IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE DATE: 5 October 2024

Case No. 2024-111939

In the matter between:

UMKHONTO WESIZWE PARTY	First Applicant
MANDLAKAYISE JOHN HLOPHE	Second Applicant
and	
JUDICIAL SERVICE COMMISSION	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
DEMOCRATIC ALLIANCE	Third Respondent
CORRUPTION WATCH NPC	Fourth Respondent
FREEDOM UNDER LAW	Fifth Respondent
ALL OTHER PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	Sixth to Twenty-First Respondents

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JUDGMENT

WILSON J:

1 The applicants approached me on an urgent basis seeking two kinds of relief, one in the alternative to the other. The primary and final relief they seek is an order declaring a decision of the first respondent, the JSC, to proceed with its October 2024 sitting next week, to be irrational, unlawful and unconstitutional. In the alternative, the applicants seek interim relief restraining the JSC from proceeding with its work until a final decision about the rationality of its refusal to postpone its October 2024 sitting is taken, or until a controversy about the designation of the second applicant, Dr. Hlophe, as one of its members, is resolved.

The decision of the Full Court in *Democratic Alliance v Hlophe*

2 Dr. Hlophe is the Leader of the Opposition in the National Assembly, and a Member of Parliament elected on the party list of the first applicant, the MK Party. It was in that capacity that Dr. Hlophe was designated, by the National Assembly, to take up one of the six seats on the JSC accorded to members of the National Assembly under section 178 (1) (h) of the Constitution, 1996.

3 On 27 September 2024, a Full Court sitting in the Western Cape interdicted and restrained Dr. Hlophe from "participating in the processes of" the JSC (see *Democratic Alliance v Hlophe* [2024] ZAWCHC 282 (27 September 2024)). The Full Court's order is interlocutory in nature. It will stand unless and until it is set aside on appeal, or an application for final relief concerning the lawfulness of Dr. Hlophe's designation to JSC is determined. It forms no part

of my task to comment on the correctness of the Full Court's order or of the reasons given for it.

4 In other words, the Full Court's order stands as a fact. The primary question before me is whether the JSC acted rationally in light of that fact by refusing the MK Party's request that its forthcoming sitting – scheduled to commence on 7 October 2024 – be postponed until the legal controversy surrounding Dr. Hlophe's designation to the JSC is resolved. If I find that this decision was irrational, then I must declare it so. If I find that the JSC's decision to proceed with its work regardless was rational, a secondary question arises. That question is whether there is any cause to interdict the JSC from proceeding, or to otherwise order it to suspend its work, on the basis that the MK Party's or Dr. Hlophe's constitutional rights would be unjustifiably infringed by the JSC continuing to perform its functions.

5 In my view, the JSC acted rationally in refusing to postpone its October 2024 sitting. Further, I think that the JSC's decision to proceed with its October 2024 sitting did not infringe, even *prima facie*, any of the MK Party's or Dr. Hlophe's rights. Assuming in the applicants' favour that their constitutional rights have been limited, the source of any such limitation was the Full Court's order, not the JSC's conduct in light of that order.

6 In what follows, I give my reasons for reaching these conclusions.

The rationality of the JSC's decision

7 After the Full Court handed its order down, on 30 September 2024, the applicants' attorney wrote to the JSC. He intimated that the applicants

intended to seek leave to appeal against the Full Court's order, and asked the JSC to postpone its October 2024 sitting until such time as the application for final relief before the Full Court had been determined, or until the outcome of a similar application pending at that time before the Constitutional Court was known, or "until the National Assembly has determined, one way or the other, whether it is legally empowered to designate another member of the opposition or to put the same question for the vote, whatever the case may be".

8 The JSC convened an emergency meeting and responded to the letter the next day through its Chairperson, the Chief Justice. The Chief Justice explained that the JSC had resolved, by a majority, to proceed with its October 2024 sitting. The Chief Justice pointed out that the JSC is bound by the Full Court's judgment and order, and explained what, in the JSC's view, that means. The Chief Justice said that the Full Court had not set aside Dr. Hlophe's designation to the JSC. The JSC accordingly remains properly constituted and able to proceed with its work in Dr. Hlophe's absence. The Chief Justice pointed out that the Full Court accepted that the JSC would lawfully be able to continue its work in Dr. Hlophe's absence. She also disclosed that the JSC had made its decision "in view of section 18 (2) of the Superior Courts Act 10 of 2013".

9 It seems to me that essence of the position spelled out in the JSC's letter was that the Full Court's decision is an "interlocutory order not having the effect of a final judgment" under section 18 (2) of the Act, meaning that an application for leave to appeal would not automatically suspend it; that the Full Court's

order prevented the JSC from proceeding in Dr. Hlophe's presence; and that the JSC's work could nonetheless lawfully proceed in Dr. Hlophe's absence.

10 I cannot say that this position is irrational. An irrational decision is one that lacks any connection to a lawful reason or purpose – one that is based on a brute preference; that is taken on a whim; or that is so tainted by bad reasons as to be unconnected to any good ones (see *Industrial Zone (Pty) Ltd v MEC for Economic Development, Environment, Agriculture and Rural Affairs, Gauteng* [2023] ZAGPJHC 376 (25 April 2023), paragraph 7). The JSC's position exhibits none of these attributes.

11 Mr Mpofu, who appeared for the MK Party, argued that the JSC had misconstrued the nature of the Full Court's order. He said that the Full Court's order is final in effect, meaning that the application for leave to appeal that the applicants delivered on 30 September 2024 suspended it. I do not think that this is correct. A final order generally has three qualities: it is not susceptible to alteration by the court that made it; it is definitive of the parties' rights; and it disposes of a substantial portion of the relief claimed in the proceedings on which it is made (see, generally, *Zweni v Minister of Law and Order of the Republic of South Africa* [1993] 1 All SA 365 (A)). The Full Court's order does none of these things. It is merely a temporary restraint pending the outcome of a definitive ruling about whether Dr. Hlophe was lawfully designated to the JSC. It will be confirmed or discharged when the court that granted it makes a final determination of that issue. The JSC was accordingly correct to conclude that the Full Court's order was not suspended by the application for leave to appeal.

12 It was next contended that the JSC was wrong to conclude that it would be properly constituted in Dr. Hlophe's absence. In this respect, Mr. Mpofu relied on the decisions of the Supreme Court of Appeal in *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) ("*Cape Bar Council*") and *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape Province* 2011 (3) SA 538 (SCA) ("*Premier of the Western Cape*"). Those decisions, insofar as they are relevant, are authority for the proposition that the JSC is not properly constituted if any of its constitutionally appointed members is absent from its deliberations without justification (see *Cape Bar Council*, paragraphs 35 and 36).

13 In *Hlophe v Judicial Service Commission* [2022] 3 All SA 87 (GJ), ("*Hlophe*") a Full Court of this division parsed *Cape Bar Council* and *Premier of the Western Cape* to mean that the absence of an *ex officio* member of the JSC was not in itself fatal to the validity of the JSC's proceedings. The absence must also be unjustified. Mr. Mpofu submitted that *Hlophe* does not bind me insofar as it departs from the decisions in *Premier of the Western Cape* and *Cape Bar Council*. I am prepared to assume that he is correct, but I do not think that this helps his argument. I see no discontinuity between the three decisions: what matters is not simply whether a designee is absent, but whether there is a justification for that absence.

14 In this case, Dr. Hlophe's absence from the October 2024 sitting of the JSC is not merely justified: it is mandated by the Full Court's order. Were I at large to go behind that order, I might have been called upon to decide whether the Full Court's order constitutes sufficient justification to exclude Dr. Hlophe from the

JSC's sitting. However, I am neither required nor entitled to do that. The fact of the Full Court's order is justification enough for Dr. Hlophe's absence. The JSC was accordingly correct to conclude that it could lawfully proceed in Dr. Hlophe's absence.

15 Mr. Mpofu also argued that the Full Court's decision cast the validity of all six of the National Assembly's designations to the JSC into doubt. For that additional reason, he submitted, the JSC cannot lawfully or rationally proceed with its deliberations. However, it seems to me that the Full Court's decision did not taint the appointment of any of the National Assembly's designees other than that of Dr. Hlophe. The order is quite clear that only Dr. Hlophe is restrained from participating in the JSC's work. Moreover, no-one asked the Full Court to consider the legality of any of the other designations. The issue was simply not before it. Nor does it follow that to impugn Dr. Hlophe's designation is to impugn the designation of the other five National Assembly members. Dr. Hlophe was restrained from participating the JSC's work because he is a former Judge removed from office for gross misconduct. None of the other designees bears that characteristic.

16 It was not suggested that the JSC was wrong to conclude that it could not proceed in Dr. Hlophe's presence. It follows that none of the reasons the JSC gave for refusing to postpone its October 2024 sitting were so tainted by mistakes of fact or of law as to render the decision to proceed irrational.

17 For these reasons, the JSC's decision to proceed with its October 2024 sitting was plainly rational.

The interim relief

18 My conclusion on the final declaratory relief sought entails the proposition that there is no *prima facie* basis on which to assail the rationality of the JSC's decision for the purposes of obtaining interim relief. What remains are the threats to the applicants' rights said to be embodied in the JSC's decision to proceed with its October 2024 sitting. The threat to rights Mr. Mpofu identified was the continuation of the JSC's work without one of its democratically elected designees being able to participate in it. This was said to limit the suite of political rights guaranteed in section 19 of the Constitution.

19 I shall assume in the applicants' favour that this constitutes a limitation of either or both of their constitutional rights. However, it seems clear to me that the limitation of rights arises from the Full Court's order, not from the JSC's decision to proceed. It is the Full Court, and not the JSC, which has decided that Dr. Hlophe may not participate in the JSC's proceedings. The JSC was required to act in light of the Full Court's decision, which it, like me, must treat as valid and binding. As long as it acted rationally in light of the Full Court's order, the JSC could not itself infringe any of the applicants' rights.

20 It follows that the applicants cannot demonstrate, even *prima facie,* that the JSC's decision to proceed was taken in breach of any of their rights. There is accordingly no basis for the interim relief claimed.

Costs

21 This means that the application must be dismissed. The JSC did not seek costs against the applicants. However, both the third respondent, the DA, and

the fifth respondent, FUL, sought a punitive costs order against the applicants in the event that the application failed.

22 FUL amplified its submissions by reference to a press release issued by the MK Party in the aftermath of the Full Court's ruling. As Mr. Mpofu accepted, the content of that press release is deeply troubling. I will not give it credence by repeating its contents here. It is enough to say that the press release constituted a gratuitous and wholly unjustified attack on the Full Court's decision, and on the judiciary in general. It reflects poorly on the MK Party, and upon the individuals who are responsible for drafting and issuing it. Dr. Hlophe, and former President Jacob Zuma, who is the leader of the MK Party, have been invited to dissociate themselves from it. I hope that they do so.

23 Nevertheless, our Constitution protects free expression. It even protects the expression of that which should not be expressed, so long as it does not amount to hate speech. It may be true, as Mr. du Plessis submitted, that the press release was contemptuous and that, for that reason, the right to free expression does not extend to it. But it forms no part of my function to make that determination here. The issue of which side of the line the press release falls was not fully argued before me, and there is no reason why the contempt it may very well have constituted cannot be explored, and if necessary punished, in other proceedings.

24 Mr. Bishop, who appeared for the DA, argued that, because neither FUL nor the DA are organs of state, the applicants do not benefit from the *Biowatch* costs shield that applies to a litigant raising a constitutional issue in good faith (see, generally, *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA

232 (CC)). However, this overlooks the fact that the Constitutional Court has frequently applied a costs shield in favour of private parties unsuccessfully litigating constitutional issues against other private parties (see, for example, *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) paragraph 90 and *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd* 2006 (6) SA 103 (CC), paragraph 28).

25 In any event, I do not think that the correct approach to costs in this case starts with the classification of the parties as private or public. Although the JSC is indisputably an organ of state, the remaining litigants before me cannot easily be classified as private or public. They are, rather, nominally private bodies and individuals acting in what they consider to be the public interest. Although the issues before me were mercifully straightforward, the parties before me are engaged in a wider dispute about the very nature of South African democracy. The applicants say that Dr. Hlophe's democratic mandate as a duly elected Member of Parliament designated to the JSC trumps any incongruency between his status as an impeached Judge and the role in appointing Judges his designation to the JSC gives him. The DA, FUL and several other parties before the Full Court see things the other way around.

26 For now, the Full Court has determined that there is enough reason to doubt the legality of the National Assembly's decision to designate Dr. Hlophe to the JSC to prevent Dr. Hlophe from participating in the JSC's work until the issue is finally resolved. The applicants took the view that this meant the JSC should not proceed until the controversy is settled. They approached me to decide whether the JSC can be forced to acquiesce in that view. I have held that it

cannot, but I cannot say that the applicants acted vexatiously or in bad faith merely by asking me to take that decision. Nor can I say that the applicants have misconducted themselves in the course of the litigation before me.

27 Accordingly, given the nature of this case, and the importance of the issues that surround it, I do not think that it would be fair to mulct the applicants in costs, even though they have been unsuccessful.

Order

28 For all these reasons, the application is dismissed, with each party paying their own costs.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 5 October 2024

HEARD ON:	4 October 2024
DECIDED ON:	5 October 2024
For the First Applicant:	DC Mpofu SC L Moela V Mokwevho L Ndabula Instructed by KMNS Inc
For the Second Applicant:	V Ngalwana SC N Khooe Instructed by KMNS Inc
For the First Respondent:	NH Maenetje SC

	CA Lewaak M Kritzinger Instructed by the State Attorney
For the Third Respondent	M Bishop E Cohen Instructed by Minde Shapiro and Smith Inc
For the Fifth Respondent	M du Plessis SC S Pudifin-Jones S Scott S Mohapi T Skosana Instructed by Nortons Inc