IN THE JUDICIAL SERVICE COMMISSION

In the matter between:

JUSTICE OF THE CONSTITUTIONAL COURT **Complainant**

and

JUDGE PRESIDENT M. J. HLOPHE **Respondent**

JSC MINORITY DECISION

[A] INTRODUCTION

1. On 18 August 2005, and on the strength of warrants issued in chambers by Ngoepe JP, the Scorpions raided the offices of Mr Zuma and Thinth (Pty) Ltd ("*Thinth"*) and thereupon seized documents in their possession, including the search on premises and seizure of documents in the possession of Mr Hulley, who was at the time Mr Zuma's attorney.

2. Following these searches and seizures, Mr Zuma and Thinth challenged the lawfulness of the said searches and seizures. They argued, ***inter alia***, that the searches and seizures were unlawful as they were executed in breach of the legal/professional privilege.

3. These challenges were decided upon by the High Courts in Gauteng and KwaZulu-Natal, with each division of the High Court coming to a different conclusion. The Gauteng High Court confirmed the lawfulness of the searches and seizures. The KZN High Court set them aside.

4. On appeal, the Supreme Court of Appeal ("*the SCA"*) was divided on the question of legal privilege.

5. Inevitably, the matter ended up in the Constitutional Court. The appeal, against the SCA decision, was heard by the Constitutional Court on 11 and 12 March 2008. After the hearing of the applications for leave to appeal and the appeal, the CC reserved judgment.

6. Under the circumstances we explain later, and on two separate occasions, Hlophe JP visited the Constitutional Court. He initially visited Jafta AJ (as he then was) sometime in March 2008 and later visited Nkabinde, J on 25 April 2008.

7. It is common cause that during these visits, Hlophe JP and the said Justices (Jafta J and Nkabinde J) discussed the issue of legal/professional privilege, which was central to the Zuma/Thinth cases and was at the time still being considered by the panel of CC Justices.

8. It is these two separate discussions with the two Justices which gave rise to the complaint against Hlophe JP.

[B] THE COMPLAINT AGAINST HLOPHE, J P

Introduction

9. On 13 May 2008, the late Chief Justice Langa lodged a complaint (purportedly) on behalf of all eleven Justices of the Constitutional Court[1]. The thrust of the complaint was that Hlophe JP (a) interfered with the independent functioning of the Constitutional Court in a manner not envisaged by section 165 of the Constitution; (b) attempted to influence Justices to breach their oath of office sworn to in terms of Item 6 of Schedule 2 of the Constitution and (c) threatened the proper administration of justice.

10. We say 'purportedly' because on 12 June 2008, Jafta J and Nkabinde J subsequently spoke separately and indicated that they had *'on a number of occasions*' informed Langa CJ and Moseneke DCJ that: (a) they *'were not intending to lodge a complaint*' against Hlophe JP; and (b) '*were not willing to make statements about the matter'*.

11. A few days later, on 17 June 2008, following a meeting of all the Justices of the CC held on 16 June 2008 - which was also attended by Jafta J and Nkabinde J - Langa CJ provided a detailed *'consolidated statement'* by the CC Justices. That statement was accompanied by confirmatory statements of, ***inter alia***, Jafta J and Nkabinde J.

[1] Langa, C J, O'Reagen, ADCJ, Ngcobo, J, Madala, J, Mokgoro, J, Skweyiya, J, Van der Westhuizen, J, Yacoob, J, Nkabinde, J, Jaftha, AJA and Kroon, AJA

12. The consolidated statement was given in an effort to explain away Justices' Jafta and Nkabinde recantations and set out the circumstances under which the CC Justices' initial complaint was made.

13. By its terms, the consolidated statement sought to assure the JSC that the allegations that Hlophe JP had made '*an improper attempt to influence'* the Court had as its factual foundation the support of and evidence by Jafta J and Nkabinde J.

14. As will become apparent later, the consolidated statement did not achieve this purpose, principally because, for many years and right up to the final hearing of the matter in December 2020, Jafta J and Nkabinde J persisted in their disavowals. They maintain that the characterisation of the complaint as one of '*improper attempt to influence the court'* should not be ascribed to them.

15. The consolidated statement gives a detailed account of the background to and versions proffered by Jafta J and Nkabinde J to the Chief Justice and Deputy Chief Justice, which underpinned the complaint by the CC Justices. It is necessary to set out these accounts in some detail.

The complaint as it relates to Jafta J

16. As already stated, the consolidated statement presaged a complaint based on the assertion that Hlophe JP had, without invitation, raised the Zuma/Thinth cases and '*sought improperly to persuade Jafta AJ to decide the Zuma/Thinth cases in a manner favourable to Mr J. G. Zuma'*.

17. The factual basis for this characterisation of the complaint was an account given by Jafta J to Langa CJ and Moseneke DCJ at the meeting held between them on 28 May 2008. There, Jaft J explained that he (Jafta J) and Hlophe JP were colleagues and friends and knew each other for many years. According to the account, Hlophe JP visited Jafta J at the Constitutional Court building in March 2008. The two had a conversation, during the course of which Hlophe JP said '*the case against Mr Zuma should be looked at properly'*.[2] In the course of that discussion, Hlophe JP uttered the words '*sesithembele kinina'*.

18. From Hlophe JP's utterances, Jafta J formed an impression that Hlophe JP wished for a particular result in the Zuma/Thinth cases. This impression was gleaned from Hlophe JP's mention of the fact that Mr Zuma was being persecuted just as he (Hlophe JP) was being persecuted in the Western Cape.[3]

19. However, Jafta J told Hlophe JP on the spot and '*in no uncertain terms'* that the Zuma/Thinth matters would be decided on its facts and on the application of the law.[4]

20. When Jafta J heard that Hlophe JP intended to visit Justice Nkabinde, he warned her that Hlophe JP had discussed the Zuma/Thinth cases with him.[5] Jafta J told the late Langa CJ and Moseneke DCJ that, only after he had heard that Hlophe JP had visited Nkabinde J did he consider the approaches by Hlophe JP to be serious. He considered these approaches to be part of an attempt at

[2] Record: Vol 1: page 55: para 29
[3] Record: Vol 1: page 55: para 30
[4] Record: Vol 1: page 56: para 31
[5] Record: Vol 1: page 56: para 33

interfering with the judicial exercise of judicial discretion by the Justices of the Constitutional Court.[6]

21. According to the consolidated statement, Jafta J told Langa CJ and Moseneke DCJ that he did not plan to lodge a formal complaint against Hlophe JP, even though he considered it to have been an improper attempt to influence.

The complaint as it relates to Nkabinde, J

22. In relation to Nkabinde J, the consolidated statement similarly complained of Hlophe JP to have, without invitation, initiated the discussion about the Zuma/Thinth cases and '*sought improperly to persuade Nkabinde, J to decide the Zuma/Thinth cases in a manner favourable to Mr J. G. Zuma'.*

23. Arising from discussions between Mokgoro J and Nkabinde J in May 2008 (which discussions took place soon after the Constitutional Court resumed duties and at the commencement of the CC May term), the consolidated statement gives the following account of what Nkabinde J related to Mokgoro J.

24. Hlophe JP asked Nkabinde J if she was one of the Zulu-speaking Nkabindes.[7] This turned out not to be so, as Nkabinde J was previously married to a 'Nkabinde' but had since divorced him. She was neither Zulu nor Zulu-speaking.

[6] Record: Vol 1: page 55: para 30
[7] Record: Vol 1: page 50: para 13

25. Hlophe JP then told Nkabinde J that he (Hlophe JP) had a mandate[8]. Hlophe JP went on to advise Nkabinde J that the issue of privilege must be decided '*properly*'.[9]

26. Hlophe JP then told Nkabinde J that he had connections with members of Intelligence[10] and that some people will lose their positions after the elections. During that discussion, the consolidated statement continues to state that Hlophe JP told Nkabinde J that he would avail himself for a position in the Constitutional Court and that Jafta AJ should also make himself available.

27. After those discussions, Mokgoro J advised Nkabinde J to report the matter because it affects the integrity of the judiciary. For her part, Mokgoro J thought that Hlophe JP's conduct reflected poorly on the leadership of the Western Cape High Court, which he leads.

28. The consolidated statement continues to narrate an account given by Nkabinde J to Langa CJ and Moseneke DCJ. It records the following.

29. On the 28th May 2008 an approximately two-hour meeting was held between Nkabinde J, Jafta J, Langa CJ and Moseneke DCJ.

30. *Apropos* the discussions between Hlophe JP and Nkabinde J, the consolidated statement gave the following account:

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[8] Record: Vol 1: page 50:para 14
[9] Record: Vol 1: page 50: para 14
[10] Record: Vol 1: page 50: para 15

30.1. Nkabinde J advised Langa CJ and Moseneke DCJ that Hlophe JP had discussed the Zuma/Thinth cases and told her the following.

30.2. That the Zuma/Thinth cases were important matters for the future of Mr Zuma;

30.3. That the issue of privilege was an important aspect for the prosecution's case;

30.4. That if Mr Zuma's arguments were correct, then there would be no case against Mr Zuma.[11]

31. According to Nkabinde J, Hlophe JP said that he had a mandate to act as he was doing; and that Hlophe JP had connections with members of Intelligence; and that there was no real case against Mr Zuma; and it was important to hold in favour of Mr Zuma.

32. To these overtures, Nkabinde J asked Hlophe JP what "*besigheid* " it was for Hlophe JP to discuss the case. Hlophe JP answered by saying that Mr Zuma was being persecuted as he (Hlophe JP) was being persecuted.[12]

33. Nkabinde J reacted there and then and made it clear to Hlophe JP that '*since he is not a member of the court, Hlophe JP was not entitled to discuss the case*

[11] Record: Vol 1: page 53: para 24
[12] Record: Vol 1: page 53: para 25

unless he had sat in the case and even if he was a member of the court, he would still not be entitled to discuss the matter'.[13]

34. Nkabinde J was puzzled by Hlophe JP's approach to her, particularly why Hlophe JP had selected the issue of privilege, principally because she had written a post-hearing note on the question of legal privilege. She wondered how Hlophe JP knew that she had written such a note. She also wondered how Hlophe JP would have obtained information regarding Nkabinde J's role on the question of privilege.[14]

35. Langa CJ advised Nkabinde J to make a written statement. However, she expressly declined and repeated her unwillingness to provide any statement about the matter;[15]

[C] HLOPHE JP'S RESPONSE

36. In responding to the complaint, Hlophe JP confirmed that he met Jafta J at the CC in March 2008. The two were old time friends and colleagues. They knew each other from the 1990's when both were academics at the then University of Transkei.[16]

37. The primary purpose for the visit was to encourage Jafta AJ to apply for the CC post.

[13] Record: Vol 1: page 54: para 25
[14] Record: Vol 1: page 53: para 24
[15] Record: Vol 1: page 51: paras 16-20
[16] Record: Vol 1: page 114 - 115

38. As friends would do, they initially discussed their families; reminisced about their time as academics, their experiences as Judges and other general discussions.[17]

39. Hlophe JP explained that the two (i.e. Hlophe JP and Jafta J) shared their frustrations on the bench and the progress Jafta J was making in his judicial career. They encouraged one another to make further progress as Judges. Both indicated their desire to make themselves available for positions as Justices of the Constitutional Court in the time to come.[18]

40. While discussing their frustrations within the courts they were serving at Hlophe JP remarked[19] about what he perceived to be a heavy workload of the Constitutional Court; the fact that the CC was handling important matters, including the Zuma/Thinth cases. According to Hlophe JP, this remark was triggered by a pile of files containing Zuma/Thinth cases which were evident from Jafta J's chambers.

41. According to Hlophe JP, the flow of the discussion led Jafta J to comment and say '*that the Zuma/Thinth cases were a brain teaser demanding a focussed application of the mind to the complex issues involved*'[20].

42. Thus, it came about that Hlophe JP added in the conversation: that he '*believed that the issue of privilege was a very concerning one and <u>had to be dealt with</u>*

[17] Record: Vol 1: page 115: para 23.3
[18] Record: Vol 1: page 116: para 23.4
[19] Record: Vol 1: page 116: para 23.4
[20] Record: Vol 1: page 116: para 23.4

properly'. To that sentiment, Jafta J responded and said '*the issue in the Zuma/Thinth case would be decided correctly'*[21] as he too felt that the issue of privilege was critical and had the potential of altering the firm foundations of our legal system.

43. Hlophe JP responded by expressing that he felt very strong about privilege and trial rights; and, on Jafta J's remark that he was not sure if the same sentiments were shared by some Justices of the Court, Hlophe JP then said *"sesithembele kinina"* - which, Hlophe JP says, in the context of their discussion, was a Zulu phrase he used to express his view '*that the issue of privilege would receive satisfactory attention from the court'*.[22]

44. With regards to Nkabinde J's allegations, Hlophe JP gave a different picture about their discussions. He said that the discussion about Nkabinde J's family was triggered by the family photos which were hanging on Justice Nkabinde's wall. Hlophe JP asked her if her surname was '*Nkabinde'*, to which Justice Nkabinde gave an explanation that the surname, '*Nkabinde'* was retained from her previous marriage.

45. While reminiscing about their experiences on the bench, Nkabinde J mentioned that she was finding the experience in the CC '*very demanding…because the CC was the final court it was important that they get things right...'*[23]

[21] Record: Vol 1: page 117: para 33.4
[22] Record: Vol 1: page 117: para 23.5
[2323] Record: Vol 1: page 123: para 28

46. The discussion then moved to the Zuma/Thinth cases whose records were also filling the space in Nkabinde J's chambers. Following the comment that the work of the CC was demanding, Hlophe JP remarked that the Zuma/Thinth matter was probably one of those demanding cases of the CC because of its implications to Mr Zuma (then the ANC President); the ANC itself and the country at large, obviously because Mr Zuma was poised to become the President of the Republic of South Africa.

47. In that context, Nkabinde J told Hlophe JP that she was writing a post-hearing note on the issue of privilege.

48. Hlophe JP explained that the issue of privilege was a matter widely publicised in the media. So it was that Hlophe JP expressed strong views on the issue and stated that '*the majority in the SCA did not attach much weight to the issue of privilege'*.[24]

49. All of this was, says Hlophe JP, '*casual conversation'* about a matter which was already in the public domain and about which he had no intricate or intimate knowledge.

50. According to Hlophe JP, the word "*mandate"* was used in response to Nkabinde J's enquiry on what the purpose was of Hlophe JP's visits at the CC precinct. In response, Hlophe JP told Nkabinde J that he "*had been given a mandate by the*

[24] Record: Vol 1: page 124: para 29

Chief Justice to chair the LOC for the Commonwealth Conference on Judges and Magistrates".[25]

51. Hlophe JP flatly denied that he ever said that he had connections with National Intelligence or that some people would lose their jobs after the impending elections whereat Mr Zuma was poised to be elected as President. For him to do so would have been vacuous as Judges enjoy security of tenure.[26]

52. In dismissing the "*no case against Mr Zuma"* allegation, Hlophe JP said: "*the suggestion that I intuitively and prophetically felt that there was no case against Mr Zuma is far-fetched and does not correctly record my conversation with Justice Nkabinde."*[27]

[D] THE EVIDENCE OF THE JUSTICES

53. The matter came before the JSC for hearing in April 2009 and evidence by the CC Justices (including Jafta J and Nkabinde J) was adduced. Some reflection on the evidence of the two Justices is worth exploring. We focus on those matters which are material to the Judicial Conducts Tribunal ("*the Tribunal"*) findings and conclusions.

54. Jafta AJ testified and said that Hlophe JP told him that the '*matter must be looked at properly because he believes that Mr Zuma was persecuted, just like he (Hlophe, JP) had been'*.[28]

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[25] Record: Vol 1: page 125: para 30
[26] Record: Vol 1: page 125: para 30
[27] Record: Vol 1: page 143: para 56.2
[28] Record: Vol 3: page 264: line 5 to 15; page 277: line 8-10

55. Jafta J also testified that before mentioning the Zulu phrase *'sesithembele kinina'*, Hlophe JP '*stated that the SCA got it wrong in its judgment'*.[29] However, in an interaction with the late Commissioner, Mr Ngubane, Jafta J conceded that his recollection of the details of discussions between him and Hlophe JP might be flawed here and there. With regard the assertion that Hlophe JP told him that the SCA have got it wrong, Jafta J said the following:

"NGUBANE: *..... Firstly, is it possible that you might have omitted some of the things which Hlophe, JP, said to you when you reported the matter to the Chief Justice?*
JAFTA: *Yes.*
NGUBANE: *It's possible, yes. And you were relying on memory on a discussion which to you, you had rebuffed and I take it you might have decided to forget about the details of the contents.*
JAFTA: *Yes.*
NGUBANE: *So your recollection of the exact conversation might be flawed here and there?*
JAFTA: *Yes.*
NGUBANE: *Yes. I'm asking that because you said the SCA got it wrong.*
JAFTA: *Yes.*
NGUBANE: *Which appears to be very important but it's not reflected in the JC's statement that you reported that.*
JAFTA: *Yes."* [30]

56. When questioned by Professor Neethling, Jafta J explained that he deduced or inferred that Hlophe JP was wishing for the CC to correct the wrongs committed by the SCA - as opposed to have been told so by Hlophe JP in so many words. In this regard, this is what he said:

"...we didn't discuss the issue of privilege. Secondly, in that context that Mr Zuma was being persecuted just like he, the Judge President, had been; coupling

[29] Record: Vol 3: page 264: li1es 5 to 13
[30] Vol 3: page 286: lines 7 - 23

it with the SCA issue, I thought that he was wishing for a decision which would favour Mr Zuma because the SCA had found against Mr Zuma and Tint (sic)."[31]

57. On whether Hlophe JP attempted to influence the Justices, Jafta, J stated as follows:

"JAFTA: ..... *I could not make up whether or not it was a deliberate attempt to seek a particular outcome or not. But I felt uncomfortable just to entertain the discussion, fearing that if the discussion goes on, even if it was innocent, it might end up influencing me one way of the other.*

So I decided, you know, to cut it short on the basis that the matter is going to be decided on its facts and the application of law on those facts.

SELIGSON: *What was his reaction when you said that?*

JAFTA: *Well, he seemed to agree and changed the subject."*

"JAFTA: *Well, I thought he implied that we would correct what he considered to be the wrong, the JSC – I mean, I'm sorry, the SCA got it wrong. And I thought then that's what he wanted to give a judgment that will correct what has been said by the SCA.*

SELIGSON: *Did you do anything about the occurrence immediately after that?*

JAFTA: *No, I did not.*

SELIGSON: *Why not?*

JAFTA: *I really wasn't sure whether it was amounting to an improper conduct on his part, at that moment, except that it was not permissible in the Courts that I was sitting to have a discussion about a matter where judgment is pending, with someone who was not on the panel. And I wasn't sure whether the JP was aware of that rule which applies to Appeal Courts, and I just left the matter there."*[32]

58. Jafta J was questioned on why he did not lay a complaint. This was his reason:

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[31] Vol 3: page 288: lines 5 - 9
[32] Vol 3: page 265 – 266: lines 5 – 20, lines 2 - 15

"*I believe I had effectively dealt with the matter"*[33]

59. Jafta J's fears for not laying a complaint was, primarily, the prospect of sitting Judges testifying against each other[34] (although a secondary – not the main - reason for his fear was because of his relationship with Hlophe, JP).[35]

60. Explaining his understanding for the rule prohibiting Judges from discussing cases with other Judges, Jafta J explained the rule with reference to his *experience* as a Judge in the following words:

> "*In my experience,* [the discussions with a non-Judge] *has never happened .... and certainly in the Appeal Courts .... the practise is that even members of the same court cannot go out and discuss cases with members of the panel where they were not sitting, before Judgment is handed down".*[36]

61. The practise in the High Courts, which Jafta J spoke of, was that Junior Judges go to Senior Judges and seek guidance. But normally, it would be a Judge who is involved in the matter who would raise the issue; although, in his experience, he had never come across an instance where a Judge who was not sitting in a case would go to a Judge seized with the matter and raise discussions relating to a pending judgment.[37]

62. Later, testifying before the Tribunal and during cross examination by Hlophe JP's senior counsel, Jafta J indicated that it was not the first time that he and Hlophe JP had discussed legal issues, nor did he regard that discussion as an

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[33] Vol 3: page 269: lines 12 - 15
[34] Vol 3: page 275: lines 10- 12
[35] Vol 3: page 275: line 22
[36] Vol 3: page 297: line 20 - 25
[37] Vol 3: page 298: line 12 - 22

attempt by Hlophe JP to intervene with the Constitutional Court deliberations. This is what he said: [38]

"MR GRIFFITHS: *Yes. Thank you. Now this was not the first occasion as we have mentioned, when you discussed legal issues with this Judge, the Judge President who you had known and worked with. This was not something new to you was it?*

MR JAFTA: *Yes, I would. I am trying to think. Yes, I would think so because after he became a judge in Cape Town, and I think after he became a Judge President, I was the Acting Judge President of the court in the Transkei, and we used to meet at heads of court meetings, and we would talk about issues generally including ....[indistinct]. Something that was a matter of concern I think to both of us that the issue of transformation of the judiciary as well as transformation of the jurisprudence in the country. And I know what he used to raise the issue of the two legal systems existing in the country in the form of customary law and common law and he used to be unhappy about that. And we used to discuss it and say hopefully at some point we might have one legal system that derives its force from the constitution.*

MR GRIFFITHS: *So as a result would you agree that the exchange between you really had no novelty between the two of you did it?*

MR JAFTA: *Did not have what, novelty?*

MR GRIFFITHS: *Any novelty. It was not something, an exchange which had not occurred before.*

MR JAFTA: *No, no, no.*

MR GRIFFITHS: *Thank you. Now when that meeting concluded you were not aware of him mentioning any kind of threat to you?*

MR JAFTA: *No*

[38] Book 3: pages 138 – 139: lines 9 - 20

MR GRIFFITHS: *And at that time, at the close of that conversation, did you perceive from him, the Judge President, any intention to intervene with the Constitutional Court deliberations?*

MR JAFTA: *No.*

MR GRIFFTHS: *Did you sense anything like that?*

MR JAFTA: *No, not at that stage, no."*

63. For her part, Nkabinde J said that Hlophe JP first raised the issue of "*legal privilege"* and "*mandate"* on the phone (on 23 April 2008) – when Hlophe JP secured an appointment with her[39]. A day after (on 24 April 2008) she was warned by Jafta J that Hlophe JP might raise the issue of legal privilege in the Zuma/Thinth matters.

64. Reflecting on their discussions about Mr Zuma's case, she told the JSC that Hlophe JP said '*the issue of privilege must be decided properly because the prosecution's case rested on the aspect of the case'*.[40] In response, she '*snapped'* and said to Hlophe JP '*you cannot talk about this case. You have not been involved in the case, you have not sat on it and you are not a member of the Court to come and talk about a case'*.[41]

65. Hlophe JP responded by saying that he '*did not mean to interfere with my work'*.[42]

[39] Vol 3: page 308: lines 1 - 10
[40] Vol 3: page 308: lines 20 - 25
[41] Vol 3: page 309: lines 9 - 14
[42] Vol 3: page 311: line 9 - 10

66. On that note, she was satisfied that she had rebuffed[43] Hlophe JP. Her concern however was around the possibility that confidential information could have been leaked from the Court and landed on Hlophe JP's hands, specifically information about her writing a post-hearing note.

67. She added on her account by stating that Hlophe JP went on to state that '*there is no case against Mr Zuma ... Zuma has been persecuted just as he was persecuted'*.[44]

68. According to Nkabinde J, in the course of their discussion, Hlophe JP mentioned that he had obtained information from National Intelligence, with a list of persons implicated in the arms deal who were going to lose their jobs once Mr Zuma becomes President of the country.[45] She also said that Hlophe JP mentioned that he had connections with some ministers whom he advised from time to time,[46] although the words 'political connections' was not specifically mentioned.[47]

69. Hlophe JP gave evidence before the Committee of the JSC[48] on 30 July 2009[49].

70. For his part, he maintained his version that Nkabinde J '*told me that she was writing a note to do with priviledge*' - stating that '*she told me, that came directly*

[43] Vol 3: page 312: lines 5 - 25
[44] Vol 3: page 309: lines 14 -18
[45] Vol 3: page 309: lines 20 - 25
[46] Vol 3: page 308: lines 15 - 20
[47] Incidentally, the term political connections appeared in the consolidated statement: vide Vol 1: page 53: para 25
[48] Consisting of Ngoepe JP, Moerane SC and Mesenya SC.
[49] Book 5: pp 88 onwards.

from her mouth'[50]. He vehemently denied that he told Nkabinde J that he had a '*mandate*' and explained that the use of that term was in the context of explaining why he as in the Constitutional Court, namely that '*the Chief Justice had given [him] a mandate to come and chair the LOC…*'[51].

71. Hlophe JP similarly denied having told Nkabinde J that he had political connections and any connections with the National Intelligence Agency. He did so by stating '*I never said that*'.[52] He said that the discussions between him and Nkabinde J was '*general discussion*' about legal principles; not about how the case must be decided.

72. On his use of the words '*sesithembele kinina*' he explained what he meant. He said the words were used to mean the following

> "*…as the last court in the land to clear up the uncertainty which clearly was created as a result of, in my view, of the ruling of the Supreme Court of Appeal relating to priviledged communication…It was used in that context, sesithembele kinina, we trust you are going to clear this uncertainty once and for all*'[53]

73. He denied having said that '*the finding must be made in favour of Zuma*'; nor did he say 'you are going to find Zuma innocent'. He said, he had no intention to influence or persuade the justices[54], and if he had intentions to do so, he would

[50] Book 5: p 96: line 6 – 12.
[51] Book 5: p 96: line 13 – 16.
[52] Book 5: p 96: line 15 – 20.
[53] Book 5: p 99: line 12 – 25.
[54] Book 5: pp 100 – 101.

have spoken to all eleven Justices of the CC, especially those like Ngcobo J, with whom he had a closer relationship.

74. He denied that he was rebuffed by any of the two Justices during their respective discussions. He described the discussions as '*a dilogue*'[55].

[E] THE PROPER APPROACH TO THE MATTER

75. The matter must be approached on the footing that Hlophe JP did not influence the Justices to decide the matter in favour of Mr Zuma. This approach accords with the evidence of both Nkabinde J and Jafta J - who expressly stated that '*Hlophe's approach did not influence'* them.

76. The question is whether did Hlophe JP attempt to influence the two Justices by stealth or some other means. That is the question which confronted the Tribunal and which we must decide.

77. The Tribunal, as with some members of the JSC who support its ruling, based its finding of Hlophe JP's guilt on the criticism levelled against Hlophe JP for the manner in which he conducted himself after the complaint was lodged and in mounting a vitriolic defence against it.

78. Such an approach, with respect, represents muddled reasoning.

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[55] Book 5: p 103: line 17 – 22.

79. The ways in which a defendant/respondent goes about in mounting a defence against the charges levelled against him is monumentally irrelevant to his guilt or innocence. If anything, those considerations bear relevance to an appropriate sanction ***if*** he or she is ultimately found guilty of an infraction. Therefore, to attach weight on Hlophe JP's bad legal strategy in defence, for purposes of determining his guilt, is to put the cart before the horse.

80. It is so that, in discussing the Zuma/Thinth cases with the two Justices, Hlophe JP was (as he said) too '*casual'* about serious matters. But, in our view, that does not mean that his conduct rose to the level of misconduct (let alone gross misconduct) on his part.

81. According to Hlophe JP, the discussion about '*legal privilege'* came about as a natural flow of discussions between him and the two Justices. It was triggered by their reminiscences about the two Justices' experience in the Constitution Court and the presence of the Zuma/Thinth record in their chambers - which was evident proof of the demands called upon the Justices to execute their judicial functions in the CC.

82. The kernel of the Tribunal's ruling is that Hlophe JP was on a '*mission'* and his conduct was 'premeditated'.[56]

[56] Ruling: Book 5: page 846: para 112

83. Relying on the *Motata Tribunal Decision*, the Tribunal holds that the test for misconduct is an objective one, which depends on '*what right thinking members of society perceive of the conduct'*.[57]

84. Whilst we agree that the test for misconduct is objective, we are unable to agree with the Tribunal's conclusion that a proper assessment of objective facts should yield to the conclusion it has reached. On the contrary, as we explain momentarily, the objective facts point away from Hlophe JP having made himself guilty of misconduct, let alone gross misconduct.

[F] NEUTRALISATION OF THE COMPLAINT

85. It is clear that the genesis of the complaint against Hlophe JP was the assertion, emphatically characterised in the joint and consolidated statement of the CC Justices, that he had made '*improper attempt to influence'* the Justices.

86. The assertion was ostensibly made on the basis that this is what Jafta J and Nkabinde J conveyed to Langa CJ and Moseneke DCJ at the meeting of 28 May 2008. We say '*ostensibly*' because at the start of the JCT hearing on 7 December 2020, both Jafta J and Nkabinde J sought to distance themselves from the language of the CC Justices' consolidated statement of complaint. In particular, the way that statement characterised the complaint against Hlophe JP. They sought to remove the sting imputed to them in the statement and expressly disavowed complaining against Hlophe JP of having "*sought improperly to*

[57] Ruling: Book 5: page 847: para 114

persuade" them "*to decide the Zuma/Thinth cases in a manner favourable to Mr Zuma"*.

87. For his part, Jafta J said Hlophe JP said that the Zuma case must be "*looked at properly"*. Nkabinde, J too made similar averments. It was probably for this reason that Jafta J and Nkabinde J objected to the hearing taking place based on the consolidated statement.

88. The fact that the complaint against Hlophe JP was not predicated upon the two Justices' complaints statements (made under oath), is no small matter. It was at the heart of Jafta J and Nkabinde J's sustained attack on the procedure adopted by the JSC in pursuing the complaint against Hlophe JP. The two Justices resisted participating at the JCT hearing and sustained their bellicose for over three years[58]. Their stance culminated in the CC decision on 24 August 2016 in *Nkabinde and Another v Judicial Service Commission*.[59] The two Justices insisted that if the JCT hearing was to take place, that must occur based on their own statement of complaint (made under oath), instead of proceedings taking place on the back of the CC Justices' consolidated statement.

89. It was accordingly unsurprising, and indeed revealing, that, at the start of the JCT proceedings in December 2020, the two Justices expressly sought to distance themselves from the CJ's Justices' characterisation of the complaint against Hlophe, JP – of having sought to improperly persuade them to decide the Zuma/Thinth cases in favour of Mr Zuma. Like *Pontius Pillate*, Nkabinde J and

[58] From October 2013 to August 2016.
[59] **2017 (3) SA 119 (CC)**

Jafta J 'washed their hands' of the characterisation sought to be imputed by the CC Justices' consolidated statement onto the discussions held between them and Hlophe JP.

90. Why then must the JSC read more into the discussions and ascribe to them a particular meaning which the two Justices expressly denounce? The JCT ruling and its reasoning for that conclusion does not explain; it must be rejected. Here are our reasons for doing so.

[G] ASSESSMENT OF PROBABILITIES

91. The Committee of the JSC found, on probabilities, that there was no sufficient evidence establishing Hlophe JP's guilt. That outcome was challenged by Freedom Under Law, and in the result, the SCA directed that the matter be remitted back to the Tribunal for a full-blown hearing where the versions of the Justices will be tested through thorough cross-examination. The SCA held that the JSC had the duty to examine probabilities with the benefit of cross-examination of Justices' conflicting versions[60]. In other words, the SCA hoped that the cross-examination of the Justices will shed more light on which version was supported by the probabilities.

92. However, at the resumed hearing before the Tribunal, the cross-examination of the Justices was uneventful. As a result, the Tribunal, like the Committee of the JSC did in 2009, decided the matter on its own assessment of probabilities. It

[60] *Freedom Under Law v Acting Chairperson: Judicial Service Commission & Others* 2011 (3) SA 549 (SCA), at para 48.

behoves of us to examine whether the Tribunal's assessment of the probabilities is supportable on the evidence that was before it. The exercise involves considerations of credibility of witnesses, their reliability, inherent probabilities and onus. (See: *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA))

93. On our assessment of probabilities, the JCT's findings and conclusions that Hlophe JP is guilty of gross misconduct are unsustainable.

94. Firstly, nothing turns on the fact that Nkabinde J was assigned to write a post-hearing note on privilege and the speculation by Makgoro J and Nkabinde J does not readily lend itself to the conclusion conjured by them – that Hlophe JP must have known (presumably) through Intelligence that Nkabinde J was assigned to write a post-hearing note.

95. On objective facts which are common cause, Hlophe JP had similar discussions with Jafta J who was, on acceptable evidence, not assigned to write any note about privilege.

96. What then would be the point of meeting Jafta J if he was not tasked with any major role in the CC's deliberations on the Zuma/Thinth matters? Hlophe JP also met with Ngcobo J (then a senior member of the CC), Madala, J (similarly a senior member of the CC at the time) and later, Chief Justice Langa. There is no evidence that any of these Justices were tasked with any particular role in the deliberations about the Zuma/Thinth matters.

97. If indeed Hlophe JP had any Intelligence information about the workings of the CC after the Zuma/Thinth cases were argued, why would he not divulge that information to Jafta J or Ngcobo J, with whom he had a closer relationship (long-standing friendship)? Instead, provided that information to a "*stranger"* which Nkabinde, J was? The suspicions by Nkabinde J and Makgoro J that Hlophe JP's approach to Nkabinde J may have been because of information possibly procured through "*surveillance"* of the CC was just that: a suspicion. Nothing in the evidence elevated these suspicions up to anything close to credible evidence, let alone acceptable evidence, that Hlophe JP had "*intelligence"* or information gathered through his connections with members of National Intelligence, if at all he had such connections.

98. Secondly, the allegation by Nkabinde J that Hlophe JP had boasted about his political connections with Cabinet Ministers and National Intelligence was strenuously denied by Hlophe JP both in his statement of response and in evidence. The JCT did not resolve this dispute in any meaningful way. Instead, it assumed as established fact that this is what Hlophe JP conveyed to Nkabinde J in a prelude to their discussions about the Zuma/Thinth matters.

99. With respect this approach to evidence is problematic. It does not comport with the civil method generally utilised to resolve irreconcilable disputes of fact[61].

100. On our assessment of probabilities, the scale tilted in favour of preferring the version proffered by Hlophe JP.

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[61] *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA) at para 5

101. Thirdly, given the promptness with which Nkabinde J said she rebuffed Hlophe JP's overtures in discussing the Zuma/Thinth cases with her, about which she had earlier been forewarned by Jafta J, the introduction of "*intelligence"* gathered information about the workings of the CC, as alleged, serious as that allegation must be, would have added a further string to the bow - a serious one at that.

102. If that was indeed so, on probabilities, Nkabinde J would not have had any hesitation to view the matter as serious and resisted advices to take immediate steps to report the matter to the JSC. The objective (common cause) evidence is that she did not immediately do so. Instead, during the entire month of May 2008, she, together with Jafta J and "*on a number of occasions"*, resisted no less than three entreatments from Makgoro J, Langa CJ and Moseneke DCJ and indicated that she did not intend to lodge any complaint against Hlophe JP. If the matter was as grave as it sounds, there certainly would have been no need for hesitation, let alone "*wrestling with what she should do about the visit for some time"*.[62] Even worse, on 12 June 2008, Jafta J and Nkabinde J broke ranks with the entire Court and signified their intention not to lodge any complaint against Hlophe JP.

103. Fourthly, it unclear why Hlophe JP's exhortations to both Jafta J and Nkabinde J – that the issue of "*legal privilege"* should be decided "*properly"*, should be turned around to mean the opposite (i.e. an exhortation that the CC Justices should decide the issue of privilege "*improperly"*).

[62] Vol 1: page 54: para 27

104. Fifthly, the JCT's holding that the expression "*sesithembele kinina"* must be interpreted to mean that the CC must right the wrongs committed by the SCA has no evidentiary basis. The interpretation urged upon us by the JCT's holding to this effect, with respect, unduly stretches the language of the words "*sesithembele kinina"*.

105. In the context in which Jafta J and Hlophe JP were discussing, the meaning of the words "*sesithembele kinina"* was settled between them. As Jafta J sought to make it plain at the start of the hearing, Hlophe JP's expression of hope, amidst the raging debate which had erupted around the SCA decision, was the hope that the CC will give the issue of legal privilege a considered treatment and decide it properly.

106. Unsurprisingly, Jafta J assured, and Hlophe JP accepted, that the matter will "*be decided on its facts and on the application of the law to them*".[63]

107. Indeed, on Jafta J's view, "*he* [had] *decisively dealt with the matter by rejecting the approach of Hlophe JP"*.[64] That should have been the end of the matter.

108. Sixthly, the account given by Jafta J about Hlophe JP's alleged statement that "*the SCA got it wrong"* morphed from being an implied statement to what was actually expressed/stated by Hlophe JP. In the consolidated statement, Jafta J said this is what he implied from Hlophe JP's other statements. However, in evidence, he said this is what Hlophe JP stated. The excerpt of evidence to which

[63] Vol 1: page 55: para 31
[64] Vol 1: page 56: para 33

we have referred[65] illustrates that, at best, Jafta,J was unsure of what discussions had taken place between him and Hlophe JP. It was accordingly wrong for the Tribunal to place reliance on the evidence of Jafta J whose reliability is questionable.

109. The overwhelming probability is that Hlophe JP did not make such a statement. Such an imputation was as a result of inferences or impressions gained by Jafta J and Nkabinde J from the discussions which took place with Hlophe JP. There is accordingly no justification for the Tribunal's findings and conclusions on this score and for the JSC to sustain the guilty findings against Hlophe JP on subjective impressions or inferences made by the Justices.

110. Seventhly, the manner in which Nkabinde J provided an account for the events which occurred, and the discussions held with Hlophe JP, evince a confusing jumble of facts and inferences. As such, Nkabinde J's evidence, viewed in its totality, was extremely unsatisfactory as to be unreliable.

111. Her assertion that Hlophe JP introduced the subject of 'privilege' and 'mandate' on the phone – at the time when Hlophe JP secured an appointment with her – is at odds with the account attributed to her as narrated by Langa CJ in the consolidated statement.

112. Moreover, given what Jafta J said about forewarning Nkabinde J – that Hlophe JP had sought to discuss legal privilege and may very well raise the same issue

[65] At paragraph 55 and 56 above.

with her – it is inherently improbable that Nkabinde J would have allowed Hlophe JP to visit her, fully knowing the impropriety of the subject matter of the intended discussion. Indeed, Nkabinde J and Hlophe JP met a day before the scheduled appointment, at the aspirant Women Judges Conference and the opportunity presented itself for her to cancel the appointment which was to take place the following day.

113. What is more probable than the version proffered by Nkabinde J is Hlophe JP's assertion that the issue of legal privilege arose as a natural flow of discussions between the two at Nkabinde J's chambers.

114. Therefore, Nkabinde J's attempt at explaining why, in the face of Jafta J's forewarning that Hlope, JP could raise the question of legal privilege, is not only untenable, but also astonishing. She was asked why she did not cancel the meeting with Hlophe JP. This was her response:

> "*It would have been discourteous for me to simply say to him, I don't want to see you anymore because I heard that you could be coming here to talk about the case of Mr Zuma. I did not know, I could not anticipate what he was coming to talk to me about"*.[66]

115. Nkabinde J's evidence thus stands in stark contrast with the account attributed to her in the consolidated statement. It is worth repeating that account here:[67]

> "*13. Nkabinde, J then said that she had been approached by Hlophe, JP in her chambers towards the end of April. She told Mokgoro, J that Hlophe, JP had commenced the conversation enquiring from her 'which Nkabinde are you?'. Nkabinde, J told him where she originated from whereupon Hlophe, JP then said he had always though she was from one of the Zulu-*

[66] Vol 3: paras 3 – 8, lines 7 - 13
[67] Record: Vol 1: page 50: paras 13 and 14

speaking Nkabinde families. She told him that she had been married to a 'Nkabinde ' and that after their divorce she had retained the surname.

14. Nkabinde, J then said that Hlope, JP had told her 'he had a mandate'. He then told her that the privilege issues in the Zuma/Thint (sic) cases had to be decided 'properly'. Nkabinde, J was concerned because she was writing a post-hearing note on the aspect of privilege. Both Mokgoro, J and Nkabinde, J wondered how Hlope, JP had become aware of the facts that Nkabinde, J had been writing on that aspect."

116. This version was disputed by Hlophe JP. Be that as it may, in the consolidated statement, Nkabinde J is reported to have told Langa CJ and Moseneke DCJ that at the CC meeting, Hlophe JP told her that the latter had a mandate. However, as already pointed out, in evidence, she said that the "*mandate*" was mentioned on the phone. For purposes of emphasis, her evidence is, again, worth repeating.[68]

Seligson: Did he mention mandate at this meeting? You said he mentioned it in the telephone call.

Nkabinde: No, he didn't say anything at the meeting about the mandate at all…..When he called… he sais he had a mandate, he eas to come to tell me what the mandate was, but when he came to my office he didn't say anything about this mandate. Of course, one would probably draw inferences, but I don't think that's my job to do that"

[68] Vol 3: page 323: lines 5 - 15

117. In light of Nkabinde J's earlier assertion that Hlophe JP had told her (on the phone) that he wanted to talk about "*legal privilege"*, her attempt to explain why she did not cancel the meeting with Hlophe, JP is startling. The two versions are mutually destructive. One version had to yield to the other. It is either Hlophe JP did not advise Nkabinde J that he wanted to talk about privilege or Nkabinde, J misstated the position when making that assertion in evidence.

118. We prefer the former version which accords with Hlophe JP's account - that the meeting between Nkabinde J and Hlophe JP took place at the instance of Hlophe JP who was due to attend the LOC meeting at the Constitutional Court. It is also common cause that Hlophe JP was Chairperson of the LOC of Commonwealth Magistrate and Judges Association. He was "*mandated"* by Langa CJ to convene a conference scheduled to take place in October 2008.[69] The probabilities thus favour HlopheJP's assertion that the word 'mandate' was used in this context.

119. According to Hlophe JP the call made to Nkabinde J was a courtesy call because the two Justices had met each other in their travails in the Labour Court.

120. It is common place for lawyers and legal practitioners (be they Attorneys, Advocates, Academics and Judges) when visiting a Court like the SCA or the CC to seize that moment and meet Judges of that Court with a view to meet, greet and reminisce about life and law. It is not something which, on its own,

[69] Vol 1, page 121: para 24

should be met with any misgivings. This should be encouraged, rather than disparaged.

121. Finally, there was no evidence establishing the existence of a rule against non-panel Judges discussing a matter with panel Judges.

122. In our view, it would be wrong to hold Hlophe JP guilty of breaching a rule which was not in existence at the time that the conduct complained of took place, namely in 2008.

123. For its finding of guilt, the Tribunal placed reliance upon a rule articulated at paragraph 90 of its ruling, that:

> "*No Judge is entitled to discuss a pending case with another Judge who has reserved judgment, unless the latter initiates such discussion and seek the others view. This prohibition is not restricted to the facts or merits only, but extends to legal principles or to the jurisprudence involved in such a case"*.[70]

124. The foundation for this rule was a subject of divergent views between the Constitutional Court Justices (including Jafta, J and Nkabinde, J) on the one hand, and Hlophe JP, on the other.

125. In the consolidated statement of complaint, Langa CJ asserted the view as one recognised by "*elementary principles of judicial ethics"*. Jafta J, for his part, characterised the rule as "*the practise in Appeal Courts"*, namely the LAC and SCA, where he sat.

[70] Ruling: Book 5: page 387: para 90

126. Accordingly to Nkabinde J's understanding, discussion of a case among Judges was limited to only those members who sat in the case. In other words, on Nkabinde J's understanding of the prohibition, it extends to all Judges, including Judges of the Constitutional Court who did not sit in the case.[71]

127. As Jafta said[72], he was not sure if Hlophe JP was aware of the rule. Indeed, Hlophe JP professed no knowledge of such a rule.

128. It is common cause that the Code of Judicial Conduct for South African Judges was only promulgated on 18 October 2012, some four years after the events giving rise to the complaint occurred.

129. Indeed the evidence reveals that Hlophe JP had only one meeting with each of the Justices. Although he expressed views regarding the pending matter, once he was told that he was not entitled to do so, he did not persist with his discussion of the matter. Both Justices Nkabinde J and Jafta J were satisfied that they had dealt with the matter appropriately. In any event, Hlophe, JP did not, on the evidence before the Tribunal, advise them how they should decide the matter.

130. On the evidence, therefore, it was not established that Hlophe JP breached any rule which was in existence at the time (in 2008) and the Tribunal's ruling that he did so is unsustainable.

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[71] Book 1: page 54: para 25

[72] See excerpt of Jafta's evidence at para 57, above: "…*And I wasn't sure whether the JP was aware of that rule which applies to Appeal Courts, and I just left the matter there".*

131. There is no evidence that Hlophe JP acted in the Constitutional Court, as to be aware of the rule articulated by the Justices. It would accordingly be wrong to find Hlophe JP guilty of a free-floating rule based on the experiences of other Justices, which Hlophe JP had no experienced of. It seems to us that the rule, if ever there was one, was, as at April 2008, very much at conceptualisation stages; it had certainly not crystilised to a known and well established rule, the breach of which will result in a guilty finding.

132. The suggestion that Hlophe JP knew of the rule because he decided the case of *S v Mayekiso & Others* 1996(1) SACR 510 (C), is, with respect, misguided. *S v Mayekiso* is not *in pari materia*. That case dealt with the bench-to-counsel discussions, where an assessor told counsel representing the accused that he had formed a good impression of a witness who had testified before them as the court. Hlophe JP found this to be an irregularity. This situation does not even remotely compare with a bench-to bench discussion about a matter, let alone a general discussion on legal principles about a matter in which a Judge was not sitting.

133. In the case of Hlophe JP there is no evidence that in discussing the Zuma/Thinth cases, Hlophe JP immersed himself to the facts of the cases. The overview of the evidence of Nkabinde J and Jafta J indicate that the discussion about the Zuma/Thinth cases was brief and general.

[H] CONCLUSION

134. In view of the conclusions we have arrived at, it is not necessary to pronounce on and decide the merits of Hlophe JP's preliminary arguments.

135. In our respectful view, the Tribunal erred in placing reliance upon the evidence of Jafta J and Nkabinde J in support of its conclusion that Hlophe JP is guilty of gross misconduct. The versions of the two Justices which were, in material respects, disputed by Hlophe JP, are inherently improbable. They should not have formed the basis for Hlophe JP's guilty findings by the Tribunal.

136. In any event, Hlophe JP was not aware of the rule prohibiting him to discuss the legal principles involved in the matter pending before the Justices. Such a rule did not exist at the time when the events giving rise to the complaint arose, and Hlophe JP was not aware of its existence.

137. In the result, the Tribunal's finding that Hlophe JP was guilty of gross misconduct should be rejected.

Dated and signed on 25 August 2021