

# "Reflecting back" on public participation in the judicial appointment of the South African Chief Justice?\*

Nomthandazo Ntlama-Makhanya

*Professor of Public Law; Department of Public and Constitutional Law  
Faculty of Law, University of Fort Hare*

## SUMMARY

After more than two decades of South Africa's democracy, the significance of the reform of the judiciary is grounded in the process of judicial appointments to restore its public credibility from South Africa's tainted past. Such reform is now constitutionalised through the establishment of the Judicial Services Commission (JSC) which serves as a focal point in the restoration of such confidence in the judiciary. The JSC's processes seek to ensure the rebuilding of public confidence which entails, amongst others the legitimacy of judicial appointments that should be reflective of gender and racial composition as envisaged in the Constitution 1996. However, the public has since weighed heavily on the criteria and discretion exercised by the JSC on its judicial appointment processes. The debates were intensified by President Ramaphosa's unprecedented reform to involve public participation and establishment of the advisory panel in his constitutional role of the nomination process of the Chief Justice. The President opened an opportunity for a pool of eligible candidates to be recommended for his consideration after they were determined and sifted by the advisory panel. The last four candidates were recommended by the panel and after their interviews, the JSC recommended Justice Mandisa Maya as Chief Justice for appointment by the President. Instead, the President appointed Justice Raymond Zondo as Chief Justice and Justice Maya as Deputy Chief Justice which raised debates and questions on the exercise of this constitutional discretion.

The purpose of this article and its focus and limitation is to examine the role of public participation and the establishment of the advisory panel in the nomination process of the Chief Justice. It raises questions about whether public participation does not amount to the representative form of democracy in judicial appointments. In addition, it will restore trust, credibility, and confidence and extend the protection of the judiciary from unjustified attacks from the members of the public. In turn, the value of the credibility of the recommendations of the JSC as a constitutional structure in the judicial appointment processes. Therefore, the paper argues that public participation in the nomination of the Chief Justice is an indirect intrusion of the representative form of democracy in judicial appointments. Public participation is also unlikely to make a significant

\* The paper was presented at the Society of Law Teachers of Southern Africa Conference entitled: *Public participation: a welcomed reform for the judicial appointment of the South African Chief Justice?* hosted by the Faculty of Law, University of Fort Hare, East London, 11-14 July 2022.

contribution to the protection accorded to the judiciary by the Constitution. If the President could “water down” the JSC’s recommendation, there is uncertainty towards the strive for the attainment of transformative ideals of the new democracy.

## 1 Introduction

The dawn of democracy which presented itself in 1994 in South Africa provided a unique opportunity for the reform and transparency in the nomination process of eligible candidates for judicial appointments. This period brought a dramatic change in judicial appointments to ensure the steering of the judicial ship in compliance with the values and prescripts of the Constitution<sup>1</sup> and those of the international community as envisaged in many of the international instruments.<sup>2</sup> The establishment of the Judicial Services Commission (JSC)<sup>3</sup> directed much-needed change to ensure the reflection of the foundational values of the Republic<sup>4</sup> in the judiciary. The JSC carries a greater responsibility to ensure the credibility and building of public confidence in its judicial appointment processes towards the advancement of the integrity of the judiciary. This process is foundational to the restoration of public confidence in the judiciary which was tainted by South Africa’s apartheid past wherein parliament reigned supreme over the judiciary.<sup>5</sup> As similarly expressed by Ackerman J in *S v Makwanyane*<sup>6</sup> on South Africa’s history and the envisaged future which is of direct application to the argument being made in this article, pointed out that:

the preamble to the Constitution refers to the creation of a new order in a state, which, amongst other things, is described as a “constitutional state,”

- 
- 1 Constitution of the Republic of South Africa, 1996, hereinafter the Constitution.
  - 2 See Universal Declaration of Human Rights 1948; International Covenant on Civil and Political Rights, 1966; Convention on the Elimination of All Forms of Discrimination Against Women 1979; Convention on the Elimination of Racial Discrimination 1965; African Charter on Human and Peoples Rights 1981; United Nations Economic and Social Council “The Bangalore Principles of Judicial Conduct” (2006) Vienna; Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers 30 October 2018 and Judicial Service Commission Act 9 of 1994.
  - 3 See S178 of the Constitution.
  - 4 See S1 of the Constitution which reads as follows:  
The Republic of South Africa is one, sovereign, democratic state founded on the following values:
    - (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
    - (b) Non-racialism and non-sexism.
    - (c) Supremacy of the constitution and the rule of law.
    - (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.
  - 5 Bader “Parliamentary supremacy vs judicial supremacy: how can judicial, public and political dialogue be institutionalized?” 2016 *Utrecht Law Review* 159-183.
  - 6 1995 6 BCLR 665 (CC).

[and] in reaction to our past, ... we have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law.<sup>7</sup>

As clearly stated in *Makwanyane*,<sup>8</sup> the uniqueness of the new dawn as envisaged in the Constitution is its commitment to the general tone for "healing the divisions of the past".<sup>9</sup> It is reinforced by the quest for a future that is founded on gender and racial balance<sup>10</sup> to promote South Africa's pluralistic character in the judiciary which was not the case in the past. Such obligation is founded on the values of the Constitution which are based on equality, freedom and human dignity as envisaged in section 1 of the Constitution. These values serve as a cornerstone and constitutional imperatives in the transformative process of the JSC's criteria for judicial appointments. The JSC criteria that it considers in giving effect to section 174(1) of the Constitution which is used as a measure in the transformation of the judiciary has been fundamental in the debates that have since ensued. The debates relate to how it exercises its constitutional obligation of attempting to restore public confidence and credibility of its own processes.<sup>11</sup> The JSC has been challenged on various occasions to the extent of having to disclose the record of its post-interviews deliberations in the *Helen Suzman Foundation v Judicial Services Commission* judgment<sup>12</sup> which found the non-disclosure to be unconstitutional for lack of transparency.<sup>13</sup> Recently, the JSC has been under intense public and legal scrutiny over how it conducted the October 2023 interviews for the appointment of the Supreme Court of Appeal (SCA) eligible candidates.<sup>14</sup> During the October interviews,

---

7 *S v Makwanyane* paras 155-156.

8 It is to be noted that *S v Makwanyane* was argued based on the Interim Constitution of the Republic of South Africa Act 200 of 1993, hereinafter the "Interim Constitution".

9 See preamble of the Constitution.

10 See S174(1) of the Constitution that sets the tone for transformation by requiring the appointment of an appropriately qualified fit and proper person and reinforced by ss 2 on the consideration for the need to reflect on the gender and racial make-up of the judiciary.

11 See Oxtoby and Masengu "Who nominates the judges: some issues underlying judicial appointments in South Africa" 2017 *Stell LR* 540-562.

12 2018 7 BCLR 763 (CC).

13 See also Ntlama "The implication of the decision in *Helen Suzman Foundation v Judicial Service Commission* 2018 (7) BCLR (CC) 8 on the functioning of the South African Judicial Service Commission" 2020 *Law Development and Democracy Journal* 248-270.

14 Moosa "JSC is defying court order by holding the SCA interviews later than agreed to, FUL says" <https://www.businesslive.co.za/bd/national/2024-02-26-jsc-is-defying-court-order-by-holding-sca-interviews-later-than-agreed-to-ful-says/> (last accessed 2024-02-26).

David Unterhalter SC<sup>15</sup> was not recommended for appointment for the SCA vacancies instead two black women were appointed and two other vacancies were left open from the original advertised positions.<sup>16</sup> This caused legal discomfort to the extent that Freedom Under the Law (FUL) approached the Gauteng High Court, Pretoria, for the review of the JSC decision. The parties reached an out-of-court settlement which was made an order of court which included an agreement to invite all candidates who received 12 or more out of 23 votes in the 2023 sitting to apply for the remaining vacancies in the new round with interviews likely to be held in June as is normally to be held in April of each year.<sup>17</sup>

With this background, in the year 2021, President Ramaphosa of the Republic of South Africa<sup>18</sup> intensified the legal and constitutional “eyes” on the criteria for judicial appointments by an “unprecedented reform” to involve public participation<sup>19</sup> and the further establishment of an advisory panel in the nomination process of the Chief Justice.<sup>20</sup> It is acknowledged that the Constitution is silent on the process to be followed on the nomination process except for the President’s discretion to nominate an eligible candidate for the interview by the JSC.<sup>21</sup> The essence of section 174(3) is that the President has absolute discretion in

---

15 Naidoo and Mondlane “Why the JSC rejected Unterhalter again – Casac” 2023 November 10 <https://www.politicsweb.co.za/documents/why-the-jsc-rejected-david-unterhalter-again--casa> (last accessed 2024-02-27). See also Maughan “Racism and arrogance: how baseless claims led the JSC to reject one of SA’s top legal minds” 2023 November 10 <https://www.news24.com/news24/southafrica/news/racism-and-arrogance-how-baseless-claims-led-the-jsc-to-reject-one-of-sas-top-legal-minds-20231110> (last accessed 2024-05-17).

16 Ferreira “Freedom Under the Law accuses the JSC of flouting the court order on supreme court of appeal vacancies” 2024 February 24, *Mail & Guardian*, <https://mg.co.za/news/2024-02-24-freedom-under-law-accuses-jsc-of-flouting-court-order-on-supreme-court-of-appeal-vacancies/> (last accessed 2024-02-27).

17 As above.

18 Hereinafter the President.

19 See Mathopo J in *South African Iron and Steel Institute v Speaker of the National Assembly* 2023 (10) BCLR 1232 (CC) para 32, giving substance to the concept in that: “[it] is a process in which the public is engaged in a given matter of public interest for the purpose of obtaining their views with the aim of ensuring the process is fair, reasonable and that the public is heard”.

20 The panel was comprised of the former Judge of the International Court of Justice, Navi Pillay as Chairperson; Minister of Justice and Constitutional Development, Ronald Lamola; Former Minister of Justice: Jeff Radebe; former Public Protector, Adv Thuli Madonsela; Co-Chair of the South African National Aids Council, Ms Mapaseka Steve Letsike and Professor Ziyad Motala at Howard University School of Law. See South African Government “President Cyril Ramaphosa invites public participation in selection of Chief Justice” 2021 <https://www.presidency.gov.za/president-ramaphosa-invites-public-participation-selection-chief-justice> (last updated access 2024-05-17).

21 However, S174(3) obligates the President to appoint the next Chief Justice after consultation with the JSC and leaders of political parties represented in the National Assembly.

the appointment of the Chief Justice which gives the impression that he need not even consider the views or recommendations of a constitutional structure (JSC) which is also required to be consulted by him in the process. It is this silence that enabled the President to exercise his discretion regarding how he would facilitate the nomination of the Chief Justice which included public participation. The public involvement has since raised debates on the delegated authority and the criteria used in the identification of the sifting panel to the exclusion of the JSC in the initial stages of the nomination process. The public responded positively to the call and after the sifting process by the panel, four candidates: Justice Mbuyiseli Madlanga; Justice Raymond Zondo; Justice Mandisa Maya, and Judge Dunstan Mlambo were shortlisted for the interviews that were held from 1 – 4 February 2022.<sup>22</sup> After the heated interviews, the JSC recommended one candidate, Justice Mandisa Maya as the Chief Justice for the President's consideration.<sup>23</sup> Instead of upholding the JSC's recommendation, the President appointed Justice Raymond Zondo as Chief Justice and Justice Maya for the Deputy Chief Justice position.<sup>24</sup> Both Justices have since occupied their respective positions.

Therefore, this article "flashes back" by reflecting on the involvement of public participation and the establishment of the advisory panel in the nomination process of South Africa's Chief Justice. The purpose was motivated by the President's opening of an opportunity for casting the net wide for a pool of candidates for nomination as opposed to his obligation of identifying a potential candidate to be interviewed and recommended by the JSC for appointment upon the success of such an interview. It, however, raises several questions about whether public participation does not amount to an indirect form of the intrusion of representative democracy in the reform of the way the process of judicial appointments should be managed and administered. In addition, whether it will restore the trust, credibility, confidence and extend the protection of the judiciary from unjustified public criticisms.<sup>25</sup> Whether the President was justified in relegating and delegating his constitutional duty of nominating the prospective candidate to the public before the consideration and recommendation by the JSC? Whether mere public participation would contribute to the reform and the transformative ideals of the judiciary? In turn, whether the recommendations of the JSC

---

22 Judges Matters "JSC Chief Justice interviews panel" February 2022 <https://www.judgesmatter.co.za/interviews/chief-justice-interviews/jsc-chief-justice-panel/> (last accessed 2024-02-26).

23 Benjamin and Ndzisho "A case of de javu? Justice Mandisa Maya's interview for Deputy Chief Justice" 17 June 2022 <https://www.judgesmatter.co.za/opinions/a-case-of-deja-vu-justice-mandisa-mayas-interview-for-deputy-chief-justice/> (last accessed 2024-02-26).

24 Staff Reporter "Ramaphosa appoints Raymond Zondo as New Chief Justice" 2022 <https://www.power987.co.za/featured/ramaphosa-appoints-raymond-zondo-as-the-new-chief-justice/> (last accessed 2022-03-20).

25 Staff Reporter "Attacks on the judiciary won't be taken lightly, says Ramaphosa" 2022 <https://www.news24.com/citypress/news/attacks-on-the-judiciary-wont-be-taken-lightly-says-ramaphosa-20210222> (last accessed 2022-03-23).

as a constitutional structure will also be a mere “smoke screen” of the due process of judicial appointments. Thereof, the article acknowledges public involvement in the nomination process of the other judges of the Constitutional Court but the uniqueness of the position of the Chief Justice is drafted distinctively from the process regarding the appointment of these other judges.<sup>26</sup> This article argues that what appears to be the “reform” of the nomination process is an unjustified attack on the protection accorded to the process by the Constitution. Public participation is unlikely to make any significant contribution under the guise of the principle of transparency and the encouragement of public involvement on issues of national interests regarding the President’s discretion on the nomination of the Chief Justice.

## 2 The Judicial Services Commissions: notoriety in judicial appointments in Africa?

### 2.1 The bedrock of the “house of negros” in post-apartheid South Africa<sup>27</sup>

The establishment of the Judicial Services Commissions (JSCs) is a groundbreaking change which brought a fresh breath to the appointment of judicial officers in contemporary Africa.<sup>28</sup> The process of judicial appointments seems to be the practice in other contemporary African countries after the attainment of their democracies from their colonial masters.<sup>29</sup> This also entails the transition from their historic pasts of non-adherence to democratic principles<sup>30</sup> in ensuring the legitimacy of judicial appointments in the re-building of the judiciary to conform to the prescripts of the new constitutional dispensation. Africa is recovering from a history of colonial control and manipulation which had a greater

---

26 See S174(4) of the Constitution.

27 The idiom is extracted from an opinion piece by Sisulu “Lindiwe Sisulu: Hi Mzansi, have we seen justice?” 2022 [https://www.iol.co.za/dailynews/opinion/lindiwe-sisulu-hi-mzansi-have-we-seen-justice-d9b151e5-e5db-4293-aa21-dcccd52a36d3?\\_ga=2.194012653.1987905907.1642326225-1129712178.1574756878](https://www.iol.co.za/dailynews/opinion/lindiwe-sisulu-hi-mzansi-have-we-seen-justice-d9b151e5-e5db-4293-aa21-dcccd52a36d3?_ga=2.194012653.1987905907.1642326225-1129712178.1574756878) (last accessed 2022-01-10).

28 See Oxtoby “The appointment of judges: reflections on the performance of the South African Judicial Services Commission” 2021 *Journal of Asian and African Studies* 34-47.

29 See Andrews “The South African Judicial appointment process” 2006 *Osgoode Hall Law Journal* 566-572.

30 Dingake, Hasic, Peppard and Hayden “Appointment of judges and threat to judicial independence: case studies from Botswana, Swaziland, Kenya and South Africa” 2019 *Southern Illinois University Law Journal* 407-432, 410 as they point out that: “in an effort to integrate these principles [judicial independence, public confidence in the administration of justice, and the rule of law], many African countries have implemented Judicial Service Commissions or Judicial Service Committees (JSC). Using the JSC model to appoint judges is significantly less confrontational than other methods, such as the “tap on the shoulder” process used in the United States and England”. (Author’s own emphasis, all footnotes omitted).

effect on the functioning of the judiciary. South Africa is the latest country to be released from the bondage of colonial and apartheid control as it subjected the judiciary to parliamentary supremacy which compromised the independence of the judiciary.<sup>31</sup> Theoretically, it appears that the judiciary was cleansed of the apartheid fermentation in South Africa but its effects continue to impact negatively on its identity as it is labelled as a “*house of negros with mentally colonized interpreters*”.<sup>32</sup> The characterisation is traceable to the integrity of the judicial appointment process which is not the subject of this paper but the focus on the reform in light of the involvement of public participation in the appointment of the Chief Justice.

Notwithstanding the current debates in South Africa which might negatively impact the judiciary in Africa as they share a common history of colonialism, countries such as Botswana, Malawi and South Africa affirm the constitutionalised system of the independence of the judiciary from the other two arms of the state: legislature and executive. Of particular significance is the role of the JSC which is of similar character regarding the appointment of the Chief Justice and President of the Supreme Court of Appeal which is made by the President.<sup>33</sup> This means the distinct process for the appointment of the Chief Justice and Supreme Court of Appeal President as opposed to the judicial officers of the other divisions of the High Courts.<sup>34</sup>

The establishment of the JSCs in contemporary Africa is advanced by the African Union’s commitment to the integrity of the judicial appointment processes as it seeks to guarantee:

- (h) The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.
- (i) The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability.

---

31 See Harel and Shinar “Between judicial and legislative supremacy: a cautious defense of constrained judicial review” 2012 *ICON* 950-975.

32 See Sisulu (2022), author’s emphasis.

33 See S95; S96; S100; S103 and S104 of the Botswana Constitution and S103, S116 of the Malawi Constitution.

34 See *Justice Alliance v President of the Republic of South Africa* 2011 10 BCLR 1017 (CC) para 78 as the Court endorsed the distinct nature of the process of the Chief Justice and held: “the distinctive appointment process for the Chief Justice and Deputy Chief Justice indicates the high importance of their offices. It signifies that their duties may require them to represent the judiciary and to act on its behalf in dealings with the other arms of government. In addition to their judicial functions, they may be called upon to perform ceremonial and administrative duties. Indeed, the Chief Justice and the Deputy Chief Justice are the most senior judges in the judicial arm of government, and their distinctive manner of appointment reflects the fact that they may be called upon to liaise and interact with the Executive and Parliament on behalf of the Judiciary”.

- (j) Any person who meets the criteria shall be entitled to be considered for judicial office without discrimination on any grounds such as race, colour, ethnic origin, language, sex, gender, political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status. However, it shall not be discriminatory for states to:
  - (i) prescribe a minimum age or experience for candidates for judicial office;
  - (ii) prescribe a maximum or retirement age or duration of service for judicial officers;
  - (iii) prescribe that such maximum or retirement age or duration of service may vary with different level of judges, magistrates or other officers in the judiciary;
  - (iv) require that only nationals of the state concerned shall be eligible for appointment to judicial office.
- (k) No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions.
- (l) Judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office.<sup>35</sup>

The envisaged process and the criteria for eligible candidates in Africa were reinforced by the adoption of the Lilongwe Principles<sup>36</sup> that set the tone for the African communities to devise ways of ensuring compliance and commitment to the appointment not only of Chief Justices in Africa but including the judges at the lowest rank of acting appointments. The Principles are designed and guided by affirmation of adherence to “transparency; independence and appointment authority; appointment on merit; fairness and stakeholder engagement”. The Principles are also grounded in the criteria for appointment which requires adherence to “minimum requirements; fit and proper standards and diversity”. They are meant to improve the institutional and personal independence of the judiciaries and their judges which is encapsulated in the selection and appointment of judicial officers.<sup>37</sup> Of further significance from the Principles is the commitment to transparency and the above minimum requirements for eligible candidates.

The Principles come in the wake of the quest for an effective judiciary in contemporary Africa where “its legitimacy, especially in the eyes of the public is required to uphold the highest attainable standards of integrity and independence with a corresponding duty on the States to respect and

---

35 African Union “Principles and guidelines on the right to fair trial and legal assistance in Africa” 2003 DOC/OS(XXX)247 <https://archives.au.int/handle/123456789/2065> (last updated access 2024-05-17).

36 See Southern African Chief Justices Forum “Lilongwe Principles and guidelines on the selection and appointment of judicial officers” adopted at the Southern African Chief Justices Forum Conference and Annual General Meeting, Lilongwe, 2018 <https://sacjforum.org/sites/default/files/about/files/2020/Lilongwe%20Principles%20and%20Guidelines%20on%20the%20Selection%20and%20Appointment%20of%20Judicial%20Officers.pdf> (last accessed 2021-12-14).

37 See the underlying principles on the selection and appointment of judicial officers.



protect judicial independence”.<sup>38</sup> They reinforce the constitutionalised system of judicial appointments in contemporary Africa by giving effect to a domesticated system of the process that will give credibility to the national process which will enhance public trust and confidence in the judiciary.<sup>39</sup>

These Principles capture the content for the criteria and transparency in the process of judicial appointments which has not been a subject of debate in South Africa only but in Africa. The process of selection is a catalyst that provides insight into whether African countries do not pay lip service to the significance of the rule of law in a democratised system of judicial appointments that affirms the independence of the judiciary. The constitutionalised system of judicial appointments is an important safeguard that must ensure that the selected persons have the necessary experience and qualifications, hence the quest for appropriateness and fitness.<sup>40</sup> The selection process is directly linked to the principles of transparency and openness which enables the determination of the suitability of the eligible candidate for the bench.

This process is further reinforced by the substantive translation into reality of the principle of the rule of law which may have an impact on the independence of the judiciary.<sup>41</sup> The rule of law is central to the judicial appointment process to ensure the development of public trust and confidence in the functioning of the judiciary. The appointment process thereof affects its independence and the questionable process may affect its credibility as is the case with the challenge by the Law Society of Botswana which reacted “angrily to the JSC’s decision to appoint judicial officers in a manner that is devoid of transparency”.<sup>42</sup> Following the discretion to be exercised by the JSC in the regulation of their procedures is to ensure that they undertake their responsibilities in a lawful and constitutional manner.<sup>43</sup> Of great concern in this case were the “fears for some staff members likely to be promoted in return for sexual favours. Secondly, the JSC’s procedure for the submission of a confidential dossier for promotion could be used as a tool to harass or settle personal scores and could brew damage to the administration of

---

38 Monageng “Effective judicial selection and appointments” 2018 September 26 <https://www.unodc.org/dohadeclaration/en/news/2018/08/effective-judicial-selections-and-appointments.html> (last accessed 2021-12-14).

39 See FUL Report “Serving the judiciary? a review of the activities of the South African Judicial Services Commission 2009-2022” 24 November 2022 [https://cisp.cachefly.net/assets/articles/attachments/89703\\_ful-jsc-report-24-nov21as-for-typesetting-hc-clean-plus-betty.pdf](https://cisp.cachefly.net/assets/articles/attachments/89703_ful-jsc-report-24-nov21as-for-typesetting-hc-clean-plus-betty.pdf) (last accessed 2023-12-15).

40 See S174(1) of the Constitution.

41 See Mutua “Africa and the rule of law” 2016 *SUR* 159-173.

42 Ontebese “Judicial appointments anger Law Society” 2021 <https://www.sundaystandard.info/judicial-appointments-anger-law-society/> (last accessed 2022-01-05).

43 See *Law Society of Botswana v President of Botswana* MAHGB – 000383-15 para 122.

justice's reputation if not handled properly".<sup>44</sup> Lastly, the "LSB decided not to participate in any appointment of judicial officers where the bare minimum of transparency has not been adhered to".<sup>45</sup> How JSC Botswana handled the recruitment process further compromises the essence of the principle of transparency which entails the public advertising of judicial vacancies, the criteria for selection and the conducting of the interviews publicly as is the case in South Africa. The JSC Botswana reinforces the perception of partiality, bias and lack of independence of the judiciary by the society which in turn compromises the trust and confidence of the public.

The adoption of the Principles and Guidelines on the right to a fair trial and legal assistance in Africa by the African Commission on Human and People's Rights attest to the quest for a commitment that will ensure, as Fombad points out:

an assessment of the extent of judicial independence [which should take into] account of the fact that judicial independence is not merely an ideal, but that there are differences in approach dictated by the differences in legal traditions.<sup>46</sup>

As Fombad argues, the consideration of each country's traditions will be imperative, particularly in South Africa's context which is still a "newcomer" in legitimising its democratic principles in the transformation of the judiciary. Therefore, the judicial appointment process is fundamental to the shaping of the principles of judicial independence that will, in turn, likely boost confidence in the courts. It is this process that dispels the myth about the notoriety of appointments and seeks to promote the institutional and personal independence of the judiciary and for the public to accept its authority in the fulfilment of its constitutional obligations.<sup>47</sup> Particularly, the Chief Justice, who carries the intellectual and human capital of the judiciary,<sup>48</sup> the latter being the branch of the state that has an overarching mandate to hold both the executive and legislature accountable without any fear or favour within the framework of the doctrine of separation of powers.<sup>49</sup>

---

44 Ontebese (note 43 above).

45 As above.

46 Fombad "An overview of the crisis of the rule of law in Africa" 2018 *African Human Rights Law Journal* 213-243 (all footnotes omitted).

47 See A6 and A7 of the South African Judicial Code of Conduct 18 October 2012 adopted in terms of S12 of the Judicial Service Commission Act 94 of 1994.

48 See *Justice Alliance v President* para 66 as the Court further described the Chief Justice as "the pinnacle of the judiciary and thus the protection of his or her independence is just as important".

49 The doctrine is not defined in the Constitution but evident from its structure as it entails the division of authority amongst the branches with the corresponding role of each not to interfere in the functioning of each.

### 3 Public participation: eliminating bias in the appointment of South Africa's Chief Justice?

#### 3.1 Casting the net wide: the back-door intrusion of representative democracy in judicial appointments?

This section moves from the premise that public participation in the nomination of the South African Chief Justice was an indirect intrusion of the general principles of the representative form of democracy in judicial appointments. It acknowledges the Constitution's silence on the way the President must exercise his obligation in the nomination of the Chief Justice but his delegation of authority to the public minoritised his own constitutional obligation and the role that could have been played by the JSC. His casting of the net wide also presented an opportunistic scheme by elite people and various groups to dominate the nomination process to the exclusion of the public that is likely not to be aware and understand with sufficient certainty and knowledge of the needed qualities of the eligible candidate. This contention is justified by his non-consideration of the recommended candidate by the JSC, Justice Maya for the Chief Justice position after the February 2022 interviews.

For the general argument in this section and in this article, following the nearing of the end of the term of office of former Chief Justice Mogoeng Mogoeng in October 2021, the President issued a call inviting the public to nominate a suitable and qualified candidate for the position of Chief Justice. The President also issued a set criterion to be followed for the nomination process in that the submission should contain:

- (i) a nomination letter, including the details of the nominator;
- (ii) the nominee's acceptance of the nomination and contact details;
- (iii) letters of support of the nomination ... including at least one letter of support from a professional body of legal practitioners; non-governmental organisations working in the fields of human rights; and
- (iv) any other additional information that the nominating person deems relevant.<sup>50</sup>

The public responded positively and at the close of the submissions on 01 October 2021 for a call that was issued on 15 September 2021, 148 nominations were received and only 25 met the stipulated criteria. The panel sifted the qualifying candidates from the 25 submissions and recommended 8 for consideration by the President which included:

---

50 Rens and Van der Merwe "Appointment process of the Chief Justice and other Constitutional Court Judges" 2021 September 16 <https://themislawchambers.co.za/appointment-process-of-the-chief-justice-and-other-constitutional-court-judges/> (last accessed 2024-02-26).

- (i) Judge President John Hlophe<sup>51</sup>
- (ii) Justice Mbuyiseli Madlanga
- (iii) Justice Mandisa Maya
- (iv) Dr Wallace Amos Mgoqi<sup>52</sup>
- (v) Adv. Busisiwe Mkhwebane<sup>53</sup>
- (vi) Judge President Dunstan Mlambo
- (vii) Adv Alan Nelson SC
- (viii) Deputy Chief Justice Raymond Zondo.<sup>54</sup>

The President, as indicated above, chose four (4) candidates that had to go through the normal JSC interview processes wherein Justice Maya was recommended for appointment for the Chief Justice position, instead Justice Zondo was appointed. The President did not honour his intended objective of promoting transparency in the appointment of the Chief Justice. The invitation of the public to the nomination process and dismissal of the recommendation of a constitutional structure (JSC) was an absolute exercise of his discretionary powers as a final determinant of the execution of the constitutional obligations that are entrusted to him and not the public. In essence, his call for the public to participate in the nomination of the Chief Justice which was endorsed through the JSC processes amounted to the undermining of the principle of transparency which, he allegedly, envisaged promoting in the first place.

It is evident from the context herein that public participation in the nomination of the Chief Justice (i) was an indirect infusion and parachuting of the representative form of democracy in judicial appointments; (ii) raises questions on the extent to which the citizenry reaches an agreement and have a deeper understanding and sufficient knowledge of the needed qualities of the eligible candidate? (iii) extended

- 
- 51 Judge President Hlophe has recently been impeached by Parliament and removed as a Judge and President of the Western Cape Division following a finding by the JSC of the gross misconduct that is traceable more than a decade ago. See the details and background in Thamm "Huge majority of MPs vote to impeach Judge President of the Western Cape" 21 February 2024 <https://www.dailymaverick.co.za/article/2024-02-21-huge-majority-of-mps-vote-to-impeach-western-cape-judge-president-john-hlophe/> (last accessed 2024-02-27).
  - 52 Bates "Wallace Mgoqi cites age as he bows out of the race for chief justice" 13 October 2021 <https://www.businesslive.co.za/bd/national/2021-10-13-wallace-mgoqi-cites-age-as-he-bows-out-of-race-for-chief-justice/> (last accessed 2024-02-27).
  - 53 Monama "Public Protector Busisiwe Mkhwebane withdraws from the race for chief justice" 29 October 2021 <https://www.news24.com/news24/southafrica/news/public-protector-busisiwe-mkhwebane-withdraws-from-the-race-for-chief-justice-20211029> (last updated access 2024-05-17). Adv Mkhwebane had also since been impeached by Parliament and removed from Parliament and see further analysis which is not the subject of this article in Gerber "Seven years of Busisiwe Mkhwebane" 2023 September 26 <https://specialprojects.news24.com/impeached-seven-years-of-busisiwe-mkhwebane/index.html> (last accessed 2024-02-26).
  - 54 The Presidency "The Presidency on 8 nominees for position of Chief Justice" 04 October 2021 <https://www.gov.za/news/media-statements/presidency-8-nominees-position-chief-justice-04-oct-2021> (last accessed 2024-02-27).

the nomination in favour of an elite group to the exclusion of the general populace in the nomination process; (iv) uncertainty on the greater respect for the autonomy of the judiciary considering the unreasonable criticisms and unwarranted attacks on cases involving high profile people in South Africa (v) inhibits the quality of the equality of the judicial voice in the advancement of the rule of law. The Chairperson of the African National Congress (ANC), Gwede Mantashe took a swipe at the judiciary by accusing the Gauteng Division, Pretoria, and the Western Cape High Court Division of having a "negative attitude towards the government".<sup>55</sup>

The above factors are a direct link to the significance of the rule of law in judicial appointments. They highlight the uncertainty on the future of the process undertaken by the President in the nomination process of the Chief Justice. The rule of law requires certainty in the application of the law and today, there is a dilemma regarding the consistency in respect of the past practice in the nomination process. Putting a woman's lens on judicial appointments, Fombad and Kibet<sup>56</sup> highlight and argue for key and core elements of the rule of law which are of direct application to the argument made in this article that extending the nomination to the general citizenry amounted to the delegation of a constitutional obligation. These elements are but not limited to (i) the principle of legality, which includes the requirement of a transparent, accountable and democratic process for enacting laws; (ii) the principle of non-discrimination and equality before the law, which means that government and its officials and agents, as well as individuals and private entities, are accountable under the law; (iii) legal certainty and prohibition of arbitrariness, which requires that laws are clear, publicised, stable, and just, are applied evenly, and protect fundamental rights, including the security of persons and property; (iv) the process whereby the laws are enacted, administered and enforced is accessible, fair and efficient; (v) justice delivered in a timely manner by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the make-up of the communities they serve; and (vi) respect for human rights.<sup>57</sup>

With these principles and as argued, the extension to public participation is not to be a welcomed reform as it undermines the principles of the rule of law within the framework of the representative form of democracy itself. From a general perspective representative democracy, entails a form of democracy where citizens are not necessarily involved in the decision-making process but have allowed the nominated representatives to take and make decisions on their behalf. Such a nomination involves the contestation by the presumed eligible

---

55 Comrie "Gwede Mantashe singles out problematic courts" 6 June 2015 <https://www.news24.com/news24/gwede-mantashe-singles-out-problematic-courts-20150622> (last accessed 2024-02-27).

56 Fombad and Kibet "Editorial introduction to special focus: The rule of law in sub-Saharan Africa: Reflections on promises, progress, pitfalls and prospects" 2018 *AHRLJ* 205-212.

57 As above.

candidates to hold office, particularly the political office which is contested by either political parties or their members. Within the framework of representative democracy, public participation, as contextualised by Ngcobo in *Doctors for Life v Speaker of the National Assembly*<sup>58</sup>

in the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken into account. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character, it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist. Therefore, our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the lawmaking processes. Parliament must therefore function following the principles of our participatory democracy.<sup>59</sup>

However, public participation is distinct concerning judicial appointments. Other than the JSC that carries this specific and constitutional role, the judiciary carries a special and unique obligation of applying the law without fear or favour in securing both its institutional and individual independence.<sup>60</sup> The latter principle is at the core of the independence of the judiciary in ensuring non-interference in the exercise of judicial authority.<sup>61</sup> For the success of the independence of the judiciary, respect for the law must be upheld by all stakeholders. Within the framework of the principle of independence, it is the judiciary that is the line of defence in the consolidation and achievement of the democratic ideals of the new dispensation. It is also the weakest link of the other two branches of the state: legislature and executive because it

---

58 2006 12 BCLR 1399 (CC).

59 *Doctors for Life v Speaker of the National Assembly* paras 115-116.

60 See S165 of the Constitution.

61 See the Code of Conduct in A4 which reads as follows: "A judge must:  
(a) Uphold the independence and integrity of the judiciary and the authority of the courts.  
(b) Maintain an independence of the mind in the performance of the court duties.  
(c) Take all reasonable steps to ensure that no person or organ of state interferes with the functioning of the courts.  
(d) Not ask nor ask any special favour or dispensation from executive or any interest group."

only justifies its judgments through well-reasoned and articulated judgments and cannot justify its decisions in public platforms as is the case with the other two branches. This is the design of South Africa's constitutional architecture in ensuring the protection of the judiciary from unreasonable public criticism.<sup>62</sup> The protection from unjustified attacks does not also mean its independence will protect the judiciary from being held accountable as Kriegler J in *S v Mamabolo*<sup>63</sup> raised fundamental questions whether:

- (i) [independence] is not a relic of a bygone era when judges were a power unto themselves?
- (ii) Are judges not hanging on to this legal weapon because it gives them a status and untouchability that is not given to anyone else?
- (iii) Is it not rather a constitutional imperative that public office-bearers, such as judges, who wield great power, as judges undoubtedly do, should be accountable to the public who appoint them and pay them?
- (iv) Indeed, if one considers that the judiciary, unlike the other two pillars of the state, are not elected and are not subject to dismissal if the voters are unhappy with them, should not judges pre-eminently be subjected to continuous and searching public scrutiny and criticism?<sup>64</sup>

These questions defuse the critique by Sisulu above on the judiciary's own assessment of its own independence and accountability and capture the content of the argument in this article that public participation, because of South Africa's constitutional identity, is not to intrude into the process of judicial appointments. The facilitation of unprecedented public participation and the establishment of the advisory panel with no clear criteria on what qualified the members to serve as such<sup>65</sup> was not in line with the constitutional imperatives that are to be carried by the President himself. The President's justification views the non-appointment of the recommended candidate as exceeding the mandate that is bestowed on him by the JSC.<sup>66</sup> On the other hand, the non-appointment was meant to

“break the precedent set by former President Zuma of not appointing the current Deputy Chief Justice, which was Justice Dikgang Moseneke at the time, in ensuring the bringing of stability in the judiciary as Moseneke DCJ lost the respect for his seniority and in turn, Justice Mogoeng-Mogoeng took time to adjust and get rid of the perceptions that he was a Zuma man”.<sup>67</sup>

---

62 See Chapters 4, 5, and 8 of the Constitution.

63 2001 5 BCLR 449 (CC).

64 *S v Mamabolo* para 15.

65 Hawker “Concerns that advisory panel pondering South Africa's next chief justice too political” 2021 <https://www.dailymaverick.co.za/article/2021-10-04-concerns-that-advisory-panel-pondering-south-africas-next-chief-justice-is-too-political/> (last accessed 2023-04-20).

66 Premium “Ramaphosa says he is not bound by the choice of Maya as Chief Justice” 2022 <https://www.businesslive.co.za/bd/national/2022-02-16-rama-phosa-says-he-is-not-bound-by-choice-of-maya-for-chief-justice/> (last accessed 2023-05-18).

67 Matlala “Why Ramaphosa chose Zondo” 2022 <https://sundayworld.co.za/news/politics/why-ramaphosa-chose-zondo/> (last accessed 2023-05-18).

However, the outcry was created by the President himself because the Constitution is foundational to how he must uphold it and is explicit, requiring the President to nominate one candidate that will be considered for eligibility by the JSC. This time around, the President delegated the constitutional obligation and established an advisory panel that came up with four candidates contrary to his obligation.<sup>68</sup> His assumption that the JSC would have acquainted itself with the past practice of a single candidate does not justify the legitimacy of his facilitation of the back-door intrusion of the representative form of democracy in judicial appointments.<sup>69</sup>

The distinct character and role of the judiciary as it functions within the framework of the doctrine of separation of powers, is expressed without any reservations that the President promoted and advanced the representative form of democracy in the nomination of the Chief Justice. The extension was limited to the elite and further to the dominant and smaller group that had a louder voice on who they thought was eligible for consideration by the President. The vesting of “all power” to the people was infused into the judicial appointment process by the President. What seems to be an advancement of citizens’ participation in the nomination process has at face value direct participation which concentrated domination to high profile people and organisations in the nomination of the Chief Justice.

The creation of the civil society space in the judicial appointment processes has the potential to extend the grip it might have on the functioning of the judiciary. It created a legitimate expectation to further seek to dictate the functioning of the judiciary. It is evident now that the public in public platforms appears to direct the judiciary not to grant bail to people alleged to have committed serious crimes. The public also wants to determine the type of sentence to be imposed after the alleged offender has been found guilty of committing a particular crime. The public wants the key to be thrown away and the alleged convicted person to rot in jail. The case of *S v Pistorius*<sup>70</sup> is amongst others a case in point. In this matter, the accused was convicted of culpable homicide for having killed his girlfriend, Reeva Steenkamp. Without a detailed background on this matter, in consideration of the sentence to be imposed, Masipa J took into account the basic principles of sentencing and considered the interests of society, the accused and the victim and went on to put an emphasis that courts are courts of law and not courts of public opinion and judges should adjudicate the law without fear or favour.<sup>71</sup> She sentenced Mr Pistorius to six (6) years imprisonment which was

---

68 Ferreira “Ramaphosa says JSC exceeded its mandate in recommending Maya for Chief Justice” 2022 <https://mg.co.za/news/2022-02-16-ramaphosa-says-jsc-exceeded-its-mandate-in-recommending-maya-for-chief-justice/> (last accessed 2023-05-15).

69 As above.

70 (CC113/2013) [2016] ZAGPPHC 724.

71 *S v Pistorius* (2013) p 4175.



overturned by the SCA to thirteen (13) years.<sup>72</sup> It is this judgment that raised an irk from the public and his release on parole after having served his sentence was also received with mixed emotions.<sup>73</sup> The public views the judiciary as being sympathetic to the perpetrators of crimes as opposed to the victims. This shows a lack of understanding of the three tiers of state as to where the judiciary fits within the framework of the system of governance in South Africa. Spies contends that the SCA in the *Pistorius* judgment lost a valuable opportunity

to give victims of crime and their families a voice in criminal justice proceedings and alerts them to the fact they are entitled to provide a victim impact statement to court, [and] the judgment is successful in creating the impression that victim's voices and those of their families matter, whilst in fact they are only used to ensure co-operation rather than participation, [and] we should start questioning the restorative roots of victim participation and its function within a retributive framework.<sup>74</sup>

With the public perceptions, the President reinforced them by not only considering their views but also the JSC opinion on the eligible candidate for the JSC position, particularly, at the heightened time to transform the judiciary to consider women with the potential to showcase their skills in leading the key institution that serves as a "glue" between the branches, spheres of the state and citizens of the country.

It is acknowledged that the Constitution is silent on how the President is to exercise the prerogative on the nomination and final appointment of the Chief Justice except for the consultation with the JSC and leaders of parties represented in the National Assembly.<sup>75</sup> The consultation is also not regulated on how it is to be undertaken and whether the expressed view of the JSC or the parties will influence the outcome of the appointment of the eligible candidate. However, the back-door intrusion of the representative form of democracy where the CJ is likely to be viewed through the lens of the "counter-majoritarian dilemma", which was dismissed in *Makwanyane*,<sup>76</sup> is a direct compromise of the principles of the new dispensation. Public view is essential but not of a binding nature in the functioning of the judiciary and this participation creates a

---

72 *Director of Public Prosecutions, Gauteng v Pistorius* (950/2016) [2017] 158 para 26.

73 Maughan "June Steenkamp's wish is to 'live my last years in peace' as she accepts Pistorius parole release" 5 January 2024 <https://www.news24.com/news24/southafrica/news/june-steenkamps-wish-is-to-live-my-last-years-in-peace-as-she-accepts-pistorius-parole-release-20240105> (last accessed 2024-02-27).

74 Spies "The need to consider victim's voices in the sentencing of offenders: Director of Public Prosecutions v Oscar Leonard Carl Pistorius" 14 December 2017 <https://ohrh.law.ox.ac.uk/the-need-to-consider-victims-voices-in-the-sentencing-of-offenders-director-of-public-prosecutions-v-oscar-leonard-carl-pistorius> (last accessed 2024-02-27).

75 See S174(3) of the Constitution.

76 See *S v Makwanyane* paras 88-89.

legitimate expectation of the dictates of the public to trammel the office of the CJ.<sup>77</sup>

Therefore, the nomination of the CJ as head of the judiciary could not be dictated by the will of the elite or the public which may seek to control the eligible candidate as their own as is the case with public representatives holding office of a political nature. The President has extended what the author terms as the political extension of the influence of the political and highly acclaimed individuals and Non-Governmental Organisations (NGOs) in the judicial appointment processes.

Public participation in the nomination of the Chief Justice comes at a time when the transformation of the judiciary is still an aspiration to be achieved in South Africa's new constitutional dispensation. Such aspiration is drawn from section 9 of the Constitution<sup>78</sup> which does not require just equal treatment but goes beyond to obligate the state to eliminate any unfair and discriminatory practices that may undermine the achievement of equality. The constitutional commitment ensures such an aspiration is of further significance in transforming the judiciary to be reflective of South Africa's diverse character. This commitment is further linked to the provisions of section 174(2) which is a prescription that requires the racial and gender composition of the judiciary in the making of judicial appointments. This requisite considers South Africa's history which did not only affect black people but was more acute against women.

The aspiration is hampered by the limited number of eligible black and particularly female candidates available for consideration for appointment by the President to the highest office in South Africa. The contention is evidenced by the nomination of Justice Mandisa Maya as President of the SCA at the time and as the only female and eligible candidate as opposed to the three men who were also nominated for the Chief Justice position. Justice Maya who has since been appointed as Deputy Chief Justice as the only woman candidate was not on an equal status with other candidates considering South Africa's history that subjected women to subordination, perception, bias, prejudice,

---

77 As above.

78 S9 reads as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed Chapter 2: Bill of Rights 6 to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

discrimination and inequality. The constitutional imperative of gender and racial attraction of her calibre was watered down despite her own competencies and her recommendation as Chief Justice by the JSC. Justice Maya was stigmatised and snubbed by the President as a “poor sister” who is secondary to men to lead the judiciary. The President adopted what the author refers to as a “*not-now approach*” as the President currently nominated Deputy Chief Justice Maya without public involvement for consideration as South Africa’s next Chief Justice and as the sole candidate for the position as was the case in the past practice.<sup>79</sup>

It is the author’s view that the disguise under the name of transparency over the nomination process does not bear any potential for the greater protection and enhancement of the judiciary’s credibility. The representative form of the judiciary shapes the transformative objectives of the new constitutional dispensation, especially with the number of women who have the potential to improve their representative profile as envisaged in section 174(2). The intersection of gender and racial make-up of the judiciary that should consider the black female candidates that continue to be underrepresented in the judiciary raises a red flag on the highly acclaimed stimulus of the Constitution in the advancement of the transformative ideas of the new democracy. The *Minister of Finance v Van Heerden*<sup>80</sup> judgment gives content in this argument:

as we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact.<sup>81</sup>

In the context of the argument herein, the *Van Heerden* judgment does not entail the prescription of numbers, blackness, womanhood and victimhood but a candidate with all the qualities to lead and administer the judiciary as evidenced by the abilities identified in Justice Maya as a potential to be in the forefront of the South African system of governance through her role in the judiciary.

---

79 Pijoos “Ramaphosa nominates Deputy Chief Justice Mandisa Maya for the chief justice post” 27 February 2024 <https://www.news24.com/news24/southafrica/news/ramaphosa-nominates-deputy-chief-justice-mandisa-maya-for-chief-justice-post-20240227> (last accessed 2024-02-27). It is the author’s contention that the inconsistency in respect of the way in which the President exercises his discretion raises question on his envisaged transparency and public participation on this issue of national interest regarding the nomination of the Chief Justice. Does it also mean he succumbed to pressure from public groups from not considering the recommendation of the JSC for the appointment of Maya J during the last process? Does it also mean South Africans have to be satisfied with what I would consider as an ‘after thought’ by the President in acknowledging the merited potential of South African women in leading the judiciary?

80 2004 11 BCLR 1125 (CC).

81 *Minister of Finance v Van Heerden* para 26 (all footnotes omitted).

Public participation and the uncertainty on the criteria used to establish the advisory panel creates a perception that the Chief Justice is likely to be subject to the whims and authority of the President, a view which sources close to President Ramaphosa alleged that he also feared by the non-appointment of the former Deputy Chief Justice, Dikgang Moseneke by former President Zuma. The view played itself out during the sentencing of former President Zuma to 15 month's imprisonment for contempt of court in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma*.<sup>82</sup> Chief Justice Zondo was Deputy Chief Justice and Chairperson of the State Capture Commission before his elevation to the position of Chief Justice. Following this judgment, the July unrest in the year 2021 followed suit where there was a shutdown in the two provinces of Gauteng and KwaZulu-Natal which affected the entire country with former President Zuma's supporters viewing the judgment as nothing more than the bait used by President Ramaphosa to get back at him as Chief Justice Zondo declined the application for his recusal in the State Capture Commission.<sup>83</sup> His appointment has been subject to negative and public criticisms to the extent of being called to step down after his delivery of the Oliver Reginald Tambo Public Lecture entitled, "Justice, democracy and rule of law", which was hosted by the Faculty of Law at the University of Fort Hare.<sup>84</sup>

The restoration of public confidence in the judiciary does not entail a "one-size-fits-all" approach. The unprecedented move and reform by the President to involve public participation in the nomination of the Chief Justice has the indirect consequence of attempting to put the judiciary on an equal pedestal with the general system of public governance. Public participation as it appears to provide legitimacy in the nomination of the Chief Justice was an important aspect that serves as a guiding principle in the enhancement of the judicial appointment processes. It also has the potential for the general citizenry to take ownership and responsibility in the decision-making process in judicial appointments. It is also essential in enhancing the effectiveness of the judiciary and strengthening the citizen's trust and public confidence and further extends the protection of the integrity of the judiciary by limiting the unjustified criticisms from the alleged perpetrators of crimes who appear not to be accustomed to judicial reasoning in the judgments delivered by the courts against them.<sup>85</sup> However, the questions about the restoration of public

---

82 [2021] ZACC 18.

83 The paper does not intend to evaluate the impact of the shutdown, which is still felt today due to damage, looting and deaths of many people.

84 Matiwane "Zondo is a political charlatan, says KZN ANC" 2023 <https://www.heraldive.co.za/news/politics/2023-03-28-zondo-is-a-political-charlatan-says-kzn-anc/> (last accessed 2023-05-20).

85 Bates "It's politics versus law, Magashule says after High Court defeat" 09 July 2021 <https://www.businesslive.co.za/bd/national/2021-07-09-its-politics-versus-the-law-magashule-says-after-high-court-defeat/> (last accessed 2024-02-27).

confidence in the judiciary remain uncertain. The judicial appointments not only of the Chief Justice in South Africa might have improved but the extension of public participation by the President as Head of the Executive and State which amounted to the exploitation of his constitutional role in judicial appointments leaves the achievement of public confidence hanging in the balance.

## 4 Conclusion

Public participation and establishment of the advisory panel in the nomination of the Chief Justice in South Africa left the lines blurred in the advancement of public trust and confidence in the appointment process itself and of the functioning of the judiciary. The uncertainty over the way the President exercised his discretion in the establishment of the panel to fulfil his constitutional obligation raised more questions than answers. The transformative project of enhancing the gender and racial makeup of the judiciary was left secondary to the significance of the highly celebrated Constitution in ensuring its substantive translation into reality. The article did not argue for a "womanhood" approach to judicial appointments but for the extension of public participation in this process which was dominated by the elitist group. The objectives it sought to achieve were inhibited by several factors that include but are not limited to the lack of awareness of the detailed requirements in respect of the needed qualities of the eligible candidate. It is the accorded and firm view of this article that the President's extension of public participation contrary to his own constitutional prescriptions is not to be welcomed as it infuses the elements of the representative form of democracy in judicial appointments contrary to the prescripts of the doctrine of separation of powers.