JUDICIAL CONDUCT TRIBUNAL

In the matter between:

JUSTICES OF THE CONSTITUTIONAL COURT **COMPLAINANTS**

and

JUDGE PRESIDENT M J HLOPHE **RESPONDENT**

TRIBUNAL DECISION

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[1] This matter concerns a complaint by 11 Justices of the Constitutional Court against Judge President Hlophe of the Western Cape Division of the High Court. The complaint was lodged over 12 years ago, in May 2008. Given the length of time it has taken to determine the merits of the complaint, it is prudent to give a full account of the undoubtedly inordinate delay. Much of the delay was due to litigation brought by one or the other of the main parties in the matter.

Factual background

[2] The factual background set out below is gleaned from those cases. We have found very useful, the detailed chronology and factual background from two

judgments of the Supreme Court of Appeal in *Freedom Under Law v Acting Chairperson: Judicial Service Commission & others* [2011] ZASCA 59; 2011 (3) SA 549 (SCA) and *Nkabinde and Another v Judicial Service Commission and Others* [2016] ZASCA 12; [2016] 2 All SA 415 (SCA); 2016 (4) SA 1 (SCA). Other relevant cases are the following: *Langa CJ & Others v Hlophe* [2009] ZASCA 36; 2009 (4) SA 382 (SCA); *Hlophe v Judicial Service Commission & Others* [2009] All SA 67 (GSJ); *Acting Chairperson: Judicial Service Commission & others v Premier of the Western Cape Province* [2011] ZASCA 53; 2011 (3) SA 538 (SCA). *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Other* [2012] ZACC 4; 2012 (6) SA 13 (CC); 2012 (6) BCLR 567 (CC).

[3] On 11 and 12 March 2008 the Constitutional Court heard argument for leave to appeal in the following matters:

(a) *Thint (Pty) Limited v National Director of Public Prosecutions & others;*

(b) *J G Zuma & another v National Director of Public Prosecutions & others;*

(c) *Thint Holdings (South Africa) (Pty) Limited & another v National Director of Public Prosecutions; and*

(d) *J G Zuma v National Director of Public Prosecutions*.

(Collectively referred to as the Zuma/Thint matters).

[4] The applications concerned various search and seizure warrants issued in terms of section 29 of the National Prosecuting Authority Act by a judge. They concerned the validity of the terms of those warrants and the lawfulness of the manner of their execution. They also raised the question of legal professional privilege over documents held on behalf of clients. The applications for leave to appeal were against two judgments handed down by the Supreme Court of Appeal on 8 November 2007, where, in both judgments, that court held by a majority that the application for, issue, and execution of, the respective warrants were lawful.

See *Thint (Pty) Ltd v National Director of Public Prosecutions* [2008] 1 All SA 229 (SCA) and *National Director of Public Prosecutions v Zuma and Another* [2008] 1 All SA 197 (SCA).

[5] The judicial panel which heard the Zuma/Thint matters in the Constitutional Court comprised Langa CJ, O'Regan ADCJ, Justices Ngcobo, Madala, Mokgoro, Skweyiya, Van der Westhuizen, Yacoob, Nkabinde, and acting Justices Jafta and Kroon. The latter two had filled the places of Moseneke DCJ and Justice Sachs who were both on vacation leave. Justice Jafta at the time, was a permanent member of the Supreme Court of Appeal. The Constitutional Court reserved judgment at the conclusion of the hearing of the four matters.

[6] Before judgment in those matters was handed down Judge President Hlophe visited Justice Nkabinde and Justice Jafta separately in their chambers at the Constitutional Court and had discussions with them. The first visit was to Justice Jafta towards the end of March 2008, and Justice Nkabinde was visited on 25 April 2008. During the respective visits, Judge President Hlophe discussed, among others things, the issues which were the subject of the pending judgments in Zuma/Thint matters.

[7] On 30 May 2008 the 11 Justices of the Constitutional Court lodged a complaint with the Judicial Services Commission (the JSC). In terms of the Judicial Services Commission Act 9 of 1994 (the Act), the JSC is the only body empowered to receive and deal with complaints concerning the conduct of judges. The complaint was that Judge President Hlophe, had, during the discussions with Justice Nkabinde and Justice Jafta, refered above, improperly attempted to influence the Constitutional Court's pending judgment in the Zuma/Thint

matters. They also published a press statement in which they confirmed that they had laid a complaint.

[8] On 10 June 2008 Judge President Hlophe lodged a counter-complaint against the Justices of the Constitutional Court. He accused them of having undermined the Constitution[1] by making a public statement alleging improper conduct on his part before properly filing a complaint with the JSC. He further complained that, by filing the complaint even before they had heard his version of the events, they had violated his rights to dignity, privacy, equality, procedural fairness and access to courts.

[9] The JSC requested statements from Justice Nkabinde and Justice Jafta, who in response, stated that they were not complainants, that they had not lodged a complaint, and did not intend to lodge one and did not intend making statements about the matter. Shortly thereafter, the late Chief Justice Langa issued a statement on behalf of all the Justices of the Constitutional Court in support of the complaint and in answer to the counter-complaint. The statement, which was confirmed by all the Justices, including Justice Nkabinde and Justice Jafta, was filed with the JSC.

[10] The statement related the versions of Justice Nkabinde and Justice Jafta as to what was said during their discussions with Judge President Hlophe and how it came about that the complaint was lodged. According to the statement Justice Nkabinde and Justice Jafta had made it clear to Chief Justice Langa and Deputy Chief Moseneke that in their view the approach by Judge President Hlophe had been improper and that after they had dealt with the matter by rejecting the

[1] Constitution of the Republic of South Africa, 1996.

approach of Judge President Hlophe they did not consider it necessary to lodge a complaint or make a statement.

[11] At a meeting of Constitutional Court Justices shortly thereafter, Chief Justice Langa and Deputy Chief Justice Moseneke stated their view that the conduct of Judge President Hlophe, as reported to them by Justice Nkabinde and Justice Jafta, constituted a serious attempt to influence the decision of the Court in the Zuma/Thint matters, and posed a serious threat to the institution of the judiciary, and accordingly to the Constitution. After discussion the Justices unanimously decided to lodge a complaint with the JSC against Judge President Hlophe.

[12] On 30 June 2008 Judge President Hlophe filed a statement in answer to the complaint and in support of his counter-complaint, in which he repeated his assertions as stated in para 8 above. He further stated that the history related by the Justices of the Constitutional Court showed a political motive by Chief Justice Langa and Deputy Chief Justice Moseneke to get rid of him at all costs. In his view, inappropriate pressure had been brought to bear on Justice Nkabinde and Justice Jafta to associate themselves with the complaint.

[13] On 5 July 2008 the JSC referred both the complaint by the Constitutional Court Justices and the counter-complaint by the Judge President Hlophe to the hearing of oral evidence. On 1 April 2009 the JSC convened to hear oral evidence. Judge President Hlophe could not attend because of ill-health. The hearing was postponed and reconvened on 4 April 2009. On that occasion, Judge President Hlophe sought a postponement on the basis that a new senior counsel had been appointed and required time to prepare for the hearing. In addition, his health had not improved. The hearing was postponed to 7 April 2009.

[14] When the JSC reconvened on that date, Judge President Hlophe was still indisposed. The JSC by majority decision refused a further postponement. The JSC proceeded with the hearing in the absence of Judge President Hlophe and his counsel. Chief Justice Langa, Deputy Chief Justice Moseneke, Justices Mokgoro, Nkabinde and Jafta presented oral evidence and were questioned by members of the JSC. On 8 April 2009 proceedings were adjourned to enable the record of proceedings to be made available to the parties for the purposes of preparing written submissions.

[15] Subsequent to the adjournment, Judge President Hlophe launched proceedings in the South Gauteng High Court, resulting in an order declaring the proceedings of the JSC of 7 and 8 April 2009 unlawful and void *ab initio*. It was ordered that proceedings be started *de novo*. See *Hlophe v The Judicial Service Commission & others* [2009] All SA 67 (GSJ).

[16] The JSC convened from 20 to 22 July 2009 to consider the complaint and the counter-complaint. On 22 July 2009 it appointed a sub-committee consisting of Judge President Ngoepe,[2] Moerane SC and Semenya SC to investigate the complaints by conducting interviews behind closed doors. On 30 July 2009 the sub-committee commenced conducting the interviews. Langa CJ, Moseneke DJC, Judge President Hlophe, Justices Nkabinde and Jafta were called to appear before the sub-committee. Justices Nkabinde and Jafta were questioned on some of the matters allegedly constituting disputes of fact. After the interviews were conducted, the inquiry was adjourned until 15 August 2009. On that occasion, the decided that the evidence in respect of the complaint did not justify a finding that Judge President Hlophe was guilty of gross misconduct and that the matter

[2] Then Judge President of Gauteng Division of the High Court, now retired.

was accordingly finalised. The JSC made a similar decision in respect of the counter-complaint. The JSC accordingly considered the matters finalised.

[17] Two separate applications were launched challenging the JSC's decision. The one was brought by the Premier of Western Cape in the Western Cape High Court, and the other by Freedom Under Law in the North Gauteng High Court. The Premier's challenge was that the JSC was not properly constituted when it took that decision and that the decision was not supported by a majority, as required by section 178(6) of the Constitution. The Western Cape High Court upheld the Premier's contentions and set aside the JSC decision. See *Premier, Western Cape v Acting Chairperson, Judicial Services Commission* 2010 (5) SA 634 (WCC); 2010 (8) BCLR 823 (WCC). The JSC appealed to the Supreme Court of Appeal. That court dismissed the appeal. See *Acting Chairperson: Judicial Service Commission & others v Premier of the Western Cape Province* [2011] ZASCA 53; 2011 (3) SA 538 (SCA).

[18] FUL's challenge to the JSC decision in the North Gauteng High sought to set aside an earlier decision of the JSC to hold a preliminary inquiry, on the basis of which it arrived at its final decision. The court held that it was not entitled to the relief it sought. On appeal to it, the Supreme Court of Appeal set aside the High Court order, replacing it with one setting aside that part of the JSC decision dismissing the complaint by the Constitutional Court Justices against Judge President Hlophe, but leaving the part dismissing his counter-complaint intact. In respect of the counter-complaint Supreme Court of Appeal had regard to its earlier decision in *Langa CJ & others v Hlophe*,[3] in which it held that the filing of the complaint by the Constitutional Court judges and the making of a public statement that they had done so, before he had been given a hearing, were not

[3] *Langa CJ & others v Hlophe* [2009] ZASCA 36; 2009 (4) SA 382 (SCA) para 55.

unlawful. See *Freedom Under Law v Acting Chairperson: Judicial Service Commission & others* [2011] ZASCA 59; 2011 (3) SA 549 (SCA).

[19] On 30 March 2012, Judge President Hlophe's application for leave to appeal the two judgments of the Supreme Court of Appeal was dismissed by the Constitutional Court. See *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Other* [2012] ZACC 4; 2012 (6) SA 13 (CC); 2012 (6) BCLR 567 (CC).

[20] In the meanwhile, in June 2010 the Act was amended and a new statutory regime to deal with complaints against judges came into operation. The amendments provided for the establishment of a Judicial Conduct Committee and a Tribunal to deal with complaints against judges. The new provisions of the Act set out in some detail the procedures to be followed in relation to the adjudication of complaints.

[21] Following on the litigation referred to above, the JSC, during April 2012, referred the complaint by the Justices of the Constitutional Court to the Judicial Conduct Committee (the JCC), chaired by Judge President Musi.[4] Thus, the new statutory regime was in place when that decision was made, to have the matter dealt with prospectively in terms of the new procedures. The JCC recommended to the JSC that a Tribunal be appointed to investigate the complaint.

[22] On 17 October 2012 the JSC requested the Chief Justice to appoint a Tribunal to investigate and report on the complaint against Judge President Hlophe, which the Chief Justice obliged, by appointing the current appointed Tribunal. In terms of section 24(1) of the Act, and after consulting the Minister

[4] Then Judge President of the Free State High Court, now retired.

and the National Director of Public Prosecutions, the President of the Tribunal appointed a member of the National Prosecuting Authority to collect evidence on behalf of the Tribunal, and to adduce evidence at a hearing.

[23] On 1 October 2013, at the hearing of the Tribunal, Justice Nkabinde and Justice Jafta challenged Tribunal's jurisdiction to adjudicate the complaint. It was submitted on their behalf that since the complaint by the Constitutional Court Justices had been lodged during May 2008, it ought rightly to be adjudicated in terms of the Rules which constituted the regulatory regime prior to the amendments to the Act. Under the old regime, for example, a complaint need not have been on oath, whereas the present statutory framework obliged a complaint to be in the form of an affidavit.

[24] Also, the prior regime did not make provision for the appointment of a Tribunal nor did it have a provision for a prosecutor drawn from the NPA to lead and adduce evidence. It was further submitted that after the decision of the Supreme Court of Appeal in *Freedom Under Law* it was not open to the JSC to withdraw its earlier decision not to conduct a formal inquiry. It was contended, in the alternative, that if the amended provisions were to be applied, there was no proper complaint before the JSC as the complaint was not on oath. The Tribunal rejected these contentions in a written ruling.

[25] Dissatisfied with that ruling, Justices Nkabinde and Jafta applied to the Gauteng Local Division of the High Court, Johannesburg, for an order, inter alia, setting aside two decisions by the JSC, namely, the decision during April 2012, when the JSC decided to refer the matter to the JCC for a preliminary inquiry and the decision on 17 October 2012 when the JSC decided to request the Chief Justice to appoint a Tribunal. In addition, the appellants also sought an order

declaring s 24(1) of the JSCA to be unconstitutional. The application was dismissed on 26 September 2014. See *Nkabinde and Another v Judicial Service Commission President of the Judicial Conduct Tribunal and Others* 2015 (1) SA 279 (GJ); [2014] 4 All SA 637 (GJ); 2014 (12) BCLR 1477 (GJ).

[26] Justices Nkabinde and Jafta's appeal to the Supreme Court of Appeal was dismissed on 10 March 2016. See *Nkabinde and Another v Judicial Service Commission and Others* [2016] ZASCA 12; [2016] 2 All SA 415 (SCA); 2016 (4) SA 1 (SCA). An application for leave to appeal to the Constitutional Court met the same fate on 24 August 2016. See *Nkabinde and Another v Judicial Service Commission and Others* 2016 (11) BCLR 1429 (CC); 2017 (3) SA 119 (CC). The dismissal of the application for leave to appeal by the Constitutional Court paved the way for the Tribunal to resume the hearing.

Post litigation delays

[27] When the Tribunal convened in July 2018 and was ready to proceed with the inquiry, Judge President Hlophe successfully sought the recusal of Musi AJP, one of the members of the Tribunal on the basis of alleged negative remarks the latter had allegedly made about Judge President Hlophe at a social gathering of judges. Although Musi AJP denied the allegation, he stated that in the interests of the Tribunal, he acceded to the request for his recusal, which he formally did. This necessitated the postponement of the proceedings, as a new member of the Tribunal had to be appointed. On 20 August 2018 the Chief Justice appointed a new member to replace Musi AJP.

[28] The Tribunal re-scheduled to commence with the hearings from 21 October 2019. However, the dispute between Judge President Hlophe and the State Attorney in respect of the latter's fees had not been resolved, which necessitated

the postponement of the hearing. The hearing was later scheduled for 16 to 30 October 2020. However, due to the unavailability of Judge President Hlophe's lead counsel, Griffiths QC and the indisposition of Justice Jafta, the hearing was postponed to 7 – 10 December 2020.

The hearing

[29] On the latter dates, after over 12 years since the complaint was lodged, the Tribunal eventually commenced with the hearing. Before us, Adv. M I Thenga, assisted by Mr M Mohlala, led the evidence on behalf of the Tribunal. Judge President Hlophe's legal team was led by Dr Adv. Griffiths QC, assisted by Adv. T Masuku SC and Adv Sidaki, instructed by Barnabas Xulu Inc. of Cape Town. The Justices of the Constitutional Court were represented by Adv. G Marcus assisted by Adv M Mbikiwa. Adv T Norman SC and Adv ZZ Matebese SC represented Justice Nkabinde and Justice Jafta, all instructed by State Attorney.

[30] Four witnesses testified before the Tribunal, namely Justices Nkabinde and Jafta, Judge President Hlophe and Professor Mathenjwa. The latter testified as an expert on behalf of Judge President Hlophe. It was agreed that the evidence of Justice Nkabinde, Justice Jafta and Judge President Hlophe tendered before a committee of the JSC in 2009, would stand as evidence in chief in respect of each. Consequently, each of them confirmed their previously tendered evidence, after which cross-examination ensued.

[31] At the commencement of their testimonies, both Justice Nkabinde and Justice Jafta made some corrections to the joint complaint statement by the Constitutional Court Justices, signed by Chief Justice Langa. In that statement the following was recorded:

Paragraph 9:

'Towards the end of March 2008, and after argument in the Zuma/Thint cases had been heard-

9(a): without invitation, Hlophe JP visited the chambers of Jafta AJ;

9(b): again without invitation, Hlophe JP raised the matter of the Zuma/Thint cases that had been heard by the Court; and

9(c): in the course of that conversation, Hlophe JP sought improperly to persuade Jafta AJ to decide the Zuma/Thint cases in a manner favourable to Mr. JG Zuma.'

Paragraph 10:

'On 23 April 2008, Hlophe JP contacted Nkabinde J telephonically and requested to meet her on Friday 25 April 2008. On that day-

10(a): Hlophe JP visited the chambers of Nkabinde J at the Constitutional Court as agreed;

10(b): without invitation, Hlophe JP initiated a conversation with Nkabinde about the Zuma/Thint cases that had been heard by the Court; and

10(c): in the course of that conversation, Hlophe JP sought improperly to persuade Nkabinde J to decide the Zuma/Thint cases in a manner favourable to Mr JG Zuma.

Paragraph 48:

'48: The first paragraph referred to the meeting between Hlophe JP and Jafta AJ. It was proposed by counsel for Nkabinde and Jafta AJ that the following detail be included in the statement:

"In the course of that conversation, Hlophe JP said that the case against Mr JG Zuma should be looked at properly (or words to that effect) and added, "Sesithembele kinina", a rough translation which is: "you are our last hope"."

Paragraph 49:

'49: The second paragraph referred to the meeting between Hlophe JP and Nkabinde J. It was proposed by counsel for Nkabinde J and Jafta AJ that the following detail be included in the statement:

'In the course of that conversation, Hlophe JP said he wanted to talk about the question of "privilege", which in his words formed the gravamen of the National Prosecuting Authority's case against Mr JG Zuma. He further said the manner in which the case was to be decided was very important as there was no case against Mr Zuma without the "privileged" information and that Mr Zuma was being persecuted, just like he (Hlophe JP) had also been.'

[32] Effectively, the changes resulted in the removal of paragraphs 9(c) and 10(c) and replacing them with paragraphs 48 and 49, respectively.

[33] Evidence was heard on 7 and 8 December 2020. The matter was postponed to 11 December 202 for closing argument, with a directive to the parties to file written submissions on or before 11 December 2020. All the parties, except Judge President Hlophe complied. In their closing arguments, counsel for Judge President Hlophe raised some objections which, in essence, were preliminary points which, ordinarily, are made at the commencement of the proceedings. But for some unknown reason, they were only raised during closing argument.

[34] At the close of the proceedings, counsel for Hlophe JP sought leave to file written submissions on or 15 December 2020. The Tribunal acceded to the request on condition that the other parties retained a right, should it be necessary, to reply to those submissions. The Tribunal received written submissions on behalf of Judge President Hlophe on 15 December 2020, which ran to 137 pages. All other counsel – the evidence leaders, for the Constitutional Court Justices, and for Justices Nkabinde and Jafta – filed supplementary written submissions in reply.

Preliminary issues

[35] There are two issues we dispose of before we consider the evidence. First, there are a number of objections raised on behalf of Judge President Hlophe. Secondly, we consider the issue of principle raised by Judge President Hlophe, as to whether it is permissible for non-panel judges to discuss issues with members of the hearing panel while judgment was pending.

The objections

[36] It is convenient to dispose of the objections raised on behalf of Judge President Hlophe, before we consider the substantive issues. They are about the following:

(a) changes to the joint complaint statement;
(b) Justice Nkabinde and Justice Jafta are unwilling complainants;
(c) counsel for the Constitutional Court Justices not entitled to participate in the proceedings;
(d) the charge sheet and the charge.

[37] We consider each, in turn.

Changes to the joint complaint statement

[38] It was submitted on behalf of Judge President Hlophe that by making the corrections referred to earlier, the two Justices tailored their evidence 'to suit the circumstances of the day.' It was further submitted that Justice Jafta's explanation for the changes was 'inadequate', while Justice Nkabinde was said to have offered no explanation at all. The changes, it was submitted, were material, and changed in a significant manner the foundation, nature and character of the accusation against Judge President Hlophe. The thrust of the objection is that the entire complaint was based on the original statement, which informed the decision to constitute this Tribunal. Also, all the cases referred to earlier, were premised on the original statement.

[39] It was suggested that those cases were incorrectly decided 'based on false information'. Also, it was submitted, this meant that there was a material conflict between the evidence of Justices Nkabinde and Jafta, on the one hand, and the evidence of Deputy Chief Justice Moseneke, Justices O'Regan and Mokgoro, on the other hand, when they appeared before the committee of the JSC in 2009.

Thus, those Justices ought to have been called, 'to testify, regarding the facts concerning those paragraphs. It is highly possible that these witnesses would have shed light onto the credibility of the versions given by Justices Jafta and Nkabinde'.

[40] Thus, so went the argument, the material changes made to the joint complaint affected the validity of the whole process, including the premise on which this Tribunal was constituted. In this regard, the following was submitted on behalf of Judge President Hlophe:

'[T]he Judicial Conduct Committee in September 2012, and based on the evidence that was available to it at that time (the evidence that has now been changed by Justices Nkabinde and Jafta), the Judicial Conduct Committee recommended the appointment of this Tribunal. Had the Judicial Conduct Committee been made aware of the material changes to the foundational evidence, being the joint complaint statement, it is highly possible that it might have come to a different decision when it considered this matter. These changed facts were not given to the Judicial Conduct Committee, to the prejudice of Judge President Hlophe.'

[41] It was also submitted that since Justice Nkabinde and Justice Jafta had not sought to make those changes for 12 years, Judge President Hlophe had been prejudiced thereby. Furthermore, it was submitted that since the joint complaint statement indicates that the details in paragraphs 48 and 49 were provided by counsel for Justices Nkabinde and Jafta at the time, it was incumbent upon the two Justices to call their erstwhile counsel 'to testify, and corroborate, their story as to how those contents were entered into the statements'. According to counsel for Judge President Hlophe, failure to do so, was prejudicial to him.

[42] In the premises, so it was submitted, this Tribunal was left with a complaint premised entirely on conflicting statements, and evidence of Justice Jafta who was characterised as 'a recalcitrant complainant', and Justice Nkabinde who was labelled 'a vacillating complainant.' The evidence was, therefore, according to

Judge President's counsel, and as such there was great danger in considering any of it in adjudicating the case against Judge President Hlophe. The final effect, according to counsel, was that there was no credible complaint before the Tribunal.

[43] In order to properly to determine whether these complaints are well grounded, it is necessary to understand the nature and scope of the changes complained about. Both paragraphs 9(c) and 10(c), on the one hand, and paragraphs 48 and 49, on the other, were in the original statement supporting the complaint by the Justices of the Constitutional Court. The two Justices simply clarified the apparent and obvious inconsistency in that statement.

[44] In respect of Justice Jafta, he changed the statement that:

'In the course of that conversation, Hlophe JP sought improperly to persuade Jafta AJ to decide the Zuma/Thint cases in a manner favourable to Mr. JG Zuma.'

to:

'In the course of that conversation, Hlophe JP said that the case against Mr JG Zuma should be looked at properly (or words to that effect) and added, "Sesithembele kinina", a rough translation which is: "you are our last hope.'

[45] In respect of Justice Nkabinde, she changed the statement that:

'In the course of that conversation, Hlophe JP sought improperly to persuade Nkabinde J to decide the Zuma/Thint cases in a manner favourable to Mr JG Zuma.'

to

'In the course of that conversation, Hlophe JP said he wanted to talk about the question of "privilege", which in his words formed the gravamen of the National Prosecuting Authority's case against Mr JG Zuma. He further said the manner in which the case was to be decided was very important as there was no case against Mr Zuma without the "privileged" information and that Mr Zuma was being persecuted, just like he (Hlophe JP) had also been.'

[46] Both Justice Nkabinde and Justice Jafta explained that they were not satisfied that the original statements correctly reflected what they sought to convey. When one analyses the first statement (in respect of each of the Justices) it contains a conclusion, namely, that during their respective conversation with him, Judge President Hlophe had sought to improperly persuade them to decide the Zuma/Thint cases in a manner favourable to Zuma. What the corrections achieve is to state the facts, without seeking to draw conclusions. The original statements imputed fault to Judge President Hlophe. The effect of the changes is that both Justice Nkabinde and Justice Jafta assumed a neutral role as witnesses, and left the conclusion as to whether Judge President Hlophe sought to influence them, to this Tribunal. This should be commended, not condemned.

[47] In the light of the above observations, it can hardly be suggested that there was a material change in the statements or that the basis of the complaint against Judge President Hlophe is different. The corrections are consistent with the evidence of both Justice Nkabinde and Justice Jafta, and do not amount to a contradiction or a material change in evidence as suggested on behalf of Judge President Hlophe. Throughout the 12-year period, the complaint has simply been that he had sought to improperly influence the outcome of the Zuma/Thint application pending in the Constitutional Court. Justice Nkabinde and Justice Jafta never changed their version of their encounters with Judge President Hlophe. In fact, much of what transpired during those encounters is largely common cause. What is in dispute, and which this Tribunal must decide, is the effect of Judge President Hlophe's conduct in relation to the two Justices.

[48] What is more, the changes were made without any objection or demure by Judge President Hlophe's counsel. Not only that. During the cross-examination of both Justice Nkabinde and Justice Jafta it was not put to either of them that they:

(a) perjured themselves;

(b) were tailoring their evidence;

(c) were recalcitrant and or unwilling witnesses;

(d) were pressurized into joining the complaint by other Justices of the Constitutional Court.

[49] In fact, none of the criticism levelled against Justice Nkabinde and Justice Jafta was put to any of them. We find this most unfair to the two Justices, especially the insinuation of perjury. As observed by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (CC) at para 60, it is a grave allegation to make against any witness that they had deliberately perjured themselves. The court viewed that insinuation as being more particularly serious as it was made against the President of the country. In the same vein, it is serious when such allegations are made against the Justices of the highest court of our Republic, without affording them an opportunity to comment on them. The Constitutional Court explained (at paras 61 and 63):

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.

…..

The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence *is* to be

challenged but also how it is to be challenged. *This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.*' (emphasis added.)

[50] With regard to the allegations of prejudice against Judge President Hlophe resulting from the changes to the statement, we make this observation. As already stated above, the original was prejudicial to Judge President Hlophe in the sense that it was said that he had improperly sought to persuade the two Justices to decide the Zuma/Thint cases in favour of Mr Zuma. That has been removed, and substituted with a neutral citation of the facts.

[51] We fail to comprehend how that could remotely prejudice Judge President Hlophe. To the contrary, it is to his favour that the prejudicial statements have been removed. What is more, none of the two Justices made allegations in their evidence before this Tribunal or before the Committee of the JSC in 2009 that Judge President Hlophe had sought to 'improperly persuade' them to decide the Zuma/Thint cases in a manner favourable to Mr JG Zuma. Given the above, we discern no prejudice whatsoever as a result of the change to the original statement.

[52] Judge President Hlophe's contention that counsel who acted for Justice Nkabinde and Justice Jafta when the statement was made ought to have been called as witnesses, is equally without merit. As explained already, the two Justices explained the circumstances in which the statement was drafted and how the impugned portions found their way into the statement. Judge President Hlophe has not provided a basis not to accept their explanations, which we find plausible.

Justice Nkabinde and Justice Jafta unwilling complainants

[53] The suggestion is that the two Justices were put under undue pressure, presumably by Chief Justice Langa and Deputy Chief Justice Moseneke. Their participation in the complaint, it was submitted, was therefore involuntarily and unwillingly. The two Justices gave a full explanation how they made the joint statement on 12 June 2008. Justice Jafta explained that initially he was satisfied that he had adequately dealt with Judge President Hlophe's discussions about the Zuma/Thint matters. However, following discussions with Chief Justice Langa and Deputy Chief Justice Moseneke, he willingly became part of the complaint by the Justices of the Constitutional Court, as he understood it to be about the institutional independence of the Constitutional Court.

[54] Justice Nkabinde also testified that as soon as she was informed that an attempt to influence one Justice of the Constitutional Court could have an effect on the judgment of the Court, she willingly participated in the collective complaint. The two Justices also explained why a need arose for them to have a separate set of counsel. These explanations Judge President Hlophe is not able to dispute as he was not privy to the making of the joint statement. His assertions are therefore purely speculative.

[55] In any event, the supposition that they were unwilling participants in the complaint was put to each of the two Justices during the 2009 hearing. They both rejected it as 'incorrect'. Justice Nkabinde was forceful in her rebuttal:

'Mr Commissioner, I think let me say first of all it is incorrect, maybe it is - I should say it is false for one to suggest that we were influenced or forced or manipulated in any way to make a statement or to participate in what the Judges of the Constitutional Court decided to do. I do know that this is what Judge Hlophe says but I think it is an insult to some of us…. So I think it is absolutely incorrect for anybody to suggest that we could have been forced or manipulated to doing what was right in the circumstances.'

[56] When both Justice Nkabinde and Justice Jafta were cross-examined in these proceedings, none of them was challenged about their rebuttals. Thus, their evidence on the absence of coercion or manipulation stands entirely uncontradicted. We therefore have no difficulty in rejecting the submissions on behalf of Judge President Hlophe.

Counsel for the Constitutional Court Justices not entitled to participate in the proceedings.

[57] It was submitted on behalf of Judge President Hlophe that counsel for the Constitutional Court Justices were not entitled to participate in this Tribunal and to make closing arguments. This submission was developed as follows: Although the nature of the proceedings before the Tribunal are *sui generis*, with degrees of overlap between elements of both civil and criminal court proceedings, the Tribunal proceedings lean more on the criminal proceedings for the following reasons:

(a) the presence of a member of the National Prosecuting Authority (NPA) in terms of section 24(1) of the JSC Act to act as an evidence leader, to collect evidence on behalf of the Tribunal and to adduce evidence;

(b) the introduction of a charge sheet;

(c) as in criminal proceedings where there is the State, representing the complainant, and the Accused, in these proceedings before the Tribunal the parties are structured in a similar way;

(d) like in criminal proceedings, there is also no onus on the accused to prove his innocence.

[58] Given the above, it was submitted that the evidence leader assumed the role played by a prosecutor in criminal proceedings, where, ordinarily, no other parties except the State and the accused, are represented. The evidence leader, like a

prosecutor, gathered the evidence, led witnesses and made closing arguments. On this analogy, it was submitted that the participation of Mr Marcus SC and Mr Mbikiwa, counsel for the Constitutional Court Justices, was both impermissible and irrelevant. They were said to be not entitled to take part in the proceedings or to make closing arguments. This, so went the argument, especially given that none of the Constitutional Court Justices testified against Judge President Hlophe in the Tribunal.

[59] There is simply no merit in this submission. The Tribunal proceedings are *sui generis* in nature. They are not akin to criminal proceedings. Unlike criminal proceedings, the proceedings of the Tribunal are inquisitorial. See Section 26(2) of the JSC Act. See also *Nkabinde and another v Judicial Service Commission* at para 79. Contrary to the submission on behalf of Judge President Hlophe, the Tribunal is expressly empowered, in terms of section 25(4) of the JSC Act, to 'regulate and protect its own proceedings. The evidence leader, although drawn from the ranks of prosecutors in the NPA, she is not a prosecutor in the Tribunal. Her role in the Tribunal is not to achieve a conviction as a prosecutor would ordinarily aim to. Her duties and powers are set out in section 24 of the JSC Act, which among others, are to collect evidence on behalf of the Tribunal, and to adduce evidence at the hearing.

[60] As for the participation of counsel for the Justices of the Constitutional Court in the Tribunal, suffice it to say this. Those whom they represent are complainants. Their participation, and them being represented by counsel, has been accepted since 2009. Until this argument was raised during the Tribunal sitting in December 2020, Judge President Hlophe has never once, in the 12 years of this complaint, questioned the participation of counsel for the Constitutional Court.

[61] The suggestion that the participation of counsel for the Constitutional Court Justices prejudiced Judge President Hlophe has merely to be stated, to be rejected. This also goes for the suggestion that counsel for the Constitutional Court Justices 'took over the central role of Prosecutor,' or that by allowing them to make closing arguments constituted any form of irregularity. This cannot be, by any stretch of imagination.

The charge

[62] The first complaint is that Judge President Hlophe has been served with two charge sheets, one in 2013 and the other in 2020, and that this somehow prejudiced him. The prejudice is said to lie in alleged material differences in the two charge sheets. The alleged material differences are said to be the following. The first charge sheet alleged an attempt to 'improperly influence'; whilst the second one alleged an 'attempt to improperly interfere or influence.'

[63] It was said that the second charge sheet 'represents something of an evolution' to the first charge sheet because of the introduction of the words 'interfere or'; the reference to section 165(2) and (3) of the Constitution. It was thus submitted that there was uncertainty as to the status of either of the charge sheets, and that 'there are two concurrent charge sheets serving before this Tribunal. In the same breath it was submitted that the second charge sheet was a nullity, and that the first charge sheet remained valid since it was never withdrawn.

[64] The second complaint, was that because the charge was put to Judge President Hlophe after the evidence of Professor Mathenjwa had been led, and thus after proceedings had commenced, that constituted an irregularity.

[65] We make the following observations about these submissions. First, ordinarily an objection to a charge-sheet would occur at the commencement of proceedings, not at the closing arguments. The charge was introduced by the evidence leader after Professor Mathenjwa's evidence. There was no objection on behalf of Judge President Hlophe. Instead, the objection was that the evidence leader should not place on record the summary of the material facts on which the charge is based.

[66] Secondly, an objection to a charge sheet is not made in vacuum. In criminal proceedings, it is normally in the context of fair trial rights. Thus, in this case, the question must arise whether Judge President Hlophe's rights to a fair hearing has been affected by: the service of two charge sheets or the timing of when the charge sheet was introduced in the proceedings. The answer must be in the negative. As shown earlier, there is no material difference between the two charge sheets.

[67] It is doubtful whether the introduction of section 165 of the Constitution or the words 'interfere or', would have had any effect on the manner in which Judge President Hlophe's defence was conducted. There is no such suggestion, and we are unable to think of any. In sum, nothing turns on the use 'interfere' or 'influence used in the two charge sheets. The important consideration is whether the facts as alleged in any of the two charge sheets, if established, would constitute gross misconduct. That is for this Tribunal to determine.

[68] There is a further reason why the complaints by Judge President Hlophe about the charge sheet are without merit. A charge sheet is not a procedural

requirement in the proceedings of the Tribunal. What Rule 4 of the Rules to Regulate Procedures Before the Judicial Conduct Tribunals requires, is that a notice be given setting out, among others, the facts which are alleged to constitute gross incompetence or gross misconduct; a concise summary of the evidence and any other information, which substantiate the complaint; copies of documentary evidence to be produced.

[69] Judge President Hlophe has been served with such notice. Whether one refers to the 2013 or 2020 notice, the facts which are alleged to constitute the complaint, or the summary of the evidence substantiating the complaint have remained the same, namely, that he has sought to improperly influence the outcome in Zuma/Thint matters after the matters had been heard and judgment reserved. Nothing could be clearer.

[70] It remains to deal with what we consider a truly frivolous and regrettable submission. It was complained that the evidence leader, without informing other parties and the Tribunal, introduced a 'third' charge sheet. What happened is this before the hearing, the evidence leader circulated a charge sheet. She explained during the hearing that the only purpose of this was to include the details of junior counsel for the Justices of the Constitutional Court, who had not previously been involved in the matter. There was no change made to the substance of the charge sheet.

[71] Considered in the light of the above, Judge President Hlophe suffered no prejudice in the conduct of his case as a result of any of the issues he complains about.

The principle of legality and the charge

[72] It was submitted that the charge which Judge President Hlophe faces is not clear and unambiguous, inasmuch as it is alleged that he had made himself guilty of gross misconduct, as envisaged in section 177(1)(*a*) of the Constitution. That section provides that a judge may be removed from office only if the JSC finds that the judge, among others, is guilty of gross misconduct. It was submitted that the section does not create an offence, nor do sections 165(2) and 165(3) of the Constitution.

[73] Accordingly, it was argued, there is no statutory enabling provision to make a contravention of section 165 of the Constitution an offence as alleged in the second charge sheet. Accordingly, it was submitted, the charge sheets do not disclose the relevant offence which is alleged to have been committed. It was further pointed out that no reference was made in the second charge sheet to the Code of Judicial Conduct,[5] nor was Judge President Hlophe charged for contravening the Code. The upshot of the above submission is that there is no valid charge against Judge President Hlophe.

[74] We have already made the point that the concept of a 'charge' or a 'charge sheet' is not a requirement in these proceedings. And, because these are not criminal proceedings, the requirements that the 'charge must be clear and unambiguous' or that the alleged conduct must be wrongful or unlawful, or that there should be *mens rea*, do not find application in these proceedings. What we are concerned with here are issues of judicial probity and ethical standards, rather than rules of law. We have explained earlier the importance of the essential facts upon which it is alleged conduct amounts to misconduct.

[5] The Code of Judicial Conduct serves as the prevailing standard of judicial conduct, which judges must adhere to, was promulgated pursuant to the provisions of the JSC Act.

[75] Even in the context of criminal proceedings, the key consideration whether the charge sheet contains adequacy information, is whether the fair trial rights of an accused are infringed upon. In *S v Legoa* 2003 (1) SACR 13 (SCA) (at paras 20 and 21) the following was stated in the context of a complaint

'The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it. A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and maybe insufficiently heedful of the practical realities under which charge-sheets are frequently drawn up. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or, in a Superior Court, from the summary of substantial facts the State is obliged to furnish. Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances.'

Delay

[76] It was submitted on behalf of Judge President Hlophe that his rights before this Tribunal to a fair hearing in terms of section 34 of the Constitution have been impinged by the unreasonable delay in finalising these proceedings. The delay is regrettable, indeed. Section 27 of the Act provides that, in the interests of protecting and advancing the dignity and effectiveness of the judiciary and the courts, a hearing must begin and be concluded without unreasonable delay. But context is important, too.

[77] We have set out in some detail the reason for the delay, some of it in no small measure, attributable to Judge President Hlophe himself. In paras 13, 14, 15, 19 and 27 we have chronicled his own litigation and occasions on which he sought postponement of the proceedings of this Tribunal. All these contributed to the delay. It is opportunistic and untenable for Judge President Hlophe, under the circumstances, to advance the delay as the basis of some prejudice.

Discussion of pending matters

[78] Judge President Hlophe's stance is that nothing prohibits such discussions. He testified that there was no rule that if a Judge was not part of a court which heard the matter and reserved judgment, he or she was not permitted to discuss pending cases with judges of that court. His view was that nothing prevented judges from discussing the legal principles and jurisprudence involved in that case, as long as they do not discuss the facts of the case. As he put it with constant refrain during cross-examination, 'As lawyers and as judges, we talk about our cases every day.'

[79] Judge President Hlophe also relied on article 11(3) of the Code of Judicial Conduct, which provides that formal deliberations, as well as private consultations and debates among judges are and must remain confidential. According to Hlophe JP, the article does not say that debates can only take place between members of that particular court.

[80] The starting point in considering these contentions must be section 165(2) and (3) of the Constitution:

'(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.'

[81] In the statement supporting the complaint against Judge President Hlophe, Chief Justice Langa said:

'Elementary principles of judicial ethics precluded a judge of one division from discussion the merits of a matter with judges of the highest court where judgment is still pending".

[82] For his part, Judge President Hlophe professed ignorance of this. In his response, Judge President Hlophe said the following:

'I do not know what the Chief Justice seeks to convey by elementary principles of judicial ethics in the circumstances of the facts underlying the Constitutional Court's complaint on either the judge's version or mine. His contention in this paragraph would have been correct only if the matters before the Constitutional Court were appeals from a decision that I had made'.

[83] During cross-examination by counsel for Justice Nkabinde and Justice Jafta, he was asked when he became aware of it for the first time. He answered:

'The very first time it was when, if my memory serves me well, when Judge Jafta filed his reply. That is when I became aware of it for the first time, because he referred to the practice in the Labour Appeal Court, as well as the Supreme Court of Appeal and he added that he does not know whether I knew about that rule because I never sat in those courts. That was the first time.'

[84] In their testimonies before this Tribunal, both Justices Nkabinde and Jafta confirmed the assertion by the Chief Justice. During cross-examination of Justice Jafta by the evidence leader, this is how the issue was canvassed:

MS THENGA: [Y]ou also indicated that everywhere you worked as a judge only those that are involved in that specific matter discuss the case. Is that correct?

JAFTA J: Yes, that is the practice in the appeal courts that I served in from the Labour Appeal Court, the Supreme Court of Appeal, the Constitutional Court, that is the practice.

MS THENGA: So now when you were approached and made to talk about that which was pending did you feel it was the practice as you know it or something else?

JAFTA J: It was definitely not the practice as I know it.'

[85] This explains the level of discomfort both Justice Nkabinde and Justice Jafta had when Judge President Hlophe broached the issue of professional privilege which was pending before the court. In his 2009 evidence, Justice Jafta testified that he was taken by surprise, because in the Appeal Courts where he had worked, judges do not discuss matters before judgment is handed down with members of the court who were not on the panel. Before this Tribunal, he testified that he 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. He explained:

'There was some level of discomfort in the sense that even though I considered the discussion to be innocent my fear was if we go into details the Judge President might express views on some principles which might attract, which I might find attractive for the resolution of the case and in that way I was reluctant, that I might end up getting these ideas from someone who was not sitting.'

And Justice Nkabinde said:

'[W]hen he started discussing this matter, regard being had to the fact that I had been one of the scribes who was allocated to write about this very issue of professional privilege, I snapped and I told him, "You cannot do this, you are not entitled to do this, you are not a member of the court, you have no say in this case. And Judge President at that time said, "My sister, I did not mean to interfere with your work."

She further testified:

'But for me, as a person who had involved in this matter, who was allocated to write about this critical issue, I felt that the Judge President was stepping the line of legitimacy, that is why I rebuffed him.'

She further testified that 'at that stage I was of the view that the Judge President was attempting to influence my thinking.'

[86] It is significant that when counsel for Judge President Hlophe cross-examined the two Justices, their evidence set out above was never challenged. It was never put to them that there was no rule prohibiting non-panel judges, or judges from other divisions, from discussing matters pending matters with members of the panel seized with the matter. As we pointed out above, Justice Jafta specifically mentioned the principle as being applicable in the Labour Appeal Court, a court that Judge President Hlophe had served in. In the absence of any countervailing evidence, we accept the assertion by Chief Justice Langa, supported by the two Justices.

[87] It is also the lived experience of members of the Tribunal, who are members of the legal profession, as judges and a practising attorney. That principle is deeply rooted in the legal profession. It is instilled through years of practice, either as an advocate or an attorney, from whose ranks most judges are drawn. With elevation to the judiciary, one carries it along. We do not know whether Judge President Hlophe ever practiced law as either an advocate or an attorney prior to his elevation. However, by 2008 when the impugned conduct occurred, he had been a judge of the high court for over 13 years, five of those as a Judge President. He is expected to have been aware of it, and on balance, he was.

[88] During cross-examination by counsel for the Constitutional Court Justices, Judge President Hlophe accepted the following proposition. Had he been one of the judges at first instance whose judgment was the subject of the appeal to the Constitutional Court, that would have been a fundamental breach of judicial ethics. However, in his view, that would be the only instance which would prohibit him from having the type of conversations he had with Justice Nkabinde and Justice Jatfa. In other words, according to him, any Judge is free to discuss the legal principles and jurisprudence which is the subject of an appeal in a higher court. He or she is free to discuss such principles and jurisprudence involved in that case, as long as he or she was not part of the judgment being appealed against. This is captured during cross-examination as follows:

'MR MARCUS: Judge President, I do not want there to be a misunderstanding between us and I think I need to try and clear this up. So, let me go back a step. You accept the proposition that were the Constitutional Court sitting on appeal in relation to one of your judgments, it would have been a breach of judicial ethics to discuss the matter with any of the judges of the Constitutional Court.

HLOPHE JP: Absolutely, I would not talk.

MR MARCUS: But is it your position that outside of that situation you regard yourself as free to discuss any pending matter with a Constitutional Court judge, is that your position?

HLOPHE JP: There is no law, Mr Marcus, with respect, which says one may not discuss a matter with any judge.'

[89] Implicit in the above is the acceptance that he would be perceived to be attempting to influence the outcome of the appeal. By attempting to draw a distinction between the instance where it is his own judgement on appeal and where he was not involved, in our view, Judge President Hlophe was being disingenuous and expedient. Such distinction does not have any sound legal basis. The principle remains the same irrespective of whose judgment it is being the subject of appeal.

[90] Therefore, Judge President Hlophe's much vaunted refrain that 'judges discuss legal principles and jurisprudence all the time', while generally true, is subject to the following important proviso: 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 other's view. This prohibition is not restricted to the facts or merits only, but extends to legal principles or jurisprudence involved in such a case.

[91] This is so because legal principles and jurisprudence are not applied in vacuum, but are always intrinsically interwoven with the facts. Often, as was the case in the Zuma/Thint matters, the legal principles or jurisprudence are *the* issues for determination. In such instances, it is difficult to imagine how one can discuss them without immersing one in the facts of the case. The rationale behind the principle is clearly to insulate judges from outside influence.

[92] Allied to this issue, is Judge President Hlophe's assertion during cross-examination that many lawyers, including judges of the Supreme Court of Appeal, were talking about the matter, yet he was the only one charged. In this regard he put much stock in the evidence of Justice Jafta. He said, in an answer to the evidence leader:

'Justice Jafta alluded to that evidence but prior to that, in response to being questioned by my counsel, Queen's counsel Griffiths, he said at that time there were many members of the profession, including SCA judges, who spoke to him about this. I recorded his evidence, if necessary, we can play the tape.

Later on, he repeated:

'I am saying the evidence of Judge Jafta is very clear, in response to being questioned by Mr Griffiths. He says there were judges of the SCA as well who were equally concerned about this. "There were many colleagues in the profession, including judges of the SCA, who expressed views about the matter." Ironically they are not being charged.'

[93] Judge President Hlophe misses the essence of Justice Jafta's evidence. The discussions that Justice Jafta alluded to in his evidence were in response to the judgment of the Supreme Court of Appeal, before the matter was even heard by the Constitutional Court. At that stage, Justice Jafta was still at the Supreme Court of Appeal, and not yet acting in the Constitutional Court. His evidence is as follows:

JUSTICE JAFTA: I would not characterise it as a matter of general public concern, but I know of lawyers and judges who were concerned about the implications of the judgment of the Supreme Court of Appeal.

GRIFFITHS QC: And consequently, it was a major issue was it not?

JUSTICE JAFTA: In the proceedings you mean?

GRIFFITHS QC: But in general terms as well was it not?

JUSTICE JAFTA: Yes, as I said there was concern. Those that I had interacted with, and I think at the time the judgment was delivered, I was still at the SCA before I came to act at the

Constitutional Court. So, colleagues, some colleagues expressed concerns about the implications of the judgment.'

[94] Lastly, on this aspect, we deal with Judge President Hlophe's reliance on article 11(3) of the Code of Judicial Conduct, which reads:

'Formal deliberations, as well as private consultations and debates among judges are and must remain confidential.'

According to him, this supports his assertion that there is no prohibition against judges discussing pending cases where they are not involved. We disagree. On a simple construction of the article, it does not support him. By the employment of the phrases 'formal deliberations' and 'private consultations' the article clearly envisages members of the same panel in a formal conference deliberating on the outcome of a matter before them. Those discussions are always strictly confidential. Judge President Hlophe's discussions with Justice Nkabinde and Justice Jafta were not 'formal deliberations.' Although private, the discussions were clearly not 'consultations.

[95] We have spent much effort discussing this issue (whether it is permissible for non-panel judges to discuss pending matters with panel judges) more than necessary, as it is so trite and would ordinarily brook no debate. But because of the force with which a senior and respected judge like Judge President Hlophe articulated it, we had to. His word carries weight and influence. Aspirant and newly appointed judges might take to heart his forceful assertions on this issue as correct. They are not. For their sake, it is important to restate the principle with clarity and unambiguity.

The evidence

[96] We finally turn to the evidence. The essential facts as between Justice Nkabinde and Justice Jafta, on the one hand, and Judge President Hlophe, on the other, are largely common cause, and can be summarised as follows: Towards the end of March 2008, Judge President Hlophe visited Justice Jafta at his chambers at the Constitutional Court. It was a scheduled meeting. During the course of their conversation, Judge President Hlophe initiated a conversation about the Zuma/Thint matters. In particular, Judge President Hlophe asked Justice Jafta whether judgment had been handed down. He said to Justice Jafta that 'the SCA has got it wrong in its judgment'. He further said that the issue of privilege was a 'very important' matter and he 'believed it to be 'a very concerning one' which had to be dealt with 'properly'.

[97] Judge President Hlophe further expressed the view that he 'felt strongly, generally, about privilege and fair trial rights.' In the course of that conversation, Judge President Hlophe also stated to Justice Jafta that Mr Zuma was being persecuted just as he (Judge President Hlophe) had been persecuted. According to him, the discussion with Justice Jafta was 'robust'. He concluded the conversation by saying '*sesithembele kinina*' meaning 'you are our last hope'.

[98] On 24 April 2008 Judge President Hlophe telephonically contacted Justice Nkabinde and requested to meet her the following day in her chambers at the Constitutional Court. In the course of that conversation, Judge President Hlophe informed Justice Nkabinde that he had a 'mandate', but did not elaborate. Further, Judge President Hlophe said, in isiZulu, something to the effect that she can look at 'this issue of privilege.' She wondered what privilege he was referring to, but did not ask him. During lunch with Justice Jafta that afternoon, she informed him of her telephone conversation with Judge President Hlophe. Justice

Jafta cautioned her that Judge President Hlophe might discuss the Zuma/Thint matters as he had done with him at the end of March.

[99] The following day, 25 April 2008, Judge President Hlophe met with Justice Nkabinde as agreed. He mentioned to her that there were concerns about people who got appointed to the Constitutional Court, and people who are appointed to that court should understand the history of the country. He further said that he had a list from intelligence of people who had been involved in the arms deal and that people were going to lose their jobs after Mr Zuma became President of the country. Justice Nkabinde asked him who was raising concerns about appointments to the Constitutional Court. In response, Judge President Hlophe said that certain Ministers, whom he advised from time to time, who raised such concerns.

[100] Indeed, as cautioned by Justice Jafta the previous day, Judge President Hlophe raised with her the Zuma/Thint matters. He said to her that he 'was concerned that the majority in the Supreme Court of Appeal did not attach much weight to the issue of privilege' and expressed 'very strong views on it'. He also remarked that the Zuma/Thint case was probably one of the most demanding of the cases that the Constitutional 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.

[101] According to Judge President Hlophe, he expressed his 'very strong views' on the issue of privilege, which he said, had to be 'correctly decided.' He expressed 'robust' views of his own on the issue to Justice Nkabinde. After Nkabinde had cautioned him that as a non-member of the court he was not entitled

to discuss the Zuma/Thint matters, but went on to explain that 'the point is that there is no case against Mr Zuma.'

[102] Professor Langalibalele Mathenjwa gave evidence on behalf of Judge President Hlophe as to the meaning and context of the phrase *sesithembele kinina*. He concluded that what Judge President Hlophe intended by using the phrase was not meant to influence anyone but 'only advancing the confidence, trust, faith, reliance and hope that Judge President Hlophe had in the person he was talking to (Justice Jafta).' He also concluded that Justice Jafta did not have an alternative understanding of the phrase and he understood it to mean that the Constitutional Court was the last hope in making a proper ruling.

[103] The evidence of Professor Mathenjwa should not detain us unduly, and we dispose of it summarily and pithily. Primarily, his evidence is irrelevant and therefore, inadmissible. Apart from explaining the direct translation and meaning of the phrase '*sesithembele kinina*' his evidence is of no value to the issue we have to decide, namely whether Judge President Hlophe's conduct, expressed in what he conveyed to Justice Nkabinde and Justice Jafta, amounts to gross misconduct. That phrase is a negligible part of Judge President Hlophe's conversation with Justice Jafta. He did not use that phrase with Justice Nkabinde. Therefore, whether or not Judge President Hlophe is guilty of gross misconduct, does not hinge on the meaning of the phrase, either literally or contextually. In any event, by December 2020 when Professor Mathenjwa testified, the meaning of the phrase was understood by all that it meant 'you are our last hope' or 'we pin our hopes on you'. His evidence therefore did not add anything new.

[104] Professor Mathenjwa sought to give context of how the phrase was used by Judge President Hlophe and understood by Justice Jafta. He is not competent

to do so, something which he was constrained to concede during cross-examination. Only Judge President Hlophe can testify about the context in which he used the phrase, and only Justice Jafta can testify as to how he understood the phrase. Besides, what to make of the phrase and the context in which it was said, is precisely for this Tribunal must decide. It is not for the witnesses. By concluding that President Hlophe did not intend to influence anyone, Professor Mathenjwa impermissibly usurps the very task of this Tribunal. For all these reasons we reject his evidence out of hand as irrelevant and inadmissible.

Discussion

[105] We return to the factual evidence, and preface the discussion with this observation. We found both Justice Nkabinde and Justice Jafta to be credible witnesses. Justice Jafta was in an unenviable position because of his friendship with Judge President Hlophe. Despite this, he was forthright and objective. Justice Nkabinde also came across as a very firm witness. Although we do not make adverse credibility findings against Judge President Hlophe, where there are material differences in his evidence *vis-à-vis* of the two Justices, on a balance of probabilities, we prefer the latter's.

[106] With that in mind, we analyse the evidence as follows. In respect of both Justice Nkabinde and Justice Jafta, it is Judge President Hlophe who initiated the discussion about the Zuma/Thint matters. He knew that both Justices had sat in the Zuma/Thint matters in the Constitutional Court and that judgment had been reserved. He also knew that the issue of privilege was one of the crucial ones to be decided by the Constitutional Court. Judge President Hlophe strongly disagreed with how the majority of the Supreme Court of Appeal had dealt with that issue. To each of the two Justices, he expressed his strong views on the issue of privilege.

[107] He said to Justice Jafta that the issue should be decided 'properly', and that 'you are our last hope' or that 'we pin our hope on you'. In the light of his view that the majority of the Supreme Court of Appeal had got the issue wrong, the phrase could only mean that the Constitutional Court was 'the last hope' to make right which the majority of the Supreme Court of Appeal had got wrong. It has to be so. Put differently, if Judge President Hlophe's view was that the majority of the Supreme Court of Appeal had got it right, there would have been nothing for the Constitutional Court to put right. This is how Justice Jafta understood the phrase. He testified as follows before this Tribunal:

'Well, I thought he implied that we would correct what he considered to be wrong, the JSC, I mean, I am sorry, the SCA has got it wrong and I thought then that that is what, he wanted to give a judgment that will correct what has been said by the SCA.'

[108] To Justice Nkabinde, Judge President Hlophe said that he 'was concerned that the majority in the Supreme Court of Appeal did not attach much weight to the issue of privilege and expressed 'very strong and robust' views on the issue and said it had to be 'correctly decided', and that there 'was no case' against Mr Zuma. Unsurprisingly, the understanding of Justice Nkabinde was similar to that of Justice Jafta, namely, that Judge President Hlophe wished the Constitutional Court to reverse the judgment of the majority of the Supreme Court of Appeal.

[109] The meeting with Justice Nkabinde should be put in its proper perspective. Unlike with Justice Jafta, Judge President Hlophe was not friends with Justice Nkabinde. The meeting was preceded by a telephone call a day before, during which two issues were mentioned: mandate[6] and privilege. During the meeting the following day, Judge President Hlophe preludes his discussion with Justice Nkabinde by bragging about his political connections, followed by a subtle threat:

[6] Judge President Hlophe explained that by 'mandate' he referred to the task that had been assigned to him to organise a conference. It would have been easier to say so than to use 'mandate'.

people were going to lose their jobs once Mr Zuma ascends to the Presidency of the country. We do not say that this was directed at her. But the lingering question, however, is this: why was Justice Nkabinde told all these? Why was the conversation with her so politically laden? She was told about Mr Zuma's political ambitions and prospects, cabinet Ministers concerned with judicial appointments, National Intelligence,[7] etc.

[110] What had all these to do with Justice Nkabinde, or with any judge for that matter? In Judge President Hlophe's own words, they were 'certainly not friends', with Justice Nkabinde but 'colleagues with a cordial relationship.' He had never previously visited her at the Constitutional Court. It seems to us the reason he told Justice Nkabinde all these, was to impress upon her that he had political connections, with the hope that when he discussed the Zuma/Thint matters, this would weigh heavily with her. This inference is irresistible, and points to an attempt to influence.

[111] The fact that Judge President Hlophe told Justice Nkabinde that 'there is no case against Mr Zuma', after saying that Mr Zuma was likely to become President of the country, is revealing. It also belies his assertion that he only discussed legal principles, and not the facts of the case. We have already demonstrated the difficulty of separating the legal principles from the merits in cases such as the Zuma/Thint matters. The question whether there was a case against Mr Zuma goes to the merits of what the Constitutional Court was grappling with, and had reserved judgment on. For Judge President Hlophe to tell Justice Nkabinde that there was no case against Mr Zuma, he clearly ventured into the merits. When viewed in this way, Judge President Hlophe, on his own version, discussed both the merits and the legal principles with Justice Nkabinde.

[7] We are conscious of the fact that Judge President Hlophe denied that he mentioned National Intelligence to Justice Nkabinde. However, weighing up the totality of their evidence, we accept Justice Nkabinde's version.

We know already that he did not agree with the majority of the Supreme Court of Appeal on the issue of privilege. This, in our view, cannot be seen in any other context than an attempt to influence the Constitutional Court to reverse the judgment of the majority of the Supreme Court of Appeal.

[112] Seen in this light, it is difficult to accept Judge President Hlophe's version that his visit to Justice Nkabinde on 25 April 2008 was merely to congratulate her on her appointment to the Constitutional Court. When one considers his conversation with Justice Jafta a month earlier, he appeared to have been on a mission. Indeed, this sentiment found expression in a simple, yet potent, proposition by the evidence leader in the cross-examination of Judge President Hlophe:

'From where I am sitting it looks like you were struggling and/or you were on a mission, I have no words to explain but there was something pushing you at that time to make sure that you have contacts with these judges of the Constitutional Court, just before the judgment could be issued out or could be delivered, so that you put across whatever you wanted to put which was burning you.'

Counsel for the Constitutional Court Justices attributed Judge President Hlophe's conduct in this regard, to 'pre-meditation'. It is difficult to disagree with this characterisation.

[113] Judge President Hlophe clearly felt strongly about how the majority of the Supreme Court of Appeal had dealt with the issue of privilege. We accept his word that many other lawyers, including judges, were equally concerned. But they abided the decision of the Constitutional Court. It is not clear why Judge President Hlophe considered it his duty, among all the judges in the country, to approach the Justices of the Constitutional Court to discuss the issue while they were still considering judgment. We have already emphasised the principle in respect of discussion of matters where judgment is pending. Considered in that

light, the conversations with Justices Nkabinde and Jafta should not have taken place in the first place.

[114] It was submitted on behalf of Judge President Hlophe that he could not have influenced the outcome of the Zuma/Thint matters by talking only to two Justices of the Constitutional Court, as there were nine others, in respect of whom there is no suggestion that he had spoken to about the matters. It was also submitted that Justice Nkabinde and Justice Jafta were, at that stage, very junior members of the court. He personally knew the senior members of the court, amongst whom, the Chief Justice and his Deputy, Justices Madala and Ngcobo. If he was intent to influence the outcome of the matters, he could have spoken to these. In our view, this misses the point. As correctly observed in the *Motata Tribunal Decision* (para 50) the test for whether conduct constitutes gross misconduct is an objective one. It does not depend on how one goes about it, or the reaction of the recipients of his or her conduct. Indeed, the complaint against Judge President Hlophe is not that he influenced the outcome of a decision, but that he attempted to do so. It is about what right-thinking members of society would perceive of the conduct.

[115] In their closing submissions, counsel for Justice Nkabinde and Justice Jafta submitted that they did not seek a finding of gross misconduct, but left that to the Tribunal. On behalf of Judge President Hlophe, it was submitted that this was indicative that they continue to believe that there was no gross judicial misconduct. This submission is simply incorrect. In closing both Justices simply stated that they refrain from proposing any outcome. As correctly submitted by their counsel, this was informed by their standing and status in the proceedings. It had nothing to do with whether they believed there was gross misconduct or not. It is not their place to decide the issue. A finding on whether there is gross

misconduct is the function of the Tribunal, and the subjective views of the two Justices are irrelevant.

[116] Lastly, we consider how Judge President Hlophe has conducted himself since the complaint against him was lodged. He questioned the integrity and motive of the Justices of the Constitutional Court. Among other things, he insinuated that in the meetings of the Constitutional Court between May to June 2008 something sinister was plotted against him. We have dealt with some aspects of that earlier when we considered Judge President Hlophe's objections that Justice Nkabinde and Justice Jafta were unwilling complainants.

[117] In particular he singled out Chief Justice Langa and Deputy Chief Moseneke for attacks. He accused them, among other things, of:

(a) having a political motive to have him removed as a judge;

(b) bringing 'undue and inappropriate pressure to bear' on Justice Nkabinde and Justice Jafta 'to act contrary to their conscience';

(c) manipulation of the facts and an abuse of their office to achieve judicial solidarity by false pretence;

(d) adopting a 'vindictive position' against him in concert with Justice O'Regan and Justice Mokgoro;

(e) dishonesty by concealing 'complete and true facts.'

[118] The following was said of Deputy Chief Justice Moseneke:

'Why, given the remarks he is alleged to have made at his 60th birthday party post-Polokwane, is he so actively involved in trying to claim I was seeking to influence judges to find for Zuma, even going so far as to subvert the truth in him concealing to his colleagues, in order to show a veneer of judicial solidarity, that the so-called complainant judges had completely disavowed themselves of any intent to complain? Since he did not sit in the matter of Zuma/Thint I am startled at the active role that he has played in ensuring that the complaint is structured in the manner in which it was.'

[119] The allegations made by Judge President Hlophe against the Justices of the Constitutional Court are very serious. Allegations of dishonesty against judges are serious. Thus, they should never be made unless there is evidence to support them. In this Tribunal, Judge President Hlophe confirmed the correctness of a passage in para 52 of *Freedom Under Law* that he had, in that case, accepted 'the version of the Constitutional Court Judges that their conduct was inspired by their desire to protect the institutional integrity of the court.'

[120] Despite that, in this Tribunal, Judge President Hlophe persisted with the insinuations referred to earlier, by arguing that Justice Nkabinde and Justice Jafta had been pressurised into lodging the complaint against him. Bearing in mind that this pressure was said to have been brought about by Chief Justice Langa and Deputy Chief Justice Moseneke, it is implicit that Judge President Hlophe still held on to the allegations against them, referred to earlier. As Justice Nkabinde and Justice Jafta have testified, those allegations are without any substance. In light of the above, we find the labelling of Justice Nkabinde as 'a vacillating witness' and of Justice Jafta as a 'recalcitrant complainant', to be demeaning and most unfortunate, especially coming from a colleague.

[121] Allegations of improper conduct against judges, and the proceedings to probe them, are akin to those applicable to members of the legal profession. Those whom such allegations are made, must bear in mind collegiality, which is the hallmarks of the profession. They must refrain from making unfounded allegations against those at whose instance they get probed for alleged impropriety. In this regard, we find apt, the remarks in *Society of Advocates of South Africa (Witwatersrand Division) v Edeling* 1998 (2) SA 852 (W) at 898F-H:

'We view the allegations of the defendant against the applicant, its Bar Council and certain of its members in a serious light. Allegations such as these are very serious to make of anybody.

It is of particular seriousness where it is made of an officer of the court whose honesty and integrity have to be beyond question. If the defendant's allegations were true, those whom he insulted would not have been fit to be advocates. The allegations were made of colleagues, people with whom the defendant had, of necessity, to work together on a regular basis. The allegations amount to a mean and vicious attack on the integrity of the defendant's colleagues. It was clear they were designed to fit the defendant's own self-interest. In the context of the case before us the unfounded allegations are evidence of an attempt on the part of the defendant to discourage full and proper investigation in his conduct.'

[122] We align ourselves with these remarks in the context of the facts before us. We consider it our duty to vindicate the integrity of the Justices of the Constitutional Court, in particular Chief Justice Langa, Deputy Chief Justice Moseneke, Justice Nkabinde and Justice Jafta, whose integrity has been called into question by Judge President Hlophe's unfounded and scurrilous attacks. They acted with honour to protect the institutional integrity of the apex court of our Republic.

Conclusion

[123] In conclusion, on an objective and proper consideration of the facts and probabilities, we find that:

(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;

(b) his conduct seriously threatened and interfered with the independence, impartiality, dignity and effectiveness of the Constitutional Court;

(c) his conduct threatened public confidence in the judicial system.

[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.

DATED AND SIGNED AT JOHANNESBURG ON THIS 9TH DAY OF APRIL 2021.

JC Labuschagne **T Makgoka** **N Pather**