

Impeaching Judges: Challenge or Achievement?

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The indispensable role of judges in maintaining justice and upholding the rule of law in our legal order can never be overstated. If our judicial system were to be depicted as a roof over society's head, judges would be the pillars that provide the essential support and stability to uphold, through their impartiality and dedication, the integrity and reliability of our legal system. These columns of support have the purpose of establishing the foundation for fairness, equity, and justice, and most importantly, fostering public trust in the judicial system.

However, it becomes a dreary sight when one (or more) of the pillars cracks and eventually falls. The collapse of even one pillar casts a shadow over the entire structure, threatening its integrity and strength. Observers witnessing this structural failure lose faith in the adequacy of the shelter it provides.

One is left with the question: When a judge 'falls' by being impeached, is it an achievement or a challenge? Put differently, is it a gain or a loss for the judiciary?

This essay aims to answer the question asked above by illustrating to the reader that, despite the challenges that inherently follow it, the impeachment of judges should be considered an achievement and a gain for the judiciary rather than a challenge and a loss.

High expectations

Given the profound significance of judges, it is inevitable that society scrutinises the judiciary through a magnifying glass. The judiciary has been referred to as the guardians of the Constitution to which, and rightly so, the Constitution allocates

enormous power¹. This places a vast responsibility on judges to present themselves as defenders and protectors² of the Constitution and should therefore uphold a reputation of trustworthiness without exception.

It should be accepted that these pillars in society are still human, subject to the inherent weaknesses, temptations and flaws that affect every one of us. It would be unfair and unreasonable to expect judges to never make any mistakes. Yet, every judge is bound by the expectation of upholding an exceptional standard of care – not only in the execution of their duties but also in their personal lives³. Judge Deon van Zyl eloquently and effectively summarises the expectations placed upon judges and encapsulates the high standards expected of them, both professionally and personally, when he said:

Appointment as a judge, of course, brings with it certain duties and responsibilities. Inasmuch as the curial and private activities of judges are generally open to public scrutiny, they cannot complain if their conduct on and off the Bench elicits criticism or even censure. Their integrity, honesty, impartiality, and independence from external influences, be they corruptive or intimidating, should be above question. Their private lives should be exemplary. The community at large accepts that they are only human and may hence be victims of the errors of human nature, but the stature they enjoy in the community requires them to be extra vigilant in ensuring that they themselves comply with the demands of the law and with the ethical and moral rules of conduct adhering to their elevated office [my emphasis].

It is inevitable then, that the notion of 'leading by example' follows in the shadow of every judge. This statement is strongly supported by Professor Hugh Corder from the University of Cape Town, who wrote that judges wield great authority, especially within a constitutional democracy like ours, and we need to be able to expect from

¹ Thabo and Odeku 2021 SciELO 549

² A guardian is defined by Soanes and Stevenson 2009 *Concise Oxford English Dictionary* 632 as a "defender, protector, or keeper."

³ The Code of Judicial Conduct (2012) aims to set a benchmark for judges' behaviour with respect to their judicial and extra-judicial conduct; stating in Article 6 that *a judge must at all times, also in relation to extra-judicial conduct, comply with the law of the land.*

them the highest levels of integrity, trustworthiness and commitment to the values of the Constitution⁴.

When taking the oath or solemn affirmation under Item 6 of Schedule 2 of the Constitution, it is unavoidable that a judge must recognise that, by virtue of his⁵ role within society and the legal system, he is held to a standard that surpasses comparison to his 'former normal self'. He must accept that he metaphorically exchanges his normal jacket for a toga, bearing much more weight onto his shoulders.

In a country where the political sphere is characterised by chaos and instability, the courts must remain steadfast to provide the stability that society needs. A stable judiciary is created when its judges operate in a consistent, reliable and predictable manner with impartiality, independence, integrity, efficiency, and accountability.

It is true, however, that within the South African context the appointment of judges is not entirely separated from politics. For example, the final and ultimate decision of who is to be appointed Chief Justice and Deputy Chief Justice in the highest court in the country lies with the President, who heads the Executive. Considering that a mere 29% of South Africans have trust in the government⁶, the judiciary should derive its authority from elsewhere – from the judiciary itself. The judiciary can only acquire the necessary authority when its judges perform their duties impartially, independently, and professionally. These core values are essential for establishing authority in the eyes of the public. It is therefore expected of judges to not fall short of these values in exercising their duties.

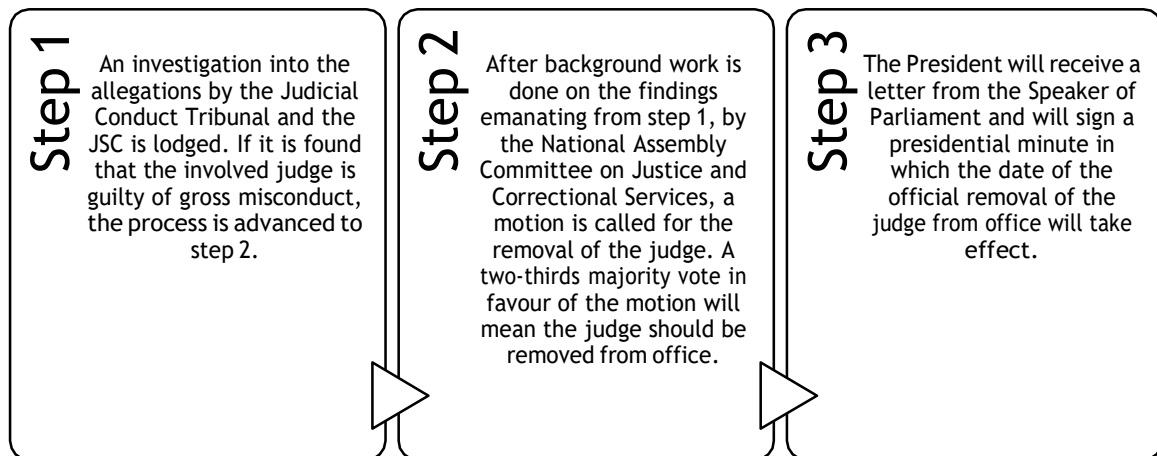
⁴ Corder 2023 <https://www.dailymaverick.co.za/opinionista/2023-11-08-impeachment-of-judges-hlophe-and-motata-will-strengthen-sas-constitutional-democracy/>

⁵ Throughout this essay, the pronoun 'he' is gender-neutral, encompassing both male and female individuals.

⁶ Edelman Trust Barometer 2024 chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.edelman.com/sites/g/files/aatuss191/files/2024-02/2024%20Edelman%20Trust%20Barometer%20Global%20Report_FINAL.pdf

Impeachment and the Constitution

The fact that the Constitution⁷ directly addresses the impeachment of a judge in Section 177, highlights the seriousness of such a matter. The section outlines a three-step process to be followed for the impeachment of a judge. This essay will not purport to delve deeply into the process; however, the illustration below provides a concise overview.



Impeachment in South Africa

This year, two judges were removed from office for the first time in South Africa's constitutional history. Judge President John Hlophe and retired Judge Nikola Motata were both impeached earlier this year for engaging in gross judicial misconduct.

In 2008, a complaint was filed against JP Hlophe for allegedly attempting to influence Justices Chris Jafta and Bess Nkabinde in a case involving former President Jacob Zuma. In April 2021, a tribunal inquiry found Hlophe guilty of gross misconduct. This decision was upheld by the Judicial Service Commission (JSC) in August 2021, and in February of this year, he was finally removed by President Cyril Ramaphosa as a judge.

Trouble began for Motata in 2007 when he crashed his car while under the influence of alcohol. Following his prosecution and conviction, two additional complaints were filed against him: first, for knowingly presenting a dishonest defence during his

⁷ *Constitution of the Republic of South Africa, 1996*

criminal trial, and second, for engaging in racist behaviour. After a 16-year battle of litigation, Motata was impeached by President Cyril Ramaphosa.

Regrettably, judicial misconduct is not isolated to the cases of Hlophe and Motata. Numerous cases of judicial misconduct arise within South Africa's judiciary. Although they are still pending cases, all the involved judges face the possibility of impeachment should they be found guilty of gross misconduct. Among various other cases, notable examples include Eastern Cape Judge President Selby Mbenenge, who is charged with sexual harassment; KwaZulu-Natal Regional Court President Eric Nzimande, who faces corruption charges for allegedly accepting bribes from magistrates seeking higher positions; and Gauteng High Court Judge Nana Makhubele, who is implicated in State-Capture related transactions⁸.

Drawbacks and challenges

The media widely reported that the state spent over R10 million to finally impeach Hlophe – to be exact, R10,575,011.63⁹. Adding to the shock of these costs, it is well known that the process to impeach Hlophe took almost 15 years. Although no reports could be found on the amount spent to impeach Motata, the process also took a scandalous 16 years.

The effectiveness of the process can surely be doubted. A press release by the DA following the impeachment of Hlophe accurately summarises the concerns regarding the process, stating the following¹⁰:

While the DA welcomes the finality of this matter, we remain concerned that the process to remove Hlophe took over 15 years after the 2008 misconduct complaint was lodged. The process was protracted and complex, with extensive investigations, hearings, and deliberations by the JSC. We also saw political

⁸ Benjamin 2024 <https://www.news.uct.ac.za/article/-2024-01-22-issues-facing-the-sa-judiciary-in-2024>

⁹ Madisa 2024 <https://www.businesslive.co.za>

¹⁰ Breytenbach 2024 <https://www.da.org.za/2024/02/the-da-welcomes-the-resolution-of-the-national-assembly-confirming-the-impeachment-of-judge-john-hlophe>

interference and legal technicalities delaying the process. The process could and should have been dealt with more expeditiously. [My emphasis]

Certain matters undoubtedly raise questions about how the impeachments of the mentioned judges were handled. How can it be justified that Motata was on “special leave” for more than 10 years pending his prosecution?¹¹ How can it be acceptable that Motata’s appearance before the Judicial Conduct Tribunal was postponed sine die and remained pending?¹²

The South African public has been, and is still, facing economically challenging times and is subjected to numerous crimes daily. It is therefore reasonable to expect that the public will lose faith in a judicial system that spends millions of taxpayers’ money (and takes over a decade) to remove judges whose actions betray the principles of their offices.

In retrospect, and with reference to Hlophe’s suspension, it is alarming to realise that a judge eventually found guilty of gross misconduct managed to remain in such an important position for almost 14 years after the initial enquiries and investigations commenced¹³. This raises the disturbing possibility that current judges engaging in similar misconduct may continue to serve, subjecting citizens to their decisions for years, even as investigations and inquiries drag on.

The issue of public trust

The debate surrounding judges’ impeachment comes down to the public’s trust and confidence in the judiciary. Former Chief Justice Sandile Ngcobo said that confidence in the judiciary is vital to the preservation of the rule of law, and, ultimately, to the preservation of our constitutional democracy¹⁴.

¹¹ *Motata v Minister of Justice and Correctional Services and another* 2017 1 All SA 924 (GP) para 2.

¹² *Motata v Minister of Justice and Correctional Services and another* 2017 1 All SA 924 (GP) para 4.

¹³ President Cyril Ramaphosa only suspended Hlophe in December 2022.

¹⁴ Ngcobo 2011 SALJ 6

In 2018 it was reported that the level of satisfaction with the police and courts continued to decline, more rapidly in the case of courts with a decline of 0.8% observed¹⁵. It is worrying that trust in the courts dropped by 14.8% between 2019/20 and 2022/23¹⁶. In 2019, a survey indicated that the number of citizens in South Africa who say that “most” or “all” judges and magistrates are involved in corruption has doubled between 2002 (15%) and 2018 (32%)¹⁷.

A key solution to addressing the decline in trust in the judiciary lies in embracing accountability within the judiciary, a fundamental step in restoring public confidence. Trust is established when people witness actions of accountability. The importance of accountability has been accurately explained by Mike Erwin and Willys DeVoll when they said that exhibiting accountability over time is a gateway to trust. When we see someone acting with accountability, we gain the evidence we need to trust them¹⁸.

The more than a decade’s worth of litigation that stemmed from the inquiries that ultimately resulted in the impeachment of Hlophe and Motata, highlights the inherent difficulty many individuals face in accepting responsibility and being answerable for their consequences. It is unfortunate that, for the layperson – who represents the majority of society – Hlophe and Motata’s continued association with the judiciary during the time that the litigation and inquiries dragged on¹⁹, led to a perception that their lack of accountability was a mirror reflecting a broader lack of accountability within the judiciary itself.

It goes without saying that for the courts to function effectively, they must be capable of doing so. It was stated in an article by the United Nations²⁰ that –

¹⁵ Statssa 2018 <https://www.statssa.gov.za/?p=11627>

¹⁶ Statssa 2023 <https://www.statssa.gov.za/?p=16775>

¹⁷ Judges Matter 2019 <https://www.judgesmatter.co.za/opinions/the-integrity-of-the-judiciary-in-south-africa/>

¹⁸ Erwin and DeVoll 2022 *Leadership is a Relationship: Dare to Lead*

¹⁹ President Cyril Ramaphosa suspended Hlophe only in December 2022 on the advice of the JSC.

²⁰ United Nations Office on Drugs and Crime 2020 <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/1--general-issues--judicial-independence-as-a-fundamental-value-of-the-rule-of-law-and-of-constitutionalism.html>

For courts to be effective in delivering justice, the general public must have confidence in their ability to do so. This implies some important questions relating to judges' legitimacy and public trust, judicial accountability, and efficient administration of justice, which are essential conditions for judges to effectively and efficiently serve society [my emphasis].

The actions of Hlophe and Motata, along with the protracted nature of their respective cases and the pending allegations against several other judicial officers, have significantly undermined – and continue to undermine – the stability and integrity of the judiciary. This raises an inevitable question, one that barely needs thought: Who can be expected to place their trust in an unstable judiciary?

Why an achievement?

While it is of great importance that the negative aspects coupled with the impeachment of a judge should be acknowledged to work towards addressing them sufficiently, removing such judges from their positions should be considered a victory.

Much like is precedent in our courts, a balancing exercise should be done to compare the consequences of not impeaching a judge against the consequences of impeaching same.

Just as it is sometimes necessary, though not ideal, to dismantle pillars to create space for new structures in order to restore the integrity of a building, so too must the Judiciary occasionally dismantle and rebuild its own pillars to preserve its integrity, support, and stability. It is during this construction phase that the guardians of the Constitution must stand strong as a unified body, protecting and defending our Constitution, our democracy, and our South Africa.

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