
Media Statement

FUL launches urgent court application challenging Dr John Hlophe's appointment to the JSC

Freedom Under Law launched an urgent court application in the Western Cape High Court today (25 July 2024), challenging Parliament's decision to appoint Dr John Hlophe to serve on the Judicial Service Commission (JSC).

The JSC is established by section 178 of the Constitution. It serves a vital oversight function over the judiciary in South Africa. Its role in maintaining a competent, impartial, independent, and accountable judiciary cannot be overstated. The JSC does this in two main ways: by hearing complaints against sitting judges, and by interviewing and appointing new judges.

On 21 February 2024, just a few months ago, Dr John Hlophe became the first judge in democratic South Africa to be removed from office. Dr Hlophe was found guilty of gross misconduct (a very high standard) by the JSC and was then impeached by the National Assembly.

Dr Hlophe was removed for attempting to influence judges of the Constitutional Court to decide a matter in favour of former-President Jacob Zuma. Once Dr Hlophe was removed as a judge, he joined Jacob Zuma's new political party, uMkhonto weSizwe Party (MK). MK deployed Dr Hlophe to the National Assembly as a Member of Parliament. And, on 9 July 2024, the National Assembly selected six MPs, including Dr Hlophe, to serve on the JSC: the very same body that found him guilty of gross misconduct and unfit to be a judge. And the same body which is tasked with interviewing and determining whether candidates possess the right qualifications and meet the high ethical standards to be appointed as judges.

The JSC is due to shortlist and interview candidates for judicial appointment in October 2024, meaning that time is of the essence and that steps to rescue the integrity of the JSC require the urgent intervention and assistance from the courts.

FUL challenges the National Assembly's decision to select Dr Hlophe on **four grounds**:

- First, the National Assembly was incorrect in its understanding and application of section 178(1)(h) of the Constitution which gives the National Assembly a discretion to select which of its members should serve on the JSC. The Constitutional Court has previously found that bodies appointing candidates onto the JSC must take their responsibility seriously and appoint "suitable candidates". Dr Hlophe is plainly not suitable. While representatives of the ANC and other parties publicly shared their reservations about whether it was

appropriate for Dr Hlophe to serve on the JSC, the National Assembly selected him anyway because he had been proposed by the MK party. But the National Assembly did not realise that it had any choice.

- Second, section 165(4) of the Constitution obliges Parliament to take steps to protect the independence of the judiciary and the public's confidence in it. Appointing Dr Hlophe to the JSC is completely at odds with that obligation.
- Third, appointing Dr Hlophe was irrational and unreasonable. A decision is irrational if it undermines the purpose for which the decision was taken. The core purpose of the JSC is to foster public confidence in the JSC and, in turn, the individuals who are selected to be judges. The very reason that Dr Hlophe was removed as a judge was because the JSC and the National Assembly found that his continued involvement in the judiciary would threaten the public's confidence in the judiciary. Appointing Dr Hlophe to the JSC means that he is again involved in the judiciary – in the key role of interviewing and deciding on the appointment of new judges – and that this involvement, too, threatens the public's confidence in the judiciary.
- Lastly, FUL argues that the National Assembly took various irrelevant factors into consideration and failed to consider relevant ones. In the first place, it wrongly treated an internal practice of the National Assembly as a strict rule to the effect that a party's nomination of a member to the JSC should be automatically adopted (instead of recognising that the National Assembly had the power to reject Dr Hlophe as a candidate for the JSC) In the second place, the National Assembly failed to consider relevant factors such as whether there was another candidate from the MK party (or another minority party) who would be suitable.

For those reasons, FUL has requested that the High Court: declare the National Assembly's decision to name Dr Hlophe to the JSC inconsistent with the Constitution and invalid; to set it aside; and to refer matter back to the National Assembly for reconsideration in light of the judgment.