FINDINGS OF THE MAJORITY OF THE JUDICIAL SERVICE COMMISSION IN TERMS OF SECTION 20(3) OF THE JUDICIAL SERVICE COMMISSION ACT, 9 OF 1994

IN RE: JUDGE PRESIDENT HLOPHE

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Introduction

1. On 9 April 2021 the Judicial Conduct Tribunal ("**the Tribunal**") published its Report and Finding ("**the Report**") in respect of the complaint lodged with the Judicial Service Commission ("**the JSC**") against the Judge President of the Western Cape Division of the High Court, MJ Hlophe ("**Judge President Hlophe**"). The Tribunal reached the following conclusion:

> *[123] In conclusion, on an objective and proper consideration of the facts and probabilities, we find that:*
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> *(a) Judge President Hlophe's conduct breached the provision of section 165 of the Constitution in that he improperly attempted to influence the two Justices of the Constitutional Court to violate their oaths of office;*
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> *(b) His conduct seriously threatened and interfered with the independence, impartiality, dignity and effectiveness of the Constitutional Court;*
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> *(c) His conduct threatened public confidence in the judicial system.*
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> *[124] In our view, this constitutes gross misconduct. We therefore unanimously conclude that Judge President Hlophe is guilty of gross misconduct as envisaged in section 177 of the Constitution."*

2. Subsequent to the publication of the Report, the JSC, in terms of section 20 of the Judicial Service Commission Act, 9 of 1994 ("**the Act**"), informed Judge President Hlophe as well as the complainants that they may submit written representations to the JSC for its consideration. Pursuant thereto, the complainants, Judge President Hlophe and the two Justices who were called as factual witnesses during the hearings (Justices Nkabinde and Jafta) submitted written representations.

3. The JSC held a meeting on 4 June 2021 to consider the Report and the aforesaid written representations. It then adjourned to further consider and formulate written reasons, and resolved to reconvene on 30 July 2021 to make its reasoned finding in terms of section 20 (3) of the JSC Act.

4. Section 177(1)(a) of the Constitution provides that a Judge may be removed from office if the JSC finds, *inter alia*, that the Judge is *"guilty of gross misconduct"*. To that end, we will closely interrogate the question whether, on a conspectus of all the evidence before the JSC, Judge President Hlophe is *"guilty of gross misconduct"*.

Overview of the evidence

5. We have considered the transcript of the evidence given under oath, in order to properly discharge our duty under section 20 of the Act. The relevant events of March and April 2008 were witnessed by Judge President Hlophe, Justice Nkabinde and Justice Jafta. We capture the salient features of their evidence below.

6. Judge President Hlophe's version, in relevant part, is as follows:

   6.1 he discussed the Zuma/Thint cases[1] firstly with Acting Justice Jafta and on a later occasion with Justice Nkabinde in two separate and private meetings in their chambers.

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[1] This is a reference to four cases before the Constitutional Court in which Judgment was still pending when the events of March / April 2008 described herein took place. See the Tribunal Decision, para [3] & [4].

6.2 he raised the subject of the Zuma/Thint matter with Justice Jafta, saying that it was a "*very important*" matter and he "*believed that the issue of privilege was a very concerning one and had to be dealt with properly*".[2] In a robust discussion,[3] he stated to Justice Jafta that Mr Zuma was being persecuted, just as he (Judge President Hlophe) had been persecuted.[4] He said to Justice Jafta "*sesithembele kinina*" meaning "*you are our last hope*".[5]

6.3 he raised the subject of the Zuma/Thint matter with Justice Nkabinde during their meeting,[6] stating that he "*was concerned that the majority in the Supreme Court of Appeal did not attach much weight to the issue of privilege*" and in a robust manner,[7] he expressed his "*very strong views on*" privilege.[8] He "*remarked that it [*the Zuma/Thint case*] was probably one of the most demanding of the cases that the Court had dealt with, given its importance to the President of the ANC, Jacob Zuma and the ANC itself and the country, in general since it was clear that Jacob Zuma was a likely contender for the Presidency of the country*".[9] He stated that he believed "*that the Zuma matter had to be correctly decided and even expressed views of my own on the legal issue of privilege*".[10]

7. Justice Jafta's version, in relevant part, is as follows:

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2 JSC Record, Vol 1, pp116-117 para 23.4.
3 JSC Record, Vol 1, p139 para 48.2.
4 JSC Record, Vol 3, p147 para 61.1.
5 JSC Record, Vol 1, p117 para 23.5.
6 JSC Record, Vol 1, p123 para 28.
7 JSC Record, Vol 1, p139 para 48.2.
8 JSC Record, Vol 1, p124 para 29.
9 JSC Record, Vol 1, p123 para 28.
10 JSC Record, Vol 1, pp136-137 para 46.1.

7.1 Judge President Hlophe initiated the discussion with Justice Jafta about legal professional privilege[11] and the "*Zuma matters*" and asked him whether judgment had been handed down. Judge President Hlophe said to Justice Jafta that "*the SCA has got it wrong in its judgment*" and concluded that part of the conversation by saying "*sesithembele kinina*".[12]

7.2 Because of the context in which Hlophe JP used the phrase "*sesithembele kinina*" (that is, after saying that the SCA had got it wrong), Jafta J understood Judge President Hlophe to mean that the Constitutional Court, as the highest court, would have to put right what the Supreme Court of Appeal had got wrong, by giving a judgment that would correct the Supreme Court of Appeal.[13]

7.3 Justice Jafta was surprised by Judge President Hlophe's approach, because in the Appeal Courts where he had worked, judges did not discuss matters with members of the court who were not on the panel before judgment was handed down.[14] Justice Jafta had never before had the experience of a judge from another Court discussing a matter with him in a matter in which he was sitting with a pending judgment.[15] He felt uncomfortable entertaining the discussion, fearing that if it continued, even if it was innocent, it might end up influencing him one way or another.[16]

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[11] Transcript of 8 December 2020, p22, lines 19-23.
[12] JSC Record, Vol 3, p264, lines 7-13.
[13] JSC Record, Vol 3, p266, lines 2-5. Transcript of 8 December 2020, p25, lines 4-9.
[14] JSC Record, Vol 3, p265, lines 6-10.
[15] JSC Record, Vol 3, p266, lines 16-19.
[16] JSC Record, Vol 3, p265, lines 12-14; Transcript of 8 December 2020, p41, lines 6-10.

7.4 While Justice Jafta did not initially think of Judge President Hlophe's conduct as improper or worth complaining about, he was able to put together facts and draw inferences, after receiving a report from Justice Nkabinde, which he had not drawn earlier.[17] Although Justice Jafta thought at the time that he had done enough by rebuffing Judge President Hlophe, with the benefit of hindsight he accepts that his approach at the time was inadequate.[18] Justice Jafta's reluctance to be a complainant in his own name was because he felt it was undesirable for a judge to testify, and because Judge President Hlophe is his friend. It was not because there was no impropriety on the part of the Judge President.[19]

7.5 The meeting between Justice Jafta and Judge President Hlophe was towards the end of March 2008. On 24 April 2008, Justice Jafta had lunch with Justice Nkabinde. At that lunch, Justice Nkabinde told Justice Jafta that she had received a phone call from Judge President Hlophe and that he wanted to discuss the issue of privilege with her. She was wondering in what context Judge President Hlophe might be coming to speak to her about privilege. When Justice Nkabinde mentioned this to Justice Jafta, it triggered Justice Jafta's recollection of his own meeting with Judge President Hlophe in March. Justice Jafta indicated to Justice Nkabinde that Judge President Hlophe might talk to her about the Zuma cases, as he had done with him.[20]

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[17] Transcript of 8 December 2020, p43, lines 1-22.
[18] JSC Record, Vol 3, p.280, line 20 – p281, line 4; p282, lines 22 – 24.
[19] JSC Record, Vol 3, p265, lines 12-14. Transcript of 8 December 2020, p41, lines 6-10.
[20] JSC Record, Vol 3, p266, line 20 – p.267, line 6. Transcript of 8 December 2020, p12, line 21 – p14, line 12.

8. Justice Nkabinde's version, in relevant part, is as follows:

8.1 Judge President Hlophe contacted Justice Nkabinde in advance of their meeting. He indicated that he had a "mandate", but did not elaborate. He also told Justice Nkabinde in isiZulu that he wanted to discuss the issue of privilege.[21]

8.2 Justices Nkabinde and Jafta had lunch together on 24 April 2008, and she told him that Judge President Hlophe had contacted her and that he wanted to discuss privilege. Justice Nkabinde wondered what about privilege he may wish to discuss, at which point Justice Jafta alerted her that he may want to discuss the Zuma/Thint cases.[22]

8.3 In their meeting, Judge President Hlophe told Justice Nkabinde that the reason he had come to see her was that a concern had been raised that people appointed at the Constitutional Court should "*understand our history*". When Justice Nkabinde asked Judge President Hlophe who had raised these concerns, he told her that he had a connection with Ministers who he from time to time advised. He then began to talk about Mr Zuma's case.[23]

8.4 Judge President Hlophe raised the issue of Mr Zuma's case with Justice Nkabinde. He said the case was important, and that it needed to be

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[21] JSC Record, Vol.3, p327, lines 17-19. Transcript of 8 December 2020, p.66, lines 9-14.
[22] Transcript of 8 December 2020, p63, line 18 – p64, line 4.
[23] JSC Record, Vol 3, p08, lines 10-18. Transcript of 8 December 2020, p67, lines 12-15.

decided properly, because the prosecution's case rested on that aspect of the case.[24]

8.5 Judge President Hlophe told Justice Nkabinde that there was "*no case against Mr Zuma*" and that Mr Zuma had been persecuted just as he had been persecuted.[25]

8.6 Judge President Hlophe claimed to have a list of names of people implicated in the Arms Deal, which he had obtained from National Intelligence. He told Justice Nkabinde that some of the people who appeared on the list were going to lose their jobs when Mr Zuma became President. He said this in the context of explaining why Mr Zuma was not the only one who was implicated in the Arms Deal.[26]

8.7 When Judge President Hlophe raised the issue of privilege and the cases involving Mr Zuma, Justice Nkabinde "*snapped*" at him and told him that he was not entitled to talk about a case in which he had not sat, particularly as he was not a member of the Court.[27]

8.8 It was clear to Justice Nkabinde that Judge President Hlophe was trying to influence her and the way in which the Court would decide the matter.[28]

8.9 Apart from exchanging pleasantries, Judge President Hlophe talked about nothing else in the meeting with Justice Nkabinde other than Mr Zuma's case, the issue of privilege, and Judge President Hlophe's connections

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[24] JSC Record, Vol 3, p308, lines 20-22.
[25] JSC Record, Vol 3, p309, lines 14-18.
[26] JSC Record, Vol 3, p309, lines 17-25. Transcript of 8 December 2020, p67, lines 5-15.
[27] JSC Record, Vol 3, p311, lines 6-10. Transcript of 8 December 2020, p63, lines 3-5.
[28] JSC Record, Vol 3, p312, lines 2-5. Transcript of 8 December 2020, p62, lines 8-10.

with Ministers and National Intelligence. Her understanding is accordingly that Judge President Hlophe went to see her to talk about those issues and nothing else.[29]

9. The material facts that were either common cause or not in dispute were as follows:

9.1 Judge President Hlophe met Justices Nkabinde and Jafta on separate occasions in their chambers in the Constitutional Court.

9.2 The conversations that he had with the two Justices included discussion of what Judge President Hlophe refers to as the "*Zuma matter*".

9.3 In both conversations, it was Judge President Hlophe that initiated the discussion regarding the Zuma matter.

9.4 In these conversations Judge President Hlophe stated that the matter must be decided "*correctly*".

9.5 Judge President Hlophe expressed views on the issue of privilege which he said was "*important*".

9.6 Judge President Hlophe admitted to having a "*mandate*", although he contends that what he meant was a mandate to organise a conference.

9.7 Judge President Hlophe concedes that he might have mentioned that *"the cases were important for Zuma and the country"*.

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[29] JSC Record, Vol 3, p332, lines 5-12.

9.8 Judge President Hlophe concedes that he remarked to Justice Nkabinde that "*there is no case against Mr Zuma*". He says that "*I cannot betray the trust of our conversation that resulted in me remarking that there is no case against Mr Zuma*".[30]

9.9 Judge President Hlophe admits using the phrase "*sesithembele kinina*" (meaning "*you are our last hope*") in his discussion with Justice Jafta, specifically in the context of discussing the matters involving Mr Zuma.

9.10 Judge President Hlophe (while disputing certain aspects of the conversations which admittedly took place) does not dispute having said to Justice Nkabinde that Mr Zuma was being "*persecuted*" as he (Hlophe JP) had been persecuted.

The Justices' complaint

10. The discussions between Judge President Hlophe and Justices Nkabinde and Jafta were brought to the attention of the leadership of the Constitutional Court, which considered that a complaint should be brought. All the Constitutional Court Justices unanimously joined therein.

11. The complaint was that Judge President Hlophe approached two justices of the Constitutional Court and attempted to improperly influence their decision in two matters that were then pending in the Constitutional Court thereby rendering

[30] JSC Record, Vol 1, p143 para 56.2.

himself guilty of gross misconduct, as envisaged in section 177(1)(a) of the Constitution.[31]

12. Through the late Chief Justice Langa, the Justices articulated their concern that the conduct had been in breach of the dual aspects of judicial independence i.e. that:

    12.1 judicial officers must act independently and impartially in dealing with cases before them; and

    12.2 the courts and judges must be protected against external interference.

13. They explained that the conduct amounted to interference with the functioning of the Court, that this interference was not limited in effect to Justices Nkabinde and Jafta, but could potentially impact on the Constitutional Court as a whole. Even if one Judge was disqualified, that could fatally contaminate the ultimate decision, as all Judges that sit in a matter must be qualified to do so.[32]

Judge President Hlophe's objections

14. Judge President Hlophe submitted Written Representations dated 30 April 2021 of 191 pages and Supplementary Written Representations dated 25 May 2021 of 44 pages (plus a two-page list of authorities). We have considered Judge President Hlophe's objections and arguments, and deal with the essence of them below.

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[31] Record: Book 2 of 2 p 464.
[32] JSC Record Vol 1 pp 62 – 64 paras 53 – 56.

The joint complaint statement was adjusted

15. The changes to the Constitutional Court Justices' statement are set out in paragraph [31] of the Tribunal's Decision. What changed is that conclusions were substituted for facts, leaving the decision-making to the Tribunal. Justices Nkabinde and Jafta did not change their versions and in any event, as set out above, much of what occurred is common cause.

16. Moreover, at the time the changes were made, there was no objection. When Justices Nkabinde and Jafta were cross-examined, there was no criticism levelled on the basis of these changes. There was no prejudice as a result of the changes and we agree with the Tribunal's rejection of this objection.[33]

The charge sheet was vague and did not disclose the offence

17. Judge President Hlophe contends that the charge sheet was vague, did not disclose an offence, and was accordingly invalid.

18. The requirement of notice in terms of Rule 4[34] is not that it stipulates specific "charges" or "offences". The requirement is that the facts and a summary of the evidence is furnished. That was done and those facts and that evidence presented the real issue for decision i.e. whether Judge President Hlophe's conduct rendered him guilty of gross misconduct, such that sections 165(3) and 177(1)(a) of the Constitution were invoked. There is plainly a constitutional prohibition against any person or organ of state interfering with the functioning of

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[33] Tribunal's Decision at paras [38] to [52].
[34] Rule 4 of the Rules to Regulate Procedures Before the Judicial Conduct Tribunals.

the courts. And section 177 makes it an impeachable offence for a judge to engage in gross misconduct.

19. These are not criminal proceedings. There is no evidence of any unfairness in the process. In regard to whether the ethical rules were too vague or unascertainable to constitute the basis for proceedings such as these, we refer to what we set out in paragraphs 39 to 55 below. In sum, the ethical rules derive from the Constitution and are necessary to uphold the rule of law.

The charge sheet was changed

20. Judge President Hlophe contended that as a result of the change in the second charge sheet, he was prejudiced. The two charge sheets, including the detailed summary of the evidence attached to each, were identical except in two immaterial respects. We underline below the wording that has been added to the second charge sheet.

    20.1 The August 2013 charge sheet describes the charge as one of gross misconduct in that Hlophe JP approached Justices Jafta and Nkabinde and attempted to "*improperly influence their decision in matters that were pending at the Constitutional Court*".

    20.2 The August 2020 charge sheet describes the charge as one of gross misconduct in that Hlophe JP approached Justices Jafta and Nkabinde and attempted to "*improperly interfere or influence their decision in matters that were pending at the Constitutional Court (contrary to the provisions of section 165(2) and (3) of the Constitution)*".

21. The Tribunal correctly rejected this contention for the reasons set out in paragraphs [65] to [75] of its Decision. In sum, the issue was whether the facts as alleged in the two charge sheets presented the real issue for decision i.e. whether Judge President Hlophe's conduct rendered him guilty of gross misconduct. That was not affected by the changes, in particular the aforesaid insertion of the words "*interfere or*". He had notice of those facts and a summary of the evidence which substantiated the complaint, as was required by the Rules.[35] There is actually no requirement for a "charge sheet" – this is not a criminal proceeding. All that is required is notice as aforesaid, and the stated facts and evidence remained the same. The change could not have caused any prejudice.

Justices Nkabinde and Jafta were coerced

22. Judge President Hlophe argues that Justices Nkabinde and Jafta were unwilling complainants. He alleges that their attestation to the joint complaint statement and their subsequent testimonies, were not done freely and voluntarily and that undue influence was brought to bear.

23. During their evidence-in-chief, Justices Jafta and Nkabinde both refuted the accusations that they were coerced or manipulated in any way in strong terms, as absolutely incorrect, insulting and totally devoid of credence.[36] There was no

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[35] Rules to Regulate Procedures Before the Judicial Conduct Tribunals.

[36] Justice Jafta: JSC Record, Vol 3, p272, line 18 – p273, line 5; p273, lines 6-8; p.274, line 23 – p.275, line 2; p290, line 14 – p291, line 20; p299, line 4 - p300, line 4.
Justice Nkabine: JSC Record, Vol 3, p319, line 22 – p320, line 13; p329, lines 4 – 22; p336, lines 14 – 20 p337, lines 3 – 10.

cross-examination on these issues. Their evidence on the absence of coercion or manipulation thus stands uncontradicted.

24. In Justices Nkabinde's and Jafta's representations to the JSC, they made their stance clear. Whilst they had not pressed for any particular outcome during the Tribunal hearings, they stated that that should not be taken as an indication, as argued by Judge President Hlophe in his submissions, that there was no gross misconduct on his part. They urged the JSC to uphold the Tribunal's acceptance of their evidence and to reject Judge President Hlophe's submissions to the extent that they were inconsistent with their evidence.

25. We therefore support the Tribunal Decision in this regard.[37]

The Constitutional Court Justices were not entitled to participate in the proceedings

26. The objection that the Constitutional Court Justices were not entitled to participate in the proceedings was dismissed by the Tribunal.[38] We consider that decision to be correct.

27. The Tribunal is empowered to regulate its own proceedings.[39] The Justices were complainants. They had participated in the proceedings since 2009. Their participation contributed to the proper administration of justice in the matter and thus such participation is to be welcomed and encouraged in future cases.

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[37] At paragraphs 53 to 56.
[38] Tribunal's Decision at paras [57] to [61].
[39] Section 25(4) of the JSC Act.

Inordinate delay

28. Judge President Hlophe contends that since there has been inordinate delay, he should no longer be in jeopardy of being disciplined.

29. The complaint was brought during May 2008. The Tribunal has set out an account of the litigation which caused the delays. In broad terms, the result of the litigation is that various challenges to the legality of the complaint, and the process, have been finalised. Many of the delays, but not all of them, have been explained as being a result of issues that Judge President Hlophe himself raised.

30. The process leading to the Tribunal encompasses many role players. It is a cumbersome process. The independence of the judiciary is at stake and the role of a judge should not be easily interfered with. That also provides part of the reason for the delay in completing this matter. The delays were part and parcel of ensuring that the rule of law applied to the fullest extent to every challenge to the process. There is a difficult tension between ensuring rights to a fair outcome are fully exhausted and also achieving finality within a reasonable time. In this case, the delays were not a result of neglect, but rather occasioned by the participants' fully exhausting their rights.

31. The inordinate delay, in and of itself, has not prejudiced Judge President Hlophe. In our view, that should put paid to any suggestion that the JSC should not now discharge its duty.[40] That duty is imposed, in peremptory language, by section 20(3) of the Act. It is duty-bound to make a finding on whether Judge President

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[40] See *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) paras 36, 39 – 41. *Bothma v Els & Others* 2010 (2) SA 622 (CC); *Rodrigues v National Director of Public Prosecutions of South Africa and Others* [2019] 3 All SA 962 (GJ).

Hlophe "*is guilty of gross misconduct*". In the absence of serious and irreparable prejudice, the JSC must discharge its duty. A permanent stay would in our view severely undermine the profound public interest in the merits of the complaint being finally determined *"[i]n the interests of protecting and enhancing the dignity and effectiveness of the judiciary and the courts*".[41]

The Tribunal lacked objectivity and impartiality

32. Judge President Hlophe argues that he was denied his constitutional right to have the dispute resolved by an independent forum, as the Tribunal demonstrated an appearance of bias, if not actual bias. He refers in particular to paragraph 122 of the Tribunal's Decision in which the Tribunal refers to the "*unfounded and scurrilous attacks*" made by Judge President Hlophe against the Justices of the Constitutional Court that brought the complaint.

33. Judge President Hlophe accused Chief Justice Langa and the other Justices of improperly coercing Justices Jafta and Nkabinde, implying also as against them that they allowed themselves to be manipulated into joining a false complaint.[42] These accusations were comprehensively refuted by Justices Jafta and Nkabinde.[43] Judge President Hlophe did not cross-examine them on this evidence.

34. Judge President Hlophe accused Chief Justice Langa and the other Justices of fraud, of vindictively seeking to get rid of him, of lying, of political motives, of

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41 Section 27 of the JSC Act.
42 JSC Record, Vol.1, p91 para 3; p100 para 7.9; pp.101-102 para 8.
43 Justice Jafta: Vol 3 p 272 line 18 – p 273 line 9; p 274 line 23 – p 275 line 2; p 290 line 14 – p 291 line 20; p 299 line 1 – p 300 line 4. Nkabinde J: Vol 3 p 319 line 25 – p 320 line 14; p 329 lines 5 – 22; p 336 line 14 – p 337 line 11.

dishonesty.[44] The Justices refuted these attacks.[45] Judge President Hlophe did not even cross-examine them on this evidence.

35. These allegations are serious. If Judge President Hlophe's allegations were true, those whom he insulted would not have been fit to be Judges. Yet he made these attacks, then did not even cross-examine on them, and has still not withdrawn them. Whilst this behaviour is not in itself the subject matter of the Justices' Complaint, the strategy of "*accusing the accusers*" and "*break[ing] down the institution involved*", was properly taken into account by the Tribunal.[46] There is good authority for doing so in aggravation of misconduct.[47] We reject Judge President Hlophe's submission that the deprecation of such conduct evidenced bias on the Tribunal's part.[48] Judge President Hlophe's unfounded attacks were unbecoming of a leader of the Judiciary, there was no basis for them and still less to have persisted with them.

36. The preservation and reaffirmation of the integrity and independence of the Judiciary and the restoration of public confidence in the administration of justice

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[44] JSC Record, Vol 1, pp110-111 para 19; p89 para 1.4; pp 112-113 para 21; p106 para 13; pp95-96 para 7.2; p99 para 7.8; pp127-128 para 33.

[45] Langa Vol 3: p 161 line 4 – p 162 line 14
p 166 line 18 – p 168 line 8
p 168 line 18 – p 170 line 15
p 174 lines 15 – 23
Moseneke Vol 3: p 223 line 7 – p 224 line 9
p 228 line 7 – 232 line 1
p 253 line 13 – p 255 line 24
Mokgoro Vol 3: p 348 line 14 – p 351 line 2
p 366 line 11 – p 367 line 7
p 375 lines 1 – 14
O'Regan Vol 3: p 384 line 5 – p 387 line 16
p 390 line 23 – p 393 line 5

[46] Tribunal Decision at paras [116] to [122].

[47] *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) para 26; *Johannesburg Society of Advocates v Edeling* 2019 (5) SA 79 (SCA) at para7; *Langa v Hlophe* 2009 (4) SA 342 (SCA) at paras 40 and 55.

[48] Judge President Hlophe's Supplementary Written Representations to the JSC dated 25 May 2021, paras 48 – 68 and 79 – 81.

are uppermost in mind. Judged from the manner in which Judge President Hlophe conducted himself throughout this incident, he demonstrated a lack of appreciation that assessed objectively, his conduct transgressed fundamental values. It is precisely due to that lack of appreciation that he persisted in his attacks on every one of the members of the judiciary that called his conduct into question. Judge President Hlophe stated that he "*had to accept the version of the Constitutional Court Judges that their conduct was inspired by their desire to protect the institutional integrity of the Court.*"[49] This makes the attacks against the judiciary who considered him to have crossed a line that should not have been crossed, and who in those circumstances had a duty to take action, unbecoming.[50]

37. We agree that the Tribunal was justified in its criticisms of Judge President Hlophe's behaviour and that it was correct to take this into account as an aggravating factor.

38. Judge President Hlophe raises a point with regards to the probabilities by pointing out that he spent a great deal of time with another relevant Constitutional Court judge, Justice Ngcobo and there is no suggestion that the Judge President "*discussed the Zuma Tint matter*" or any other matter with Justice Ngcobo. Similarly, he indicates that there is no suggestion that – despite opportunity – he discussed the "*Zuma Tint matter*" with the late Chief Justice Langa or other justices including Madala and the late Justice Skweyiya. Judge President Hlophe says[51] that if he wanted to influence "*there were so many other judges*" that he

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[49] *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* 2011 (3) SA 549 (SCA) at para 52. Transcript of 8 December 2020, p120 lines 3 – 17.
[50] As stated by the SCA in the *FUL* decision, paras 21, 22 & 49.
[51] Record: Tribunal Book 3 at pp 239 to 240.

could have approached. It would seem that the Judge President argues that the fact that he did not attempt to influence these other justices, was indicative of his lack of intention to interfere with the Constitutional Court. But that is not decisive of the matter for the following reasons:

38.1 It might be as suggested to him under cross-examination, that Judge President Hlophe regarded Justices Jafta and Nkabinde as less senior judges and as more prone to be influenced.

38.2 It might also be that Judge President Hlophe would take matters further with the other justices, had Justice Jafta not rebuffed his comment, or Justice Nkabinde not cautioned him of crossing over the line.

38.3 In any event, the fact that a person contravenes a law a certain number of times and on other occasions elects to be compliant, does not indicate a lack of intention in relation to the acts of non-compliance.

38.4 Linked to the argument referred to above is the following contention by Judge President Hlophe:[52]

> *"Judge Jafta gave evidence earlier on here and said there were so many judges, including SCA judges, who spoke to him about the issue of professional privilege. None of them is being prosecuted".*

38.5 This contention is rejected for the following reasons:

38.5.1 Firstly, Justice Jafta's statement relates to discussions which took place whilst he was at the Supreme Court of Appeal and which related to a judgment that was **not** pending but had been handed

[52] Record: Tribunal Book 3 at p 238.

down and in which he was not involved. Consequently, there can be no suggestion that such discussions were aimed at influencing him to decide any matter in a particular manner.[53]

38.5.2 Secondly, the JSC and Tribunal had to deal with the complaint before it.

38.5.3 Thirdly, this seems to also be a version of the "*accuse the accuser*" type of approach, which we have dealt with elsewhere.

Reasons for upholding the Tribunal's findings

The Constitution

39. The Tribunal set out the starting point as being section 165 of the Constitution, as it is there that the independence of the Judiciary is guaranteed. Section 165 of the Constitution provides:

> *"(1) The judicial authority of the Republic is vested in the Courts.*
>
> *(2) The Courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.*
>
> *(3) No person or organ of state may interfere with the functioning of the Courts.*
>
> *(4) Organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the Courts.*
>
> *(5) An order or decision issued by a court binds all persons to whom and organs of State to which it applies."*

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[53] Record: Tribunal Book 3 at p137.

40. Section 174(8) of the Constitution requires that before judicial officers begin to perform their functions, they must take an oath or affirm, *"that they will uphold and protect the Constitution".*

41. The Constitutional Court has recognised that judicial independence is "*foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law*".[54] It has held that an independent judiciary is *an essential part of the separation of powers*, that it is *crucial to the Courts for the fulfilment of their constitutional role* and that it is an internationally recognized principle.[55]

42. At the core of judicial independence is the:

> *"... complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge* conducts his or her case and makes his or her decision."[56]

43. The SCA has captured the gravity of the Conduct and its threat to judicial independence in this pithy statement:

> *"Any attempt by an outsider to improperly influence a pending judgment of a court constitutes a threat to the independence, impartiality, dignity and effectiveness of that court."*[57]

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[54] *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at para 59.

[55] *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) at paras 34 to 39.

[56] *The Queen v Beauregard* (1986) 30 DLR (4th) 481 (SCC) cited in: *De Lange v Smuts NO* (supra) at para 70 and *Van Rooyen and others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 (5) SA 246 (CC) at para 19.

[57] *Freedom Under Law v Acting Chairperson, Judicial Service Commission and Others* 2011 (3) SA 549 (SCA) at para 50. See also *Minister of Police v Vowana and Another* [2019] 2 All SA 172 (ECM) at paras 13 to 25 where Malusi and Jolwana JJ summarise the principles and apply them in a case where a Magistrate permitted an attorney to assist him in writing the judgment.

44. It is trite that the test for whether conduct constitutes gross misconduct is an objective one, and is concerned with the appearance or perception of independence and impartiality.[58]

45. The requirement of judicial officers to not only be independent, but also be seen to be independent, is one of the foundational prescripts of the rule of law. It is nothing less than a fundamental jurisprudential principle.

46. It bears mentioning that the right to freedom of opinion and of expression, protected by sections 15 and 16 of the Constitution, must obviously be read harmoniously with section 165(3), such that Judge President Hlophe's right to expression does not extend to interfering with the functioning and independence of the courts.

Judicial standards of conduct

47. The "Guidelines for Judges of South Africa"[59] acknowledge that to fulfil its constitutional role, the "*judiciary needs public acceptance of its moral authority and integrity, the real source of its power.*" It is recognised that it is most often the appearance of impropriety that affects the reasonable person's understanding of whether that which is improper has taken place, for it is often the unspoken, between-the-lines-winks-and-nods that may affect whether judges are perceived to have been the cornerstones of impartiality and independent. The very first guideline provides that:

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[58] *Van Rooyen (supra)* at para 32 (read with paras 33- 34) citing *R v Genereux* (1992) 88 DLR (4th) 100 (SCC).

[59] (117) 2000 *SALJ* 377.

"A judge should uphold the independence of the judiciary and the authority of the courts, and should maintain an independence of mind in the performance of his judicial duties. A judge should also take all reasonable steps to ensure that no person or organ of state interferes with the functioning of the courts."

48. It bears mention that the Guidelines were one of several sets of standards of judicial conduct considered by the Judicial Group on Strengthening Judicial Integrity[60] under the United Nations, in developing the Bangalore Principles on Judicial Conduct. The Bangalore Principles are a comprehensive statement of ethical principles. They were adopted by the Judicial Group on Strengthening Judicial Integrity, at a meeting of chief justices held in The Hague on 25-27 November 2002.[61]

49. The standards contained in the Bangalore Principles include:

49.1 The principle of independence, saying that *"Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects."*[62]

49.2 The notes on the application of this principle include that:

49.2.1 *"A Judge shall exercise the judicial function independently on the basis of the Judge's assessment of the facts and in accordance*

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[60] Comprising Chief Justice Latifur Rahman of Bangladesh, Chief Justice Bhaskar Rao of Karnataka State in India, Justice Govind Bahadur Shrestha of Nepal, Chief Justice Uwais of Nigeria, Deputy Vice-President Langa of the Constitutional Court of South Africa (as he then was), Chief Justice Nyalali of Tanzania, and Justice Odoki of Uganda, meeting under the chairmanship of Judge Christopher Weeramantry, Vice-President of the International Court of Justice, with Justice Michael Kirby of the High Court of Australia as rapporteur, and with the participation of Dato' Param Cumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers.

[61] The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

[62] Value 1.

with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference direct or indirect from any quarter or for any reason."[63]

49.2.2 "*In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions that the judge is obliged to make independently.*"[64]

49.3 The principle of impartiality, saying that "*Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.*"[65]

49.4 The notes on the application of this principle include that "*a judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.*"[66]

49.5 As part of the principle of integrity,[67] the notes include that *"[a] judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer"* and *"[t]he behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.*"[68]

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[63] Para 1.1.
[64] Para 1.4.
[65] Value 2.
[66] Para 2.2.
[67] Value 3.
[68] Paras 3.1 and 3.2.

50. The Constitution imposes the obligation upon judges to uphold and protect the Constitution, which includes the obligation upon courts to act independently, impartially and without fear, favour or prejudice.[69] This is in accordance with the Bangalore Principles and the Guidelines. These standards existed before the Code as a standard for judicial conduct, and the Code has merely codified these pre-existing standards (and not brought them into existence).[70]

51. The complaint against Judge President Hlophe was levelled before the adoption of the Code. The Tribunal, in the case concerning Judge Motata, has already decided that this does not matter. The Code is expressly based upon the constitutional framework applicable to judges and serves as the prevailing standard of judicial conduct.[71] Essentially, a judge is required to conduct him or herself in a manner that will uphold and protect the Constitution. These obligations stem from the Constitution, not the Code. The values of the Code existed under the Constitution. This was confirmed in *Motata v Minister of Justice and Constitutional Development*.[72]

52. The perception of the public of the judicial system as a whole, and the public confidence in the system, ensures its effectiveness and proper functioning. This is a facet of the constitutional standard of conduct expected of a judge and therefore imposes obligations upon a judge, whether or not that is expressly formulated as a rule or set out in any code.[73]

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[69] Section 165(2).
[70] The Code of Judicial Conduct for South African Judges, promulgated under section 12 of the JSC Act, came into operation on 18 October 2012. It was published under GN R865 in Government Gazette 35802 of 18 October 2012.
[71] Paragraphs 2 to 4 of the Preamble to the Code. Section 12 of the JSA Act
[72] 2012 JDR 1644 (GNP) at para 14.
[73] *Nkabinde and Another v Judicial Service Commission and Others* 2016 (4) SA 1 (SCA) at para 5.

53. These constitutional standards of conduct were also reflected in the 2000 Guidelines as well as in the Bangalore Principles, which in 2002, were adopted as reflecting internationally accepted core principles applicable to judicial conduct. The Code therefore encapsulates these pre-existing fundamental standards of judicial conduct that are based on the Constitution. Since the Code's promulgation, it serves as the standard against which judicial conduct is to be measured. It therefore informs the JSC's evaluation of whether a judge has committed gross misconduct in terms of section 177(1) of the Constitution.

54. The Code is expressly based on the Bangalore Principles.[74] It reflects and endorses all of the above principles. Article 4 provides:

> *"**Judicial independence***
>
> *A Judge must –*
>
> *(a) uphold the independence and integrity of the Judiciary and the authority of the Court;*
>
> *(b) maintain an independence of mind in the performance of judicial duties;*
>
> *(c) take all reasonable steps to ensure that no person or organ of state interferes with the functioning of the Court; …"*

55. In the Notes to this Article, the following is stated:

> *"Note 4(iv): Judicial independence is not a private right or a principle for the benefit of Judges as individuals. It denotes freedom of conscience for Judges and non-interference in the performance of their decision-making. …*
>
> *Note 4(v): Organs of state are constitutionally mandated to assist and protect the Courts to ensure their independence, impartiality, dignity, accessibility and*

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[74] Para 7 of the preamble to the Code.

effectiveness. The correlative is the right of every Judge not to have his or her independence of mind disturbed by any person or organ of state."

Judge President Hlophe's justification of his conduct

56. In his evidence, Judge President Hlophe relied on Article 11.3 of the Code, which provides that *"Formal deliberations as well as private consultations and debates among judges are and must remain confidential."* In our view, Judge President Hlophe's reliance on this Article and his insistence that Judges frequently discuss their matters is no answer.

57. The Article says nothing about discussing the merits of pending decisions with judges who sat on the appeal panel. It cannot be plucked out of context and used to justify Judge President Hlophe's conduct when the overwhelming, constitutionally-endorsed values of judicial independence and impartiality would as a result be compromised.

58. In any event, the aforesaid is expressly captured in Note 11(ii) to that Article: which states that *"Private consultations and debates between judges are necessary for the judiciary to perform its functions. However, these occasions may not be used to influence a judge as to how a particular case should be decided."* This is in accordance with international jurisprudence. In the American code of judicial conduct discussed by Gray,[75] it is acknowledged that a presiding judge may consult other judges or court personnel. However, a judge who does so must make *"[r]easonable efforts to avoid receiving factual information that is*

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[75] Ethical Standards for Judges, Cynthia Gray of the American Judicare Society at 2. Referred to as *"In the Matter of De Joseph"*. See www.jcjc.state.ny.us, New York State Commission on Judicial Conduct July 5, 2005.

not part of the record, and does not abrogate the responsibility personally to decide the matter."[76]

Judge President Hlophe's knowledge of the ethical standard

59. We agree with the Tribunal that Judge President Hlophe probably knew of the relevant standards of judicial ethics, as encapsulated in the Code, and that on an objective assessment, he must be taken to have known of them:

59.1 When he raised the matter in discussion with Justice Jafta, Justice Jafta had rebuffed him. Notwithstanding this rebuff, Judge President Hlophe still proceeded to arrange a meeting with Justice Nkabinde in which he again pursued a discussion regarding the *Thint* / Zuma cases knowing she had sat on the bench and judgment was still pending.

59.2 Judge President Hlophe had strongly disapproved the conduct of an assessor when, during a trial, the assessor expressed an opinion on the performance of a witness with defence counsel. Judge President Hlophe correctly stressed how important impressions were, that remarks and opinions could adversely affect the perception of impartiality, that confidence in the legal system is dependent on what "right-thinking people" reasonably perceive in relation to impartiality. He took the decision that the proceedings should start *de novo*.[77]

59.3 The Justices of the Constitutional Court who brought the complaint considered it is an elementary principle of judicial ethics that a Judge from

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[76] Gray at 11 referring to Rule 2.9(A)(3).
[77] *S v Mayekiso and others* [1996] 1 All SA 571 (C).

one division does not discuss the merits of a matter with Judges of another where Judgment is still pending. This accorded with the experience of the members of the Tribunal, and those of the JSC hearing this matter who serve as senior judges.

59.4 Judge President Hlophe is a senior long-standing judge, formerly an academic. He cannot but have a thorough knowledge of the Constitution and principles of judicial independence.

The "misconduct"

60. On his own version, it is clear that Judge President Hlophe did not express abstract, academic views about the law of privilege. He said that the SCA got the law wrong and, in the meeting with Justice Nkabinde, that there was no case against Mr Zuma. In that context, he urged them both to decide the case correctly. We agree with the Tribunal that to decide the case "*correctly*", where Judge President Hlophe's view was that the SCA got the law wrong, could only mean overturning the SCA, and thus finding in favour of Mr Zuma. That is consistent with his admitted suggestion that Mr Zuma was being persecuted. It also means that in saying "*sesithembele kinina*" Judge President Hlophe conveyed his hope that the Constitutional Court, as the apex Court, would correct the errors committed by the SCA. That is how Justice Jafta understood the phrase and how a reasonable observer would have understood it.

61. Viewed objectively, Judge President Hlophe's conduct was in breach of the requisite objective standard, as now codified in Article 11. We therefore align

ourselves with the Tribunal's finding that Judge President Hlophe had to have conducted himself in accordance with that standard, and failed to do so.[78]

62. In the circumstances, we accept that the Tribunal was correct in concluding that Judge President Hlophe's conduct constituted an attempt improperly to influence the two judges concerned; to threaten and interfere with the independence, impartiality, dignity and effectiveness of the Constitutional Court and breached the principle that no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.

63. It accordingly follows, in our finding, that Judge President Hlophe's conduct falls short of the standard required of a Judge. It must follow from the above finding that Judge President Hlophe has committed an act of misconduct.

64. What remains for our consideration is the question whether it can be said, on a conspectus of all the evidence, that the misconduct so committed amounts to "*gross misconduct*" in terms of section 177(a) of the Constitution. We consider this question further below.

Gross misconduct

65. In terms of section 177(a) of the Constitution, a Judge who has been found guilty of gross misconduct may be removed from judicial office.

66. For the reasons as set out herein and by the Tribunal, we also conclude that the misconduct amounted to gross misconduct in terms of section 177(a) of the

[78] Tribunal Record 474, para 53.

Constitution. We consider the following factors are important in coming to this view:

66.1 Judges play a fundamental role in the judicial system and are obliged to adhere to standards of conduct that protect that role and the judicial system as a whole.

66.2 Judges are *pillars* in the *entire judicial system* and their role is a *fundamental* one, which must be viewed with *the eyes of the external observer* in order to ensure that *the rights and freedoms which that system is designed to promote and protect,* the rule of law and the foundations of our democracy, are, in the eyes of the public, upheld in order that the public's confidence in its justice system is promoted.[79]

66.3 The public is entitled to require senior judges in the judicial system to adhere to high standards of impartiality and independence. Judge President's Hlophe's conduct, viewed objectively, was not in accordance with these values.

66.4 If a reasonable person were to learn of the conduct, she would reasonably believe or at least worry that the result could be influenced thereby, not least because of Judge President Hlophe's senior position within the judiciary.

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[79] *Nkabinde v Judicial Service Commission* 2016 (4) SA 1 (SCA) at para 5, relying on *Therrien (Re)* 2001 SCC 35 (84 CRR (2d) 1).

66.5 Judge President Hlophe's motives do not necessarily alter this. The impact of the conduct upon objective observers is determinative. The reasonable loss of confidence in the independence and impartiality of the judiciary is an extremely serious matter.

66.6 Judicial independence is fundamental, not only to faith in the judiciary to do justice in a particular case, but also to individual and public confidence in the administration of justice. Without public confidence, the legal system cannot command the respect and acceptance that are essential to its effective operation.

66.7 Core to the principle of judicial independence is that individual Judges hear and decide the cases that come before them: no outsider – be it government, a pressure group, individual, or even another Judge – should interfere, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision.[80]

66.8 Viewed objectively, the conduct was an attempt to defeat or obstruct the administration of justice. That constitutes a serious interference with the constitutionally protected independence of the judiciary.

66.9 South African Judges are held to the highest standards of judicial ethics, which standards extend to conduct outside the performance of their judicial functions. It is expected of Judges, in and out of Court, to conduct themselves in a manner that engenders and maintains confidence in the Judiciary. Conduct, whether inside or outside the courtroom, that brings

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[80] *De Lange v Smuts NO and Others, supra* at paragraph 41 above.

the Judiciary into disrepute is considered serious enough to result in the removal of the Judge.

66.10 The preservation and reaffirmation of the integrity and independence of the Judiciary and the restoration of public confidence in the administration of justice are uppermost in mind.

66.11 Judge President Hlophe's unfounded attacks on the judiciary were unbecoming and should not have been made. We have taken this into account in aggravation of the misconduct.[81]

67. For these reasons, we agree with the Tribunal that Judge President Hlophe has made himself guilty of gross misconduct in terms of section 177 of the Constitution.

Conclusion

68. For the reasons set out above, we find that Judge President Hlophe's conduct rendered him guilty of gross misconduct as envisaged in section 177(1)(a) of the Constitution, in that he attempted to influence, improperly, Justices Nkabinde and Jafta to decide matters that were then pending before the Constitutional Court in favour of particular litigants.

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[81] *Law Society, Northern Provinces v Mogami* 2010 1 SA 186 (SCA) para 26. *Johannesburg Society of Advocates v Edeling* [2019] ZASCA 40 at para 7]. *Langa v Hlophe* 2009 (4) SA 342 (SCA) at paras 40 and 55.