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

Reportable:	**YES**
Of interest to other Judges:	**YES**

Case no: **16170/2024**

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	
MANDLAKAYISE JOHN HLOPHE	1st Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	2nd Respondent
JUDICIAL SERVICE COMMISSION	3rd Respondent
UMKHONTO WESIZWE PARTY	4th Respondent
ALL OTHER PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	5th Respondent

and

Case No.**16771/2024**

CORRUPTION WATCH NPC	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	1st Respondent
JUDICIAL SERVICE COMMISSION	2nd Respondent
MANDLAKAYISE JOHN HLOPHE	3rd Respondent
ALL OTHER PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	4th Respondent

and

Case No. **16463/2024**

FREEDOM UNDER LAW NPC	Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY	1st Respondent
THE JUDICIAL SERVICE COMMISSION	2nd Respondent
MANDLAKAYISE JOHN HLOPHE	3rd Respondent
ALL OTHER PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	4th Respondent

Coram: THE COURT: (Coram Baqwa, Daffue *et* Collis JJ)

Heard: 5 & 6 SEPTEMBER 2024

Delivered: 27 SEPTEMBER 2024

Summary:

Unprecedented events – urgent applications – the Judicial Service Commission's (JSC's) next sitting on 7-11 October 2024 – interim interdicts –whether the requirements for interim interdict fulfilled – jurisdiction in terms of section 167 (4) (e) – the high court has jurisdiction to hear this matter – review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) – error of law - irrationality – designation of an impeached judge by the National Assembly to the JSC in terms of section 178(1) (h) of the Constitution –impeached judge insisted that his designation was done in terms section 53(1)(b) & (c) of the Constitution read with Rule 9 of the National Assembly and a Parliamentary Convention – National Assembly's discretion to designate members to the JSC – nomination of Members of Parliament is a political decision – the presence of an impeached judge contrary to section 165(4) of the Constitution will undermine the independence, dignity and effectiveness of the court – interim interdict granted.

ORDER

The following orders are granted:

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

1. This application is dealt with as one of urgency and the applicant's failure to comply with the Uniform Rules of Court and Practice Manual is condoned.

2. Pending the determination of the merits of the Applicant's review of the National Assembly's decision to designate the First Respondent (Dr Hlophe) as its representative to the Judicial Service Commission (JSC), either in Part B of this application, or by the Constitutional Court in Case CCT 253/24 and/or in Case CCT 222/24, whichever occurs first, Dr Hlophe is interdicted from participating in the processes of the JSC.

3. The First and Fourth Respondents shall 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 forms, time periods and service provided for in the Uniform Rules of Court are dispensed with and the application is heard on an urgent basis in terms of Uniform Rule 6(12)(a).

2. Pending the determination of the merits of the Applicant's review of the National Assembly's decision to designate the Third Respondent (Dr Hlophe) as its representative to the Judicial Service Commission (JSC), either in Part B of this application, or by the Constitutional Court in Case CCT 253/24 and/or in Case CCT 222/24, whichever occurs first, Dr Hlophe is interdicted from participating in the processes of the JSC.

3. Costs are reserved for determination in Part B of the application.

AND

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

1. The Application is postponed to be heard simultaneously with Part B of the applications in case numbers 16170/2024 and 16771/2024 or the Constitutional

Court's processes under cases CCT253/2024 and/or CCT222/2024 whichever occurs first, costs to stand over for later adjudication.

JUDGMENT

The Court: (Coram Baqwa, Daffue *et* Collis JJ)

Introduction

[1] This court is called upon to deal with an unprecedented scenario. On 9 July 2024 the National Assembly (NA) designated to the Judicial Service Commission (JSC) a Member of Parliament (MP) being a former judge who was on 21 February 2024 impeached by the NA for gross judicial misconduct.

[2] The NA's designation of the MP in question, namely Dr Hlophe, triggered three applications. The Democratic Alliance, Freedom Under Law and Corruption Watch issued their separate applications on 19 July 2024, 25 July 2024 and 30 July 2024 respectively. They deem their applications to be urgent insofar as the next sitting of the JSC is from 7 to 11 October 2024. We are required to adjudicate whether the NA properly exercised its discretion to designate Dr Hlophe to the JSC.

The parties

[3] The applicant in application 16170/2024 is the Democratic Alliance (DA), a registered political party that holds 87 seats in the NA. The applicant in application 16771/2024 is Corruption Watch NPC (CW), a non-profit company incorporated in terms of the laws of the country. Freedom Under Law NPC (FUL), a non-profit company incorporated in terms of the laws of the country, is the applicant in case number 16463/2024.

[4] The respondents' citations differ in the different applications. In all three applications, Mandlakayise John Hlophe (Dr Hlophe), the Speaker of the NA (the Speaker), the Judicial Service Commission (JSC) and all parties represented in the NA are cited as respondents. Unlike the other two applicants, the DA cited Umkhonto Wesizwe (MK) specifically as respondent (the fourth respondent) in its application.

[5] Dr Hlophe is a MP and the parliamentary leader of MK, a political party duly represented in the NA. It is the official opposition. Dr Hlophe is a former judge of the High Court and held the position of Judge President of the Western Cape Division of the High Court for many years.

[6] Ms AT Didiza is the Speaker of the NA. Although she abides the decision of this court, she filed an explanatory affidavit and instructed counsel to address the court by way of written heads of argument and oral submissions.

[7] MK is a registered political party, it having been founded by the former President of the Republic of South Africa, Mr Jacob Gedleyihlekisa Zuma, who is also the *interim* leader of MK.

[8] The African Transformation Movement (ATM) is a registered political party, it having two seats in the NA. It was not cited in its own name. It filed a notice to oppose and answering affidavit late, but applied for condonation which application was granted.

The relief sought

[9] Both the DA and CW seek *interim* orders pending finalisation of the relief sought in Part B. Their draft orders were uploaded on case-lines. Save for prayer 1, dealing with urgency and costs (these applicants have a different approach), the remainder reads as follows:

'1. …

2. Pending a determination of the merits of the Applicant's review of the National Assembly's decision to designate [Dr Hlophe] as its representative to the [Judicial Service Commission], either in Part B of this application, or by the Constitutional Court in Case No. CCT 253/24 and/or in Case No. CCT 222/24, whichever occurs first, Dr Hlophe is interdicted from participating in the processes of the JSC.

3. ... .'

[10] The DA in Part A of its application seeks costs on an attorney and client scale, including the costs of three counsel on scale C, whereas CW is satisfied that costs be reserved for determination in Part B. FUL approaches their matter entirely differently. It seeks final relief, *i.e.* an order that the NA's decision taken on 9 July 2024 to designate Dr Hlophe as one of its six representatives to serve on the JSC be declared

unconstitutional and invalid, that the decision be reviewed and set aside and the matter be referred back to the NA to take a decision afresh in accordance with the directives set out in this court's judgment.

Procedural and preliminary issues

[11] On 7 August 2024 a case management meeting was held, chaired by the Acting Deputy Judge President, in respect of all three applications. By agreement between the parties the following orders were issued pursuant thereto:

'1. These matters are enrolled before the Full Bench of this Division for hearing on 5 and 6 September 2024.

2. The respondents shall file their answering affidavits by Friday, 16 August 2024.

3. The applicants shall file their replying affidavits by Friday, 23 August 2024.

4. The applicants shall file their heads of argument by 12h00, Wednesday, 28 August 2024.

5. The respondents shall file their heads of argument by 12h00, Friday, 30 August 2024.'

It needs to be emphasised that the applications were not consolidated. It was merely agreed that the self-standing applications would be adjudicated during the same hearing.

The grounds of review

[12] All three applicants rely on the same grounds of review although their approach during argument differed somewhat. These are the following:

a. the NA committed a material error of law in that it failed to properly exercise its discretion in terms of s 178(1)(h) of the Constitution, alternatively that the NA did not recognise that it had a discretion at all;

b. the designation of Dr Hlophe to the JSC is incompatible with the JSC's obligations under s 165(4) of the Constitution;

c. the NA took various irrelevant factors into consideration and failed to consider relevant and material factors in reaching its decision; and

d. the NA's decision was unreasonable and irrational.

These grounds of review will be considered during the evaluation of the parties' submissions.

[13] Both the Speaker and the JSC filed notices to abide. The Speaker in addition filed an explanatory affidavit, whilst Dr Hlophe, MK and ATM filed opposing affidavits to which the three applicants responded in their respective replying affidavits. Heads

of argument were filed thereafter and the applications were accordingly ripe for hearing on 5 and 6 September 2024.

[14] On 30 August 2024 and in preparation of the applications, this court requested the parties to report by not later than Tuesday, 3 September 2024 at 15h00 whether it was viable to hear the three applications simultaneously in one hearing, bearing in mind the different requirements for an *interim* interdict and a review. None of the parties replied to this correspondence. The parties were also requested to agree on timeframes pertaining to the oral arguments and upon receipt of their feedback, the court made certain directives.

[15] On 30 August 2024 Emperor Thembu 2nd Votani Majola (*The Emperor*) filed an application for leave to join the proceedings as *amicus curiae*. The Emperor did not obtain the written consent of the parties to the proceedings. This belated application to be admitted as *amicus curiae* was opposed by CW on several grounds which we do not find necessary to elaborate on at this stage. After considering this application and the oral submissions, this Court refused the application on the basis that the matters raised by the Emperor did not engage the issues for determination by this Court and therefore were not of assistance to it.

Dr Hlophe's objection to FUL's application

[16] Once we had dealt with the Emperor's application, Adv Mpofu SC objected on behalf of MK to FUL's participation in the hearing. We noted the objection, but disallowed any arguments on the issue at that stage. We ruled that the parties should deal with all submissions relating to the three applications in accordance with the timetable set. It should be emphasised that the legal representatives of the parties, which included Mr Mpofu, agreed to the hearing of all three matters on the days set aside for the hearing as directed by the Acting Judge President indicated above. Also, when the court asked for responses as mentioned above, none of the parties objected to the simultaneous hearing of all three applications. MK's claim that 'FUL is not properly before this court in respect of Part A', is incorrect. FUL is not seeking *interim* relief as the other two applicants. Its review application is brought on the basis of rule 6 of the Uniform Rules of Court, rather than rule 53. Clearly, it has no intention to apply for *interim* relief.

The common cause facts

[17] The core facts relevant to these applications are largely common cause. These are set out in the following paragraphs.

[18] Dr Hlophe was appointed a judge in the Cape Provincial Division in 1995 and elevated to the position of Judge President of that Division in 2000.

[19] The justices of the Constitutional Court, led by Chief Justice Langa and Deputy Chief Justice Moseneke, lodged a complaint to the JSC against Dr Hlophe whereupon the matter was referred to the Judicial Conduct Tribunal (Tribunal).

[20] After having heard evidence and argument, the Tribunal provided its report and recommendation to the JSC on 9 April 2021. It concluded that Dr Hlophe was guilty of gross misconduct in that his:

'a. …. conduct breached the provisions of section 165 of the Constitution in that he improperly attempted to influence the two Justices of the Constitutional Court to violate their oaths of office;

b. … conduct seriously threatened and interfered with the independence, impartiality, dignity and effectiveness of the Constitutional Court;

c. … conduct threatened public confidence in the judicial system.'[1]

[21] The JSC considered the Tribunal's report and recommendation in accordance with s 20 of the Judicial Service Commission Act 9 of 1994 whereupon the majority agreed with the Tribunal's findings and found that Dr Hlophe was guilty of gross misconduct. It concluded that Dr Hlophe's 'conduct rendered him guilty of gross misconduct as envisaged in section 177(1)(a) of the Constitution, in that he attempted to influence, improperly, Justices Nkabinde and Jafta to decide matters that were then pending before the Constitutional Court in favour of particular litigants.'[2]

[22] Having considered the JSC's report, the NA's Portfolio Committee on Justice and Correctional Services recommended to the NA to remove Dr Hlophe from office. On 21 February 2024 the NA resolved with a majority vote in excess of 75% of MPs

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[1] Record 01-74: para 123 of the report.

[2] Record 01-109: para 68 of the findings of the majority of the JSC.

to call on the President to remove Dr Hlophe for gross misconduct. On 6 March 2024 Dr Hlophe was removed from office by the President, acting on the resolution of the NA in terms of s 177 of the Constitution.[3]

[23] Dr Hlophe attempted to challenge his removal. He *inter alia* applied for direct access to the Constitutional Court which application has been dismissed recently, *ie* on 20 August 2024.[4] There is no extant application to set aside the decision of the NA and therefore, the decision to remove him remains in full force and effect. After his removal from office Dr Hlophe joined MK, the official opposition in the NA, and was elected as MP. As mentioned above, this political party was established by former president Zuma.

[24] Notwithstanding objections to the Speaker by several organisations, urging the NA not to designate Dr Hlophe as member of the JSC, the matter was put to the vote on 9 July 2024 whereupon the NA passed a motion by majority to designate Dr Hlophe as one of six MPs to serve on the JSC pursuant to s 178(1)(h) of the Constitution.

[25] The JSC will hold interviews from 7 to 11 October 2024. Several vacant positions need to be filled, *inter alia* the position of Judge President of the Western Cape Division, a position held by Dr Hlophe until he was impeached, four vacancies in that Division, as well as three vacancies in the Supreme Court of Appeal (SCA) and vacancies in other Divisions.

[26] In the meantime, Afriforum has applied to the Constitutional Court for direct access to that court, seeking in essence similar relief as contained in Part B of the applications of the DA and CW and the review application of FUL. That application is opposed. The parties were directed to file heads of argument for consideration by that court. We were informed during the hearing that the applicants filed applications in the Constitutional Court to be joined as parties in that litigation.

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[3] Record 01-307: press release.
[4] Record 08-26.

Relevant Legislation and the Rules of the NA

[27] We shall set out the relevant legislation and NA rules under this heading before we embark on the adjudication process. It is apposite to start off with s 177 of the Constitution which deals with the removal of a judge from office. It stipulates as follows:

'(1) A judge may be removed from office only if—

(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

(b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.' (emphasis added)

This aspect is not subject to debate. It is common cause that Dr Hlophe has been removed from office. There is no pending procedure to have that decision set aside on review. As mentioned above, Dr Hlophe applied to the Constitutional Court for direct access, but his application was refused recently.

[28] Section 178(1) of the Constitution provides for the membership of the JSC and *inter alia* the appointment of its members. In terms of s 178(1)(h) 'six persons [shall be] designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly'.

It is common cause that Dr Hlophe was one of the six persons, he being one of three members of opposition parties, designated by the NA to the JSC.

[29] Section 165 of the Constitution confirms that the judicial authority of the Republic is vested in the courts which are independent and subject only to the Constitution and the law.[5] Section 165(4) reads as follows:

'(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.'

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[5] Section 165(1) and (2).

[30] Section 167(4)(e) deals with the Constitutional Court's exclusive jurisdiction and stipulates that only that court may 'decide that Parliament or the President has failed to fulfil a constitutional obligation.'

[31] NA rule 9 reads as follows:

'(1) Conventions and practices relating to the business of the House and its committees and other forums are established by agreement amongst political parties and parliamentary office-bearers, and may be varied by agreement amongst them and reviewed from time to time as decided by the Rules Committee.

(2) <u>Conventions</u> and practices <u>must be consistent with the</u> provisions of the <u>Constitution</u>, these rules, orders of the House, rulings, and directives and guidelines of the Rules Committee.' (emphasis added)

The Speaker's position

[32] As mentioned, the Speaker abides the decision of this court. She has taken a neutral position, but elected to file an explanatory affidavit which the court found helpful.[6] Furthermore, Adv Hassim SC on behalf of the Speaker filed written heads of argument and also addressed us orally. We briefly deal with the Speaker's evidence and submissions in the following paragraphs.

[33] The motion in respect of JSC designations was initially tabled to be considered on 2 July 2024, but withdrawn and placed on the order paper of 9 July 2024. On that date opposition to the motion had been recorded in terms of rule 109 of the NA rules, whereupon the Speaker proceeded to call for declarations on the vote in accordance with rule 108. The motion had been agreed to on the basis of majority support as governed by rule 96(b) and 97 of the NA rules. The objections of the DA, Freedom Front Plus and African Christian Democratic Party were noted.

[34] The inclusion of Dr Hlophe's name on the list of nominees prompted objections, a situation that had never arisen before. The Speaker responded in writing to letters from non-governmental organisations pertaining to the issue and explained that there was no barrier to the nomination of Dr Hlophe, or any other MP, for consideration as a designated member of the JSC. However, this led the Speaker to invoke the rules, thereby permitting a debate on the motion prior to voting. The Speaker's views on the

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[6] Record 05.

issue have been made clear, to wit that the eventual designation of a JSC member from the ranks of MPs is for the NA to deliberate and decide. She stated as follows: 'A political decision is ultimately taken with the passing of a motion to give expression to designation in terms of s 178 of the Constitution, as per the general rules of the National Assembly.'[7]

[35] In the Speaker's letter of 9 July 2024, the NA recorded that it only considered the express wording of its powers in s 178(1)(h). She stated that only the following two requirements applied:

'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".[8]

Requirements for interim relief

[36] The well-known requirements for *interim* relief are the following:

a. a *prima facie* right;

b. a reasonable apprehension of irreparable harm;

c. balance of convenience; and

d. no alternative remedy.

[37] In adjudicating this application for *interim* relief, the court shall exercise a discretion resting on substantive considerations of justice.[9] It shall also ensure that the objects, spirit and purport of the Constitution are promoted as set out in *OUTA.*[10] At this point it should be made clear that there are not eight requirements for *interim* relief as submitted on behalf of MK during oral argument, but only the four requirements mentioned above, subject however to what was said by the Constitutional Court in *OUTA.*

[7] Record 05-21: Explanatory affidavit para 46.2.

[8] Record 05-19 to 05-20.

[9] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* 2023 (4) SA 325 (CC) paras 279-307.

[10] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 45.

MK's points *in limine*

[38] MK relies on several points *in limine* which shall be considered hereunder, to wit:

a. abuse of process;

b. the High Court's lack of jurisdiction;

c. lack of urgency;

d. the applicants' lack of *locus standi*;

e. incomplete/inchoate pleadings and non-compliance with the *OUTA*[11] requirements;

f. inapplicability of PAJA and/or a legality review.

(a) Abuse of process

[39] Bearing in mind the three separate applications brought by the three applicants in these proceedings, the one after the other, Adv Mpofu SC strenuously argued that such action is a serious abuse of process which should not be countenanced by the court. He argued that the applicants' 'malice is clearly directed at targeting an individual with whom they have political differences, a battle which should not involve the courts.' These parties, he submitted, merely attempt to undermine a process, the outcome of which would undermine the will of the people who voted for the MK party. In order to bolster his submissions, Mr Mpofu relied on *Hudson v Hudson*,[12] followed *inter alia* in *Beinash v Wixley*[13] and *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others.*[14]

[40] The DA denies, that its application is abusive. It contends that if the NA's decision was unlawful and irrational, then the courts must review that decision.

[41] In our view the applicants have satisfactorily explained why they elected not to launch one application. CW explained that it applies for *interim* relief, whilst FUL seeks final relief in the form of a review and setting aside of the decision to designate Dr Hlophe. Further, CW is a non-governmental organisation and did not want to join the proceedings instituted by the DA, being a political party.

[11] *Ibid*.
[12] 1927 AD 259 (AD).
[13] 1997 (3) SA 721 (SCA) p 734F-G.
[14] 2023 (2) SA 68 (CC).

[42] Furthermore, the parties agreed during the case management meeting referred to above that all three matters should be heard simultaneously as a result of which timeframes were provided for the filing of affidavits and heads of argument. Thereupon Dr Hlophe and MK prepared and responded in composite answering affidavits to the three applications.

(b)The High Court's lack of jurisdiction

[43] The High Court's jurisdiction is attacked. It is appropriate to deal with the submissions of ATM, in particular, as well as those of Dr Hlophe and MK that the Constitutional Court has exclusive jurisdiction over the present dispute. These submissions can be dealt with swiftly. None of the applicants allege that the NA has failed to fulfil a constitutional obligation imposed upon it.[15] In *Economic Freedom Fighters v Speaker of the National Assembly and Others* the Constitutional Court interpreted its jurisdiction narrowly to ensure that it is not the court of first and last instance unnecessarily. In that case the court considered the total failure by the NA to hold the executive accountable and concluded that such failure fell within its exclusive jurisdiction under s 167(4)(e) of the Constitution.[16]

[44] *In casu* it is not the case of the applicants that the NA failed to fulfil a constitutional obligation. It is precisely the manner of the fulfilment of its constitutional obligation which is being attacked. In *African Transformation Movement v* Speaker *of the National Assembly and Others*[17] the High Court held that it had jurisdiction to hear an application for the review and setting aside a decision of the Speaker of the NA in declining a request to hold voting by secret ballot. In that case the applicant's cause of complaint related to the procedural path to the vote and did not involve a failure to fulfil a constitutional obligation. The court held further that a party relying on jurisdictional exclusivity in terms of s 167(4)(e) must establish that there was a failure by the NA to fulfil a constitutional obligation.[18] Having accepted that it had jurisdiction, the High Court dismissed the applicant's application for review. On appeal the refusal decision was set aside by the Supreme Court of Appeal[19] and the matter was remitted to the Speaker for a fresh decision.

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[15] See for example: *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) paras 16-19; see also s 167(4)(e) of the Constitution.
[16] *Ibid* para 43.
[17] 2022 (2) SA 468 (WCC).
[18] *Ibid* paras 18-26.
[19] *African Transformation Movement v Speaker, National Assembly and Others* 2022 (4) SA 409 (SCA).

(c) Lack of Urgency

[45] The respondent parties also rely on an alleged lack of urgency. There can be no doubt that the applications are urgent. Not only did the parties agree to the filing of answering affidavits and heads of argument and the simultaneous hearing of all three applications on 5 and 6 September 2024, but the next sitting of the JSC, as mentioned above, is from 7 to 11 October 2024. Sufficient time was provided to the respondents to comply with the directives in this regard. As mentioned, during the intended sitting of the JSC, interviews for the position of the Judge President of the Western Cape Division will take place in addition to vacancies for the Supreme Court of Appeal and other Divisions of the High Court. Any participation of Dr Hlophe in these interviews, it was argued, will undermine the integrity of the JSC and the public perception of its ability to perform its constitutional function. In addition, it was argued, that no final relief in Part B will be obtained before the October interviews, hence the decision to approach this Court for *interim* relief prior to the upcoming October interviews.

(d)The applicant's lack of locus standi

[46] The applicants' *locus standi* is also in dispute. There are ample examples in our case law where all three applicants have embarked upon litigation. Their *locus standi* was not an issue, and correctly so. In *Albutt v Centre for the Study of Violence and Reconciliation*[20] the court held that the concession of the NGO's standing was properly made insofar as our Constitution adopts a broad approach to standing, especially relating to the violation of rights in the Bill of Rights. The Supreme Court of Appeal dealt with the DA's standing in *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others*[21] and held that the DA's members expected of it to do whatever is in its power to foster and promote the rule of law. This obviously includes litigation.

[47] Before this Court, the DA has standing in this application in that it is a political party represented in the NA and on the JSC. It and its members have an interest in NA's decision to designate Dr Hlophe to the JSC. CW makes submissions on policy and legislation which focus on holding public institutions and office bearers accountable. It also raises awareness around corruption, advocates for change and

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[20] 2010 (3) SA 293 (CC) para 33.

[21] 2012 (3) SA 486 (SCA) para 45; see also *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* 2011 (3) SA 549 (SCA) para 21.

undertakes public education to encourage the preservation of the rule of law. It has instituted this application in its own interest in terms of s 38(a) of the Constitution and has also brought the application in the public interest in terms of s 38(d) of the Constitution.

(e) Incomplete/Inchoate pleadings

[48] MK in particular submitted that the applicants' pleadings are inchoate and/or incomplete and lack compliance with *OUTA*[22] requirements. It is alleged that, contrary to the elementary rules of pleading, all three applicants simply failed to plead or allege the fulfilment of the well-settled *OUTA* test. Instead, they rely on the so-called 'pre-constitutional or common law Setlogelo test'. This submission on behalf of MK is rejected. Mr Moela, its junior counsel, correctly made the point that the common law or Setlogelo test was not jettisoned. Yet, he submitted that there are now eight requirements for *interim* interdicts. This is obviously incorrect. In order to set the record straight, the following *dicta* in *OUTA* are quoted:[23]

'[50] Under the *Setlogelo* test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, <u>the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm….</u>'

The court continued as follows:

'[55] A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant, if interim relief is not granted, as against the harm a respondent will bear, if the interdict is granted. Thus <u>a court must asses (sic) all relevant factors carefully</u> in order to decide where the balance of convenience rests.'

The court continued further:

'[63] There is yet another and very important consideration when the balance of convenience is struck. It relates to <u>separation of powers</u>. In *ITAC* we followed earlier statements in *Doctors for Life* and warned that —

"(w)here the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, <u>courts may not usurp that power or function by making a decision of their preference</u>. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other

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[22] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC).
[23] Ibid paras 48-66.

branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

[64] In a dispute as the present one, this does not mean that an organ of state is immunised from judicial review only on account of separation of powers. The exercise of all public power is subject to constitutional control. In an appropriate case an interdict may be granted against it …

[65] When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the executive or legislative branches of government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. While a court has the power to grant a restraining order of that kind, it does not readily do so, except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.

[66] A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.' (emphasis added and footnotes omitted)

[49] MK took the point that review under PAJA[24] and/or a legality review is not available to the applicants *in casu*. This aspect will be dealt with hereafter during the evaluation of the parties' submissions.

The FUL application

[50] MK failed to deal with the merits of FUL's application. Fact of the matter is that the grounds of review relied upon by FUL are in essence on all fours with those relied upon by DA and CW. Mr Mpofu made the following submission in paragraph 142 of his heads of argument:

'In the totality of the circumstances all the four broad grounds of illegality which have been pleaded by the DA and Corruption Watch are devoid of any merit. This shows that Part B is unlikely to succeed. The separate application of FUL is also doomed to fail whenever it will be ripe for hearing.'

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[24] The Promotion of Administrative Justice Act 3 of 2000.

Clearly, MK's legal team has considered the FUL application on its merits. MK had sufficient time to deal with FUL's application in detail as it has done with the DA and CW's applications. Its failure to do so has its consequences.

[51] FUL is of the view that its review application is ripe for hearing and insists on a final order. We initially considered that FUL is entitled to finality. In our view FUL correctly submitted that there is nothing to be added to the record of the proceedings of 9 July 2024. The Speaker attached the unrevised Hansard of 9 July 2024 to her affidavit.[25] FUL made it clear that it renounced the benefits of relying on rule 53 of the Uniform Rules of Court as it brought the application in terms of rule 6. MK decided not to answer FUL's application fully and it did so at its peril.

[52] Consequently, and after much deliberation, we concluded not to finally pronounce on FUL's application, but to postpone it to be heard simultaneously with Part B of the DA and CW applications or the Constitutional Court processes whichever occurs first. We are mindful of the fact that DA and CW requested us to grant *interim* orders only. Therefore, the *interim* relief that they seek will now be considered under the next heading.

The evaluation of the parties' submissions in respect of interim relief.

[53] Adv Masuku SC submitted on behalf of Dr Hlophe that the *interim* order sought by DA and CW against him is misconceived for a number of reasons, to wit:

a. it is not alleged that Dr Hlophe has caused or intends to cause any constitutional harm when exercising his duties as a JSC member;

b. although Dr Hlophe was removed from office as a judge, the law does not disqualify him from occupying any private or public office as a consequence of that removal;

c. Dr Hlophe's designation was done in accordance with s 53(1)(b) and (c) of the Constitution, read with rule 9 of the NA Rules and in terms of a Parliamentary convention;

d. the NA's convention is consistent with the Constitution;

e. the DA launched its application in order to achieve what it could not achieve through a constitutionally sanctioned democratic process;

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[25] Record 05-61 to 05-82; see also record 05-83 to 05-92: minutes of 2 July 2024.

f. emphasis is placed on the fact that s 178 of the Constitution provides no additional requirements other than those stipulated in the section and unlike as submitted by all three applicants herein, especially the DA and CW;

g. the interdict would prevent Dr Hlophe from performing his constitutional obligations while remaining a member of the NA that designated him to do so on the JSC;

h. much is made of Dr Hlophe's background and experience as a senior judge and academic and his valuable role in respect of transformation of the bench and right of access to courts;

i. the point is also raised that the JSC would be unlawfully constituted if Dr Hlophe is prevented from taking his position on that body;

j. the DA and CW have failed to meet the *OUTA* test as there is no demonstrable evidence of harm if Dr Hlophe is allowed to perform his constitutional functions as a member of the JSC, a task that he fulfilled for 15 years since the alleged acts of misconduct surfaced;

k. the applicants are accused of speculating on future challenges of decisions to be taken by the JSC if Dr Hlophe is allowed to participate as one of its members;

l. the balance of convenience favours the implementation of a lawful decision by the NA that is not the subject of any suspension or *interim* order.

[54] Adv Mpofu SC on behalf of MK also strenuously submitted that Dr Hlophe is suitably qualified and fit and proper to serve on the JSC, bearing in mind his qualifications, achievements and expertise. Also, he is entitled to serve on the JSC because he is an MP and he cannot be prevented from performing his constitutional duties as MP. Furthermore, he was designated by the NA to serve on the JSC in accordance with the NA's convention which is consistent with the Constitution. The golden thread running through the opposition of Dr Hlophe and MK is that the applicants conflate his position as impeached judge with his present position as MP. It is also submitted that the applicants' whole theory and basis of the applications would fall away when Dr Hlophe is eventually reinstated as a judge.

[55] ATM submitted, in the alternative and only if this court finds that the High Court has jurisdiction, that the NA fulfilled its constitutional obligations in designating Dr Hlophe to the JSC and that it acted lawfully in the process.

[56] The respondents' submission that the JSC would not have a quorum in order to take valid decisions if Dr Hlophe is interdicted from participating in that forum is incorrect. In *Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province*[26] the court pointed out that the majority support for decisions required by s 178(6) is the majority of members entitled to be present according to s 178(1) and not merely the majority present and voting. In that case the issue was whether the Premier's attendance was necessary. The court concluded that it was, bearing in mind s 178(1)(k) of the Constitution.[27] *In casu*, the absence of Dr Hlophe on the JSC would not be significant. There would still be five NA members represented on the JSC, constituting a majority of such members.

[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.

[58] Although only the DA and CW seek *interim* relief, there is no reason why this court may not consider the submissions of FUL in order to consider whether the first two applicants have proven a *prima facie* right, it being the first requirement for *interim* relief. As a first ground of review the DA relies on an error of law. The Speaker correctly conceded that the NA was not obliged to 'rubberstamp JSC nominations'. Notwithstanding this, the Hansard shows that Members of Parliament misconstrued the NA's powers, accepting that they did not have the power to vote against MK's nomination of Dr Hlophe and therefore did not exercise any discretionary power. The Chief Whip of the ANC was the last speaker to speak before voting took place. He

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[26] 2011 (3) SA 538 (SCA).
[27] *Ibid* paras 15,19&20.

made it clear that the Members of Parliament will have to 'stay with the current convention and the Rules of the National Assembly.'[28] In *Minister of Environmental Affairs & Tourism and Another v Scenematic Fourteen (Pty) Ltd*[29] the court confirmed the well-known principle that a functionary in whom a discretionary power is vested must themselves exercise that power in the absence of a right to delegate. The DA concluded that the error of law committed is material.[30] In this regard the DA further submitted that a practice or convention in the NA cannot trump an express NA rule.[31] If the NA's Rules provide that parties can decide how to vote on ordinary motions, including JSC nominations, such practice cannot override the rule. We are in agreement with the submission that a practice or convention cannot trump the Constitution, the rule of law, rationality and legality.

[59] FUL submitted that the NA's decision was based on a material error of law as it did not properly exercise its discretion in terms of s 178(1)(h) of the Constitution. It is apparent that it did not recognise that it had such a discretion at all. Corruption Watch's primary ground of review is that the NA did not exercise the designation power itself, but merely accepted Dr Hlophe's nomination by the MK. This designation power in terms of s 178(1)(h) of the Constitution vests in the NA alone and not in any other body or individual members thereof. It is common cause from the contents of the Hansard that the NA followed the convention that a party's nomination to the JSC is simply accepted by the NA. Although such a practice or convention may be valid in respect of parliamentary committees in general it is irrelevant in this case as the JSC is not a parliamentary committee, but a body established by the Constitution consisting of members representing different interest groups.

[60] A further ground of review is that the designation of Dr Hlophe to the JSC is incompatible with the NA's obligations under s 165(4) of the Constitution. The applicant parties made the obvious point that the JSC performs a vital role in the appointment of judges and found support to strengthen this argument in the decision

[28] Record 05-81.
[29] 2005 (6) SA 182 (SCA) para 20.
[30] Reliance is placed on *Genesis Medical Scheme v Registrar of Medical Schemes and Another* 2017 (6) SA 1 (CC) para 20; *African Transformation Movement v Speaker of the National Assembly and Others* 2022 (4) SA 409 (SCA) paras 12-13.
[31] See *inter alia* NA Rules 9 and 92.

of *Helen Suzman Foundation v Judicial Service Commission.*[32] The Constitutional Court stated the following about JSC members:

'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 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.' (emphasis added)

[61] It is reiterated that s 165(4) of the Constitution obliges all organs of state to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. The authority of courts and obedience of their orders is the very foundation of a constitutional order founded under the rule of law. It depends on public trust and respect for the courts as reiterated in *Secretary, Judicial Commission of Inquiry into allegations of State Capture v Zuma and Others.*[33] Dr Hlophe's version on point is telling in this regard. He stated the following under oath:[34]

'The purpose of removal from judicial office has nothing to do with eligibility for membership in the NA. It is to protect judicial independence. It does not carry any more punishment than the removal because a judge does not lose any benefits other than the status of the judicial office when removed from office.'

The NA is an organ of state as contemplated by paragraph (b)(i) of the definition in s 239 of the Constitution. It thus carries the responsibility to assist and protect the courts and not to take steps which will undermine their independence, impartiality, dignity, accessibility and effectiveness. The appointment of Dr Hlophe to the JSC will inevitably undermine the independence, dignity and effectiveness of our courts.

[62] The next review ground is that the NA took various irrelevant factors into consideration and failed to consider relevant and material factors in reaching its decision. This may be dealt with in the same breath as the last ground of review, to wit that the NA's decision was unreasonable and irrational. The NA designated Dr Hlophe whilst he had been impeached for serious misconduct because he grossly breached his judicial oath of office. Therefore, so it was submitted, he is in no position to assess

[32] 2018 (4) SA 1 (CC) para 37.
[33] 2021 (5) SA 327 (CC) para 27; see also para 103.
[34] Record 04-45: para 66.

the fitness and propriety of judicial candidates. It is submitted that his presence on the JSC will undermine the legitimacy of the appointment process.

[63] On the argument advanced by the Speaker as to the criteria to be taken into account when designating an MP to the JSC, our *prima facie* view is that the Speaker is wrong in submitting that there were no further criteria than the two mentioned in her letter of 9 July 2024.[35] The overarching purpose of the JSC's composition is to safeguard judicial independence and to ensure public confidence in the appointment process of judges. We do not speak for the review court that will ultimately have to adjudicate Part B of the two applications, but this aspect bolsters the applicants' *prima facie* right. In conclusion on the issue, the applicants submitted, relying on *Democratic Alliance v President of the Republic of South Africa and Others*[36] that the NA's means are not rationally linked to the purpose for which the power was conferred. In our view there are indeed sufficient prospects of success on review, which establishes the prima facie right which needs protection.

[64] It is evident from the papers that the NA failed to appreciate that it had a discretion in designating MPs to the JSC and consequently, it failed to exercise such discretion and did 'rubberstamp' MK's nomination of Dr Hlophe. Dr Hlophe and MK submitted that his removal from the office of a judge did not prevent the NA to designate him. According to them, no collateral consequences followed upon his removal from the office as a judge, unlike the situation of a President provided for in s 89 of the Constitution. This startling submission, based on the evidence of Dr Hlophe quoted above, is untenable. The JSC is not an ordinary portfolio committee of Parliament, but an entity established by the Constitution.

[65] Bearing in mind the objective facts and submissions of all the parties pertaining to the grounds of review, we are satisfied that at least a very strong *prima facie* case has been made out to be successful in the review applications contained in Part B of the two respective applications. We decided to postpone the FUL application for review as mentioned earlier and it is thus not desirable to say anything more in this

[35] Record 05-19 to 05-20; para 35 of this judgment.
[36] 2013 (1) SA 248 (CC) para 89.

regard. In our view the first requirement for an *interim* interdict has been established by the applicants demonstrating good prospects of success in the review application.[37]

[66] An applicant for an *interim* interdict must show that it is likely to sustain some harm of irremediable or irreversible character, to wit a reasonable apprehension of irreparable harm. Dr Hlophe was found guilty of attempting to influence judicial deliberations and thereby he became the first judge to be impeached. Mr Zuma, the former President of the country was on centre stage in the Constitutional Court litigation at that stage. He is the leader of MK, the party that nominated Dr Hlophe to be designated as a member of the JSC. Although there is no pending litigation to set aside any of the decisions taken against him, Dr Hlophe made his intention clear. He intends to persist in litigating against not only the JSC, but the NA. This is ironic in that he has been designated to the JSC and is presently an MP in the NA. All three applicant parties made valid points, indicating that the legitimacy of the JSC's processes would be tainted, which cannot be repaired later if Dr Hlophe is allowed to participate in the JSC interviews and deliberations. This will undermine public confidence in the JSC.

[67] Much more does not have to be said. Based on the *OUTA dicta* referred to above, we seriously considered this second requirement for an *interim* interdict and are satisfied that the applicants' *prima facie* rights are threatened as there is a reasonable apprehension of irreparable and imminent harm if interdicts are not granted.

[68] We have seriously considered all relevant factors and the parties' submissions dealing with the third requirement, to wit balance of convenience, and in particular the separation of powers. We accept that the review court that will eventually hear the review applications may not usurp the powers of the NA in making a decision of its preference. It would have to exercise its authority within the bounds of the Constitution. In assessing the balance of convenience requirement, this Court has to consider the harm to be endured by the applicants if *interim* relief is not granted and the applicants succeed in obtaining final relief, compared to the harm borne by Dr Hlophe and MK if the *interim* relief is granted and the applicants fail to obtain the final relief.

[37] *Economic Freedom Fighters v Gordhan and Others* 2020 (6) SA 325 (CC) para 42.

Notwithstanding this, we are satisfied, in evaluating the balance of convenience, that this is one of the clearest of cases to grant a restraining order and that it is also constitutionally appropriate to grant the required *interim* interdicts. In granting same, Dr Hlophe will not be prevented to carry out his obligations as MP. He may miss one or perhaps two sittings of the JSC prior to the hearing of Part B of the applications. In granting same, the JSC will function in his absence, but if required, the NA may always designate another MP, nominated by the opposition parties to take his place. Irreparable harm befalls neither Dr Hlophe, nor the MK.

[69] Nothing really has to be said about the fourth requirement, to wit the absence of a satisfactory remedy. If the applicants have established irreparable harm, then there is no alternative remedy and *vice versa*. Most obviously, a review in due course will not protect the legitimacy of the upcoming JSC interviews. The NA's stance is clear. Dr Hlophe and MK made it clear in their opposition of the applications that they would fight them tooth and nail. Surely, there was no satisfactory alternative remedy available to the applicants given the imminent JSC interviews.

Costs

[70] The DA seeks the costs of three counsel in the event of being successful with the relief it seeks. CW is satisfied that the costs of its application be reserved for later adjudication. We are satisfied that the DA was entitled to approach the court for an *interim* interdict and that it should be awarded its costs as a successful party. However, there is no reason to allow the costs of three counsel and an appropriate order will be made in this regard. The costs in the FUL application will obviously have to stand over for later adjudication.

Orders

[71] The following orders are granted:

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

1. This application is dealt with as one of urgency and the applicant's failure to comply with the Uniform Rules of Court and Practice Manual is condoned.

2. Pending the determination of the merits of the Applicant's review of the National Assembly's decision to designate the First Respondent (Dr Hlophe) as its representative to the Judicial Service Commission (JSC), either in Part B of this application, or by the Constitutional Court in Case CCT 253/24 and/or in Case CCT

222/24, whichever occurs first, Dr Hlophe is interdicted from participating in the processes of the JSC.

3. The First and Fourth Respondents shall 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 forms, time periods and service provided for in the Uniform Rules of Court are dispensed with and the application is heard on an urgent basis in terms of Uniform Rule 6(12)(a).

2. Pending the determination of the merits of the Applicant's review of the National Assembly's decision to designate the Third Respondent (Dr Hlophe) as its representative to the Judicial Service Commission (JSC), either in Part B of this application, or by the Constitutional Court in Case CCT 253/24 and/or in Case CCT 222/24, whichever occurs first, Dr Hlophe is interdicted from participating in the processes of the JSC.

3. Costs are reserved for determination in Part B of the application.

AND

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

1. The Application is postponed to be heard simultaneously with Part B of the applications in case numbers 16170/2024 and 16771/2024 or the Constitutional Court’s processes under cases CCT253/2024 and/or CCT222/2024 whichever occurs first, costs to stand over for later adjudication.

THE COURT:

BAQWA, J

DAFFUE J

COLLIS J

Appearances

<u>For the applicants</u>:-

Democratic Alliance (DA):	Advv I Jamie SC; M Bishop and E Cohen
Instructed by:	Minde Schapiro & Smith Inc BELLVILLE
Freedom Under Law NPC (FUL):	Advv W Trengove SC; M du Plessis SC; S Pudifin-Jones; S Scott; and S Mohapi
Instructed by:	Nortons Inc c/o Abrahams Kiewitz Inc CAPE TOWN
Corruption Watch (CW):	Advv P Maharaj-Pillay and M de Beer (the heads of argument also prepared by Adv G Budlender SC)
Instructed by:	Norton Rose Fulbright South Africa Inc CAPE TOWN

<u>For the respondents</u>:

Dr MJ Hlophe:	Advv T Masuku SC; M Simelane; I Shai and N Mjiyako
Instructed by:	B Xulu and Partners Inc CAPE TOWN
Umkhonto Wesizwe (MK):	Advv DC Mpofu SC; L Moela and L. Ndabula
Instructed by:	KMNS Inc c/o Venfolo Lingani Inc CAPE TOWN
African National Transformation Movement (ATM):	Advv A Katz SC and M Mhambi
Instructed by:	Ashersons Attorneys CAPE TOWN

Speaker of the National Assembly (the Speaker):	Advv A Hassim SC and A Nacerodien
Instructed by:	State Attorney CAPE TOWN