSC's processes.

4. The law

The legal framework guiding this case is rooted primarily in the Constitution and supported by key judicial precedents. Section 165(4) of the Constitution obliges all organs of the state to protect and assist the courts to safeguard their independence, dignity, and effectiveness. This provision underscores the principle that judicial integrity is central to constitutional democracy. Section 167(4)(e) of the Constitution establishes the Constitutional Court's exclusive jurisdiction, permitting only that court to decide whether Parliament or the President has failed to fulfil a constitutional obligation. The distinction between a failure to fulfil an obligation and the exercise of discretion is crucial in jurisdictional disputes. This distinction was highlighted in *African Transformation Movement v Speaker of the National Assembly*.¹⁹ There, the High Court held that it had jurisdiction to review the Speaker's refusal to allow a secret ballot, because the complaint related to how the discretion was exercised rather than a failure to meet a constitutional duty. Although the High Court dismissed the application, the Supreme Court of Appeal overturned that decision and ordered the Speaker to reconsider the matter afresh.

In *Economic Freedom Fighters v Speaker of the National Assembly*,²⁰ the Constitutional Court emphasised that the exercise of parliamentary powers is subject to constitutional scrutiny, particularly where accountability and legality are at stake. Similarly, in *Judicial Commission of Inquiry into Allegations of State Capture v Zuma*,²¹ the court reinforced the principle that no person is above the Constitution and that compliance with judicial orders is non-negotiable in a constitutional democracy.

Section 178(1)(h) of the Constitution empowers the National Assembly to designate six members to the JSC, at least three of whom must come from opposition parties. While this provision affords Parliament discretion, that discretion must be exercised in a manner consistent with constitutional values and the protection of judicial independence.

5. A commentary

The appointment of Judge John Hlophe to the JSC, following his removal from judicial office for gross misconduct, raised serious constitutional questions about the extent and limits of parliamentary discretion in judicial oversight.²² While section 178(1)(h) empowers Parliament to appoint six members to the JSC, this authority must be exercised in line with constitutional principles and ethical governance. In *Democratic Alliance v Hlophe*, the

19 *African Transformation Movement v Speaker of the National Assembly* 2022 (4) SA 409 (SCA).

20 *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC).

21 2021 (5) SA 327 (CC).

22 Corder, H *The Judiciary in South Africa* (Juta, 2014) 206.

Western Cape High Court reaffirmed that such discretion must be exercised rationally and in accordance with the values of accountability and integrity.²³ In its ruling, the court found that Parliament had acted inconsistently with section 165(4), which requires all state organs to protect and support the independence and effectiveness of the judiciary.²⁴ By nominating a judge who had been removed for undermining judicial impartiality and independence, Parliament not only acted irrationally but also, as this study argues, compromised the legitimacy of the very institution tasked with upholding ethical standards within the judiciary.²⁵ The central contention advanced here is that constitutional accountability requires more than the mechanical observance of formal procedures under section 178(1)(h); it demands that Parliament exercise its discretion in a manner that sustains the integrity and credibility of the JSC itself. In other words, the argument is that permitting an impeached judge to serve on the JSC corrodes public confidence in judicial governance and creates a direct contradiction between the JSC's constitutional purpose and its composition. The court held that this designation was not only irrational but also incompatible with the constitutional vision of ethical governance, particularly in light of Hlophé's breach of section 165(2), which requires impartial adjudication.²⁶

This reasoning aligns with the Constitutional Court's findings in *Economic Freedom Fighters v Speaker of the National Assembly*,²⁷ where complaints about non-security features in the Nkandla upgrades triggered an investigation by the Public Protector.²⁸ She found that the President and his family were unduly enriched, in violation of section 96 of the Constitution, the Executive Members' Ethics Act and the Executive Ethics Code. Remedial action was directed under section 182(1)(c) of the Constitution, requiring the President to repay a reasonable portion, reprimand Ministers, and report to the National Assembly.²⁹ It was held that Parliament's powers must always be exercised within the framework of legality, rationality and constitutional accountability.³⁰ The Western Cape High Court drew on this precedent to emphasise that legislative discretion is subject to review when it threatens the rule of law and institutional trust.³¹ The parallel is clear: constitutional powers, even when broadly phrased, are never unconstrained, and the judiciary has a duty to strike down exercises of such power that undermine the Constitution's underlying values.

Hugh Corder has similarly warned that, in a constitutional democracy, discretionary power must be firmly anchored in mechanisms of accountability, especially in matters involving judicial integrity.³² He argues that Parliament should serve as a custodian of constitutional norms rather than act as a partisan body shielded by the doctrine of separation of powers.³³ The High Court echoed this approach, affirming that separation

23 *Democratic Alliance v Hlophé* (note 1) paras 9-11.

24 *Ibid.*

25 *Ibid* para 12.

26 *Ibid* para 14.

27 *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC).

28 *Ibid.*

29 *Ibid* paras 7-9.

30 *Ibid* paras 1-3.

31 *Democratic Alliance v Hlophé* (note 1) para 15.

32 Corder (note 22) 208.

33 *Ibid.*

of powers cannot be invoked to justify decisions that erode ethical oversight and constitutional values.³⁴

The court also considered the broader constitutional consequences of appointing an impeached judge to the JSC. It recognised that misconduct by senior members of the judiciary damages not only the officeholder's credibility but also undermines public trust in the justice system as a whole.³⁵ In *Helen Suzman Foundation v Judicial Service Commission*,³⁶ on October 2012, the JSC deliberated privately after candidate interviews for the Western Cape High Court and advised the President on appointments.³⁷ The Helen Suzman Foundation (HSF) challenged the decision, arguing it was irrational and unlawful, and sought disclosure of the JSC's recorded deliberations under rule 53(1)(b) of the Uniform Rules of Court.³⁸ The Constitutional Court had to decide whether recordings of JSC deliberations form part of the 'record of proceedings' under rule 53(1)(b) and whether their disclosure is legally permissible. This echoes the Constitutional Court's decision, which held that fairness, transparency, and rationality are essential in processes involving judicial appointments.³⁹ In the *Hlophe* matter, the court stressed the need for Parliament to develop mechanisms that ensure ethical screening, procedural integrity and alignment with constitutional principles.⁴⁰

Furthermore, the High Court rejected the argument that Hlophe's removal from office did not constitutionally bar him from serving on the JSC. It reasoned that, even in the absence of an explicit disqualification, ethical ineligibility can be derived from the overarching constitutional values of openness, responsiveness, and accountability, as set out in section 1(d) of the Constitution. This view aligns with Powell's scholarship, which argues that constitutional governance requires not only formal legality but also substantive ethical compliance, particularly for individuals responsible for regulating the judiciary.⁴¹ The court embraced this normative standard, holding that rationality in appointments must include a clear assessment of the nominee's ethical suitability.⁴²

The *Hlophe* judgment clarifies the boundaries of parliamentary discretion in constitutional appointments. It affirms that such discretion must be exercised within the ethical limits imposed by the Constitution and subject to judicial scrutiny where it threatens institutional credibility. This case thus sets a valuable precedent for holding Parliament accountable when its appointments conflict with constitutional values, ensuring that public trust in judicial governance is not sacrificed for political expediency.⁴³

34 *Democratic Alliance v Hlophe* (note 1) para 16.

35 *Ibid* para 17.

36 *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC).

37 *Ibid*.

38 *Ibid* paras 1-4.

39 *Ibid* para 32.

40 *Democratic Alliance v Hlophe* (note 1) para 18.

41 Powell, CH 'Judicial Independence and the Office of the Chief Justice' (2019) 9 *Constitutional Court Review* 498.

42 *Democratic Alliance v Hlophe* (note 1) para 19.

43 *Ibid* para 20. This case thus sets a valuable precedent for holding Parliament accountable when its appointments conflict with constitutional values, ensuring that public trust in judicial governance is not sacrificed for political expediency. See also Roux (note 7) 392.

5.1 The constitutional meaning of ‘fit and proper’

The controversy surrounding Hlophe’s appointment to the JSC following his impeachment has reignited critical debate about what it truly means to be ‘fit and proper’ for public office in South Africa.⁴⁴ While section 178(1)(h) of the Constitution authorises the National Assembly to nominate six members to the JSC, it remains silent on the precise criteria governing such appointments. Nonetheless, the standard of being ‘fit and proper’ is well established in constitutional jurisprudence and must be interpreted in light of the foundational values that shape South Africa’s democratic order.⁴⁵ In *Democratic Alliance v Hlophe*,⁴⁶ the Western Cape High Court clarified that ethical fitness is not a discretionary or political question; it is a constitutional necessity.⁴⁷ The court found that nominating a judge who had been impeached for gross misconduct to a judicial oversight body defies the principles of legality and accountability.⁴⁸ This reasoning is grounded in section 1(c) of the Constitution, which affirms the rule of law as a core value, requiring that all public decisions, including appointments, be rational, lawful, and consistent with constitutional imperatives. Justice Edwin Cameron has long argued that judicial credibility hinges on unwavering ethical accountability, noting that judges must uphold the highest standards of personal and professional conduct to sustain public confidence in the judiciary.⁴⁹

Cathleen Powell similarly contends that the standard of ‘fit and proper’ must encompass not only formal qualifications, but also integrity, conduct and alignment with constitutional values.⁵⁰ The High Court adopted this approach in *Hlophe*, affirming that ethical disqualification can and should arise from behaviour that undermines judicial independence and impartiality.⁵¹ In support of its findings, the court invoked the Constitutional Court’s decision in *Justice Alliance of South Africa v President of the Republic of South Africa and Others*,⁵² where it was held that the appointment of judges must be informed by clear, objective criteria rooted in the values of the Constitution.⁵³ Applying this precedent, the court concluded that Parliament’s failure to properly assess Hlophe’s ethical record amounted to a fundamental legal misstep.⁵⁴

The judgment also engaged with section 165(2) of the Constitution, which requires judges to apply the law ‘impartially and without fear, favour or prejudice.’ This obligation, the court held, extends not only to judicial office-holders, but also to those who oversee judicial appointments and discipline. Permitting a judge removed for interfering with judicial

44 Corder (note 22) 206.

45 Constitution of South Africa, 1996, s 1(c).

46 Note 1.

47 Ibid para 14.

48 Ibid para 15.

49 Cameron (note 3) 251-265.

50 Powell (note 6) 498.

51 Note 1 para 17.

52 *Justice Alliance of South Africa v President of Republic of South Africa and Others* [2011] ZACC 23.

53 Ibid para 68.

54 *Democratic Alliance v Hlophe* (note 1) para 18.

impartiality to return to a governance role within the JSC, the court reasoned, risks sending a damaging message that ethical transgressions do not have lasting consequences.⁵⁵ Such a decision, it warned, would erode the commitment to transparency, accountability and separation of powers as articulated in section 1(d) of the Constitution. Chris Oxtoby and Matthias Krönke have argued that the legitimacy of the judiciary depends as much on its structural independence as it does on public perceptions of its ethical soundness.⁵⁶ The *Hlophe* ruling reinforces this insight, holding that the question of ethical fitness cannot be reduced to subjective or political judgments; it is a constitutional threshold tied to the rule of law.⁵⁷

The impeachment of Hlophe and his later nomination to the JSC have sparked renewed discussion about whether judicial misconduct can be rehabilitated within the constitutional framework governing judicial oversight.⁵⁸ According to section 177(1)(a) of the Constitution, a judge may be removed from office if the JSC finds that they are guilty of gross misconduct, incapacity or incompetence. As already discussed above, the Judicial Conduct Tribunal (JCT) in Hlophe case concluded that he had sought to improperly influence two Constitutional Court Justices in a matter involving former President Jacob Zuma; this conduct violated section 165(2), which guarantees judicial independence and impartiality. The JCT was unequivocal in its findings: Hlophe's actions 'seriously threatened and interfered with the independence, impartiality, dignity and effectiveness of the Constitutional Court.'⁵⁹ This recommendation for removal was upheld by the JSC, and Parliament proceeded to vote for his impeachment by the constitutionally required two-thirds majority under section 177(1)(b). For Instance, president Cyril Ramaphosa formalised Hlophe's removal on 1 March 2024, marking a historic first in South Africa's democratic era.⁶⁰ Yet, despite this unprecedented impeachment, Parliament designated Hlophe to the JSC under section 178(1)(h), a move that prompted legal challenges from civil society organisations, including the Democratic Alliance, Freedom Under Law and Corruption Watch. In *Democratic Alliance v Hlophe*,⁶¹ the Western Cape High Court ruled that the designation was irrational and inconsistent with the Constitution. The court made clear that ethical disqualification may be inferred from conduct that directly undermines judicial independence.⁶²

Former Justice Johann Kriegler has argued that certain forms of judicial misconduct, especially those that interfere with core judicial functions, are so serious that they cannot be remedied by removal from office alone.⁶³ He maintains that to protect institutional integrity, individuals found guilty of such misconduct must be entirely excluded from judicial governance structures.⁶⁴ The Western Cape High Court in *Democratic Alliance v Hlophe* is

55 Ibid para 19.

56 Oxtoby, C & Kronke, M 'Public Confidence in the Judiciary: A South African Perspective' (2020) *UNODC Judiciaries in Africa Project* 99-100.

57 *Democratic Alliance v Hlophe* (note 1) para 20.

58 Cameron (note 3) 251-265.

59 *Democratic Alliance v Hlophe* (note 1) para 4.

60 Ibid para 1.

61 Ibid.

62 Ibid paras 14-15.

63 Kriegler, J 'Judge Hlophe Betrayed the Nation with His Greed' (2007) 20(3) *The Advocate* 33-34.

64 Ibid.

central to this discussion.⁶⁵ The court made it clear that allowing an impeached judge to serve on the JSC sends a troubling message that serious ethical breaches carry no lasting consequences.⁶⁶ This case is important because it confirms that serious ethical breaches cannot be ignored without damaging the integrity of judicial governance.

In reinforcing this principle, the court referred to *Justice Alliance of South Africa v President of the Republic of South Africa*,⁶⁷ in which the Constitutional Court held that appointments to the JSC must reflect the Constitution's values, including integrity, accountability, and transparency.⁶⁸ In 2011, President Jacob Zuma sought to extend Chief Justice Sandile Ngcobo's term of office by five years under section 8(a) of the Judges' Remuneration and Conditions of Employment Act.⁶⁹ Several organisations – JASA, Freedom Under Law, CALS and CASAC – challenged both the empowering provision and the President's conduct, arguing that it undermined separation of powers and judicial independence.⁷⁰ The Constitutional Court had to decide whether section 8(a), which authorised the President to determine the extension of the Chief Justice's tenure, was consistent with section 176(1) of the Constitution and the principle of judicial independence.⁷¹ The High Court found that Parliament had failed to consider these values in designating Hlophe, thus committing a material error of law.⁷² Cathleen Powell has cautioned against conflating political rehabilitation with ethical redemption. She asserted that while democratic politics may forgive and reintegrate controversial figures, judicial governance demands a higher threshold of sustained adherence to constitutional principles.⁷³ The *Hlophe* judgment reflects this distinction, confirming that ethical accountability extends beyond formal removal and requires exclusion from constitutional oversight roles where integrity is paramount.⁷⁴

The court also dismissed the argument that parliamentary privilege insulated Hlophe's designation from review. It held that the exercise of discretionary powers under section 178 remains subject to constitutional scrutiny, particularly when exercised irrationally.⁷⁵ This position is consistent with the Constitutional Court's ruling in *Economic Freedom Fighters v Speaker of the National Assembly*,⁷⁶ where complaints about non-security features in the Nkandla upgrades triggered an investigation by the Public Protector.⁷⁷ She found that the President and his family were unduly enriched, in violation of section 96 of the Constitution, the Executive Members' Ethics Act and the Executive Ethics Code.⁷⁸

65 *Democratic Alliance v Hlophe* (note 1).

66 *Ibid* para 19.

67 *Justice Alliance of South Africa v President of the Republic of South Africa* [2011] ZACC 23.

68 *Ibid* para 68.

69 *Ibid* paras 7-9.

70 *Ibid*.

71 *Ibid*.

72 *Democratic Alliance v Hlophe* (note 1) para 18.

73 Powell (note 6) 498.

74 *Democratic Alliance v Hlophe* (note 1) para 20.

75 *Ibid* para 10.

76 *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11.

77 *Ibid* paras 6-10.

78 *Ibid* paras 7-9.

Remedial action was directed under section 182(1)(c) of the Constitution, requiring the President to repay a reasonable portion, reprimand Ministers, and report to the National Assembly. The President's responses and the National Assembly's endorsement of contrary reports led the EFF and the DA to approach the Constitutional Court. In terms of her constitutional powers under section 182(1)(a) of the Constitution, the Public Protector investigated allegations of improper conduct and irregular expenditure concerning the security upgrades at the Nkandla private residence of President Jacob Zuma. It was stated that Parliament must discharge its constitutional duties in a manner that enhances transparency, legality and public accountability.⁷⁹ The issue was whether or not the President failed to fulfil his constitutional duties. The court held that the Public Protector's remedial action has a binding effect.⁸⁰ By ignoring it, the President violated his duties under sections 83(b) and 96.

5.2 Jurisdiction, irreparable harm, lawfulness, rationality and the interim interdict

The Cape Town High Court confirmed it had jurisdiction, rejecting the argument that the matter fell solely within the Constitutional Court's authority under section 167(4) (e). It relied on precedents such as *EFF v Speaker*⁸¹ and *ATM v Speaker*,⁸² noting that the case concerned how Parliament exercised its discretion, not whether it failed to fulfil an obligation. Applying section 165(4), the court held that allowing an impeached judge to sit on the JSC risked undermining judicial independence and public confidence. Such participation would erode the credibility and dignity of the JSC's processes, thereby causing irreparable harm. The court found that Parliament had committed a material error of law under section 178(1)(h) by failing to consider relevant factors when designating Dr Hlophe. His impeachment for gross misconduct should have disqualified him, yet the National Assembly treated the process as a formality, rendering the decision irrational.

The court applied the four-part test for interim interdicts: the applicants demonstrated a *prima facie* right, a reasonable apprehension of harm, a favourable balance of convenience, and the absence of an adequate alternative remedy. On this basis, the court granted interim relief preventing Dr Hlophe's participation in the JSC. The decision in *Democratic Alliance v Hlophe* presents a key constitutional moment to assess this balance. In this regard, the Tribunal's findings were severe, stating that Hlophe's actions 'seriously threatened and interfered with the independence, impartiality, dignity and effectiveness of the Constitutional Court'.⁸³ Following this, the JSC endorsed his removal under section 177(1)(a) of the Constitution. The National Assembly, acting in accordance with section 177(1)(b), voted for his impeachment. The President's formal role under section 177(2) was to remove him from office once these steps were completed, thereby illustrating that all three branches of government are implicated in the constitutional process of judicial

79 Ibid paras 1-3.

80 Ibid.

81 *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC).

82 *African Transformation Movement v Speaker of the National Assembly and Others* [2023] 3 All SA 58 (WCC).

83 Ibid para 4.

removal. Despite these serious findings, Hlophe was later nominated by Parliament to serve on the JSC under section 178(1)(h). This decision sparked litigation initiated by the Democratic Alliance, Freedom Under Law and Corruption Watch. They argued that allowing an impeached judge to participate in judicial oversight violated the principles of judicial integrity and the duty imposed by section 165(4), which requires all state organs to support and protect the courts in maintaining their independence, dignity and effectiveness.⁸⁴ The court ultimately agreed, declaring Parliament's designation of Hlophe as irrational and unconstitutional.⁸⁵ The court emphasised that ethical accountability must be integral to judicial governance and concluded that someone previously removed for compromising judicial independence cannot be deemed 'fit and proper' to sit on the JSC.

This judgment is consistent with broader academic commentary. Cathleen Powell contended that judicial independence is incomplete without firm ethical safeguards and institutional structures that promote integrity.⁸⁶ She criticised the Office of the Chief Justice for failing to prevent reputational damage when internal accountability systems are weak.⁸⁷ Gundo Ramaru echoed this concern, arguing that ethical violations by high-ranking judges undermine public confidence and the rule of law, particularly in contexts where judicial credibility must remain above reproach.⁸⁸ The court's reasoning in *Hlophe* also draws on *Helen Suzman Foundation v Judicial Service Commission*,⁸⁹ where:

On October 2012, the JSC deliberated privately after candidate interviews for the Western Cape High Court and advised the President on appointments.⁹⁰ The Helen Suzman Foundation (HSF) challenged the decision, arguing it was irrational and unlawful, and sought disclosure of the JSC's recorded deliberations under rule 53(1)(b) of the Uniform Rules of Court. The Constitutional Court had to decide whether recordings of JSC deliberations form part of the 'record of proceedings under rule 53(1)(b) and whether their disclosure is legally permissible.⁹¹ The Constitutional Court stressed the judiciary's centrality to constitutional democracy and warned against political interference.⁹² Echoing this, the High Court warned that permitting a judge impeached for interfering with judicial independence to influence judicial governance 'undermines the very institution he was found to have compromised'.⁹³ The political context of Hlophe's nomination, reportedly backed by the MK Party, further complicates the matter and raises legitimate concerns over partisan intrusion into judicial processes. Therefore, the judicial should not interfere the role of other spheres. Its sphere should act freely independently.

84 *Democratic Alliance v Hlophe* (note 1) paras 9-15.

85 *Ibid.*

86 Powell (note 6) 502.

87 *Ibid.*

88 Ramaru, GK *Praxis of Judicial Independence in South Africa: An Imminent Constitutional Recourse* (University of Cape Town 2023) 22-27.

89 *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC).

90 *Ibid* paras 1-4.

91 *Ibid.*

92 *Ibid* para 32.

93 *Democratic Alliance v Hlophe* (note 1) para 14.

6. Conclusion and recommendations

The *Hlophe* judgment reaffirmed that ethical accountability is central to maintaining public trust in South Africa's judiciary. It established that individuals removed for gross misconduct cannot return to roles overseeing judicial integrity. Parliament's discretion must be guided by constitutional values, not political convenience. To strengthen judicial governance, clear eligibility criteria for JSC appointments should be codified. Ethical vetting mechanisms must be formalised and independently monitored. Parliament should adopt transparent procedures that prioritise integrity over partisanship. Judicial oversight bodies must reflect the values of impartiality, credibility and accountability to sustain the legitimacy of constitutional democracy. Ethical rehabilitation in judicial roles should not be assumed without demonstrable reform and public confidence. Moreover, the ruling is a vital step towards safeguarding judicial independence and ensuring that oversight bodies reflect the highest ethical standards.

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