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DOI: https://dx.doi.org/10.18820/24150517/JJS46.i2.6

ISSN 0258-252X (Print)
ISSN 2415-0517 (Online)

Journal for Juridical Science
2021:46(2):120-137

Date Published:
30 November 2021

JUDICIAL PROBITY AND ETHICAL STANDARDS: THE JUDICIAL CONDUCT TRIBUNAL'S DECISION ON JUDGE PRESIDENT JOHN HLOPE[1]

1. INTRODUCTION

This case note on the Judicial Conduct Tribunal's (hereinafter, "the tribunal") decision regarding Judge President John Hlophe (hereinafter, "Hlophe" for the sake of brevity) in April 2021 is prompted not only by the increasing attacks on the South African judiciary, but also by the moral force which underlies the rule of law and the independence of the judiciary as constitutional guarantees.[2]

Some of the criticism levelled against the judiciary is to be expected, considering the unavoidable subtle tension between the three arms of government. South Africa's judiciary is entrusted with the power of judicial review in terms of the *Constitution of the Republic of South Africa*, 1996. Judgments delivered against the executive or prominent political players are often met with scathing verbal onslaughts.[3] It is, therefore, unfortunate that, in a few instances, some criticism receives credence because of the conduct, or alleged conduct of individual members of the judiciary as well as the Judicial Service Commission (hereinafter, "the JSC").[4] The Hlophe saga is a case in point.

1 At the time of writing, the Judicial Service Commission was yet to decide Hlophe JP's fate.

2 The Tribunal's decision was accessed on POLITICSWEB 11 April 2021. "The Judicial Conduct Tribunal's decision on Judge John Hlophe." https://www.politicsweb.co.za/documents/the-judicial-conduct-tribunals-decision-on-judge-j (accessed on 23 June 2021).

3 See, for example, Corder 2019.

4 Kawadza 2018; Siyo & Mubangizi 2015; *Daily News* 2021a; Hoffman 2021; Judges Matter 2021; *Daily News* 2021b; Marks 2021. Other examples of judicial conduct that attracted negative public comment were the judge

Published by the UFS
http://journals.ufs.ac.za/index.php/jjs

Judges, in their capacity as litigants and in their conduct in and outside court, and their legal representatives have a duty towards the court in terms of established rules of ethics and the law of procedure.[5] If they do not meticulously carry out these duties in and out of court, they harm justice and cast a shadow on the public confidence in the administration of justice. It threatens the fabric of our constitutional dispensation.

By presenting Hlope's submissions before the tribunal in this contribution, the author warns against the harmful effect of unethical conduct on the image of the judiciary and the administration of justice, and revisits aspects of the ethical and professional prohibition against the misuse/abuse of the courts and their processes as manifested in frivolous litigation.

It is trite that the independence of the judiciary is the chief pillar upon which South Africa's commitment to the rule of law relies and that we all, in particular as legal professionals, should zealously guard these.

In the discussion of the tribunal's decision, the author has opted not to rehash the entire 12-year case history and the multitude of legal actions that emanated from it. This is done for the sake of brevity, and because it is assumed that readers will be familiar with at least the key moments in the matter.[6]

2. BRIEF CONTEXTUALISATION

In May 2008, 11 judges of the Constitutional Court filed a complaint against the judge president of the Western Cape division of the high court, alleging that he had breached the provisions of sec. 165 of the *Constitution*[7] by attempting to influence the Constitutional Court's decision in the Zuma/Thint

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Motata case (*Mail & Guardian* 17 October 2019, Rabkin "Why drunken judge not impeached" https://mg.co.za/article/2019-10-17-why-drunken-judge-not-impeached/ (accessed on 2 May 2021, and the criticism against the chief justice's pro-Israel public remarks and refusal to retract them despite an order of the Judicial Service Commission's Conduct Committee to do so. IOL 7 May 2021, Sidimba "Moeng to face J.S.C. over pro-Israel comments during long leave" https://www.iol.co.za/news/politics/mogoeng-to-face-judicial-conduct-committee-over-pro-israel-comments-during-long-leave-cc98b5e6-c920-49b4-b1dd-8494444e9abc (accessed on 10 May 2021).

5 See, for example, the rule of striking out irrelevant, frivolous and vexatious allegations in Rule 23 Uniform Rules of Court.

6 See, for example, *Freedom Under the Law v Acting Chairperson: Judicial Service Commission* 2011 3 SA 549 (SCA); *Nkabinde v Judicial Service Commission* 2016 4 SA 1 SCA; *Langa CJ v Hlophe* 2009 4 SA 382 (SCA); *Hlophe v Judicial Service Commission* [2009] All SA 67 (GSJ); *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape* 2011 3 SA 415 (SCA); *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law* 2012 6 SA 13 (CC). For a commentary on the earlier sequence of the controversy, see Brickhill *et al.* 2013:1-5.

7 In summary, that the judicial authority is vested in the courts; that the courts are independent and subject to the *Constitution* only; that no person or organ of state may interfere with the functioning of the court, and that organs of state support

arms-deal matter. After back-and-forth litigation (of no small magnitude), the JSC eventually appointed the tribunal, which finally announced its decision in April 2021.

The tribunal found that Hlophe's conduct "seriously threatened and interfered with the independence, impartiality, dignity and effectiveness of the Constitutional Court".[8] It was further found that the judge's conduct threatened public confidence in the judicial system and, therefore, that he was guilty of gross misconduct, as envisaged in sec. 177 of the *Constitution*.[9]

The JSC's consideration of the tribunal's decision was initially scheduled for 4 June 2021 by, as the press called it, a "small" JSC of 14 members,[10] excluding politicians serving on the Commission. Because of a reported deadlock among members, the final decision was later postponed to 30 July, and then once more to 25 August, this time to afford two JCS members time to recover from illness. Unsurprisingly, news headlines have suggested that the judiciary is "in crisis" and that the delay in finalising the Hlophe impeachment decision exposes "capture within the Judicial Service Commission".[11]

Apart from legitimate ill health, the only other possible explanation for the delay in bringing the matter to a close could be that (a) JSC members disagree on whether the tribunal's decision points to misconduct or gross misconduct by Hlope, therefore, (b) whether he should be removed from office altogether, or only be suspended in terms of sec. 177(3) of the *Constitution*. In the case of removal, the National Assembly would have to call for a removal through a resolution supported by at least two thirds of its members. This is not required in the case of a suspension. It is not improbable that the JSC would reject its own tribunal's findings, as it did in the case of judge Motata. In that case, decided by the JSC on 10 October 2019, it rejected the tribunal's conclusions. It refused to make a finding that judge Motata was guilty of gross misconduct so as to invoke the mechanism of sec. 177(1)(a) of the *Constitution* to remove him from office. Instead, the majority of the JSC decided that Motata was rather guilty of a lesser offence of misconduct; he was subsequently fined. This, and the fact that the case took 12 years to bring to finality, signifies that the disciplinary process provided for in the *Judicial Service Commission Act*,[12] if anything, is notoriously slow and impractical.[13]

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the judiciary to ensure its independence, impartiality, dignity, accessibility and the effectiveness of the courts.

8 Tribunal decision:par. 123.

9 Tribunal decision:paras. 123-124. In terms of those provisions, the president, on the advice of the JSC, may now suspend Hlophe JP on account of his gross misconduct.

10 Thamm 2021.

11 Thamm 2021.

12 *Judicial Service Commission Act* 9/1994, as amended.

13 Judges Matter 7 September 2020, "The JSC's misdealings against judge Motata" https://www.judgesmatter.co.za/opinions/the-jscs-misdealings-against-judge-motata/ (accessed on 2 May 2021). Freedom Under the Law took the decision of the JSC on review to the Johannesburg High Court and no judgment has been rendered at the time of writing. See also *Freedom Under the Law v Motata*

3. PRELIMINARY OBJECTIONS RAISED BY JUDGE PRESIDENT HLOPHE

In articulating the tribunal's decision, Judge Labuschagne considered a number of preliminary issues that Hlophe had raised as objections. The tribunal did not uphold any of the objections; in fact, in most instances, the tribunal pointed to the frivolous nature of the objections, essentially augmenting the argument that the disciplinary process was misused. Moreover, none of the allegations sustaining the objections were put to the witnesses in cross-examination during the hearing.[14]

3.1 Changes made to the joint complaint statement

The original complaint against Hlophe was made in a joint statement by the 11 Constitutional Court judges in 2008. Commencing their testimony before the tribunal in 2021, however, Justice Jafta and Justice Nkabinde – the two judges whom Hlophe had allegedly attempted to influence – made certain corrections to the joint statement.

With reference to the conversations between Hlophe and the two respective justices, the 2008 statement read in both instances: "in the course of that conversation, Hlophe JP sought improperly to persuade [Jafta AJ]/[Nkabinde J] to decide the Zuma/Thint cases in a manner favourable to Mr JG Zuma".[15] In terms of the conversation with Justice Jafta, it was now proposed that the statement be amended to read:

> 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".[16]

(33227/2020) [2021] ZAGPPHC 14 (28 January 2021) http://www.saflii.org/za/cases/ZAGPPHC/2021/14.html (accessed on 30 September 2021).

14 Tribunal decision: par 49, the settled nature and purpose of cross-examination was summed up as follows by the Tribunal: "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".

15 *National Director of Public Prosecutions v Zuma* [2008] 1 All SA 197 (SCA); *Thint (Pty) Ltd v NDPP* [2008] 1 All SA 229 (SCA). These cases concerned the validity of the terms of certain search and seizure warrants issued in terms of sec. 29 of the *National Prosecuting Authority Act*. The Constitutional Court's judgment is reported under *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 1 SA 1 (CC).

16 Tribunal decision:par. 31.

With regard to the conversation with Justice Nkabinde, her counsel proposed that the following 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.[17]

At the tribunal hearing, Hlophe submitted that neither Justice Jafta nor Justice Nkabinde had provided proper explanations for these, in his view, material corrections, and that this essentially rendered the entire process against him invalid from the start.[18] The tribunal dealt with this objection by considering the nature and scope of the changes.[19] It concluded that, by proposing the changes, both Justice Nkabinde and Justice Jafta, in effect, opted against drawing conclusions on the tribunal's behalf, and merely stated the facts instead. To the tribunal, the amendments meant that the two judges "assumed a neutral role as witnesses, and left the conclusion as to whether Judge President Hlophe sought to influence them, to this Tribunal".[20] The corrections were neither contradictions nor introduced any material changes in evidence.

One would struggle to dispute the tribunal's conclusion, as it is hard to imagine any legitimate reason or purpose for Hlophe's visits and communications with the Constitutional Court justices other than an attempt to influence them. As Judge Labuschagne correctly pointed out, much of what transpired during these encounters had become "largely common cause".[21] And since this objection was not put to Justices Jafta and Nkabinde in cross-examination, their unchallenged testimony could be accepted as correct.[22] Therefore, according to the tribunal, the amended statement did not prejudice Hlophe in any way. If anything, the witnesses' neutral stance as to whether Hlophe had sought to influence them improperly, leaving the decision to the tribunal, was to his benefit.

3.2 Judges Nkabinde and Jafta are "unwilling" complainants

The tribunal interpreted this objection as a suggestion on Hlophe's part that the late Chief Justice Langa and Deputy Chief Justice Moseneke had unduly pressured the two Constitutional Court justices to pursue the complaint against Hlophe. Therefore, Justices Jafta and Nkabinde's participation in the complaint was involuntary and unwilling, Hlophe submitted.[23]

17 Tribunal decision:paras. 31-32.
18 Tribunal decision:par. 40.
19 Tribunal decision:par. 43.
20 Tribunal decision:par. 46.
21 Tribunal decision:par. 47.
22 Tribunal decision:par. 49.
23 Tribunal decision:par. 53.

Yet Judge Jafta explained that, after his conversations with the then Chief and Deputy Chief Justice in 2008, 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".[24] Judge 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 joined the collective complaint.[25] The allegation was also put to them in cross-examination at the 2009 hearing,[26] where both denied that they were unwillingly dragged into the matter.[27]

3.3 Counsel for the Constitutional Court judges were not entitled to participate in the proceedings

With this objection, Hlophe argued that the proceedings before the tribunal, although *sui generis* in nature, resembled the process followed in criminal proceedings. A member of the National Prosecuting Authority served as an evidence leader and presenter on behalf of the tribunal; there was a "charge sheet"; the parties in the procedural structure before the tribunal mimicked those in a criminal trial, and, as with a criminal trial, there was no onus on the accused to prove his innocence. According to the objection, this suggested that the NPA member was the prosecutor, thus rendering participation by counsel for the Constitutional Court judges "impermissible and irrelevant".[28]

Rejecting the objection, Judge Labuschagne confirmed that the proceedings before the tribunal were in line with the prescripts of the *Judicial Service Commission Act* and were not irregular. The tribunal also pointed

24 Tribunal decision:par. 53.
25 Tribunal decision:par. 54.
26 Briefly, as far as is relevant in this instance, the reader will recall that oral evidence was given by Justices Jafta and Nkabinde before the JSC in 2009. The JSC deposed of the matter then, because it held that it did not have the authority to depose of matters involving *misconduct* by judges. Further, that the evidence did not support that Hlope was guilty of *gross misconduct*. See Constitutionally Speaking 28 August 2009 at https://constitutionallyspeaking.co.za/majority-decision-of-the-jsc-in-the-hlophe-matter-28-august-2009/ (accessed on 30 September 2021). This decision of the JSC was successfully challenged on appeal in *Acting Chairman: Judicial Service Commission and others v Premier of the Western* Cape 2011(3) SA 538 (SCA) and in *Freedom Under Law v Acting Chairperson: Judicial Service Commission and others* 2011(3) SA 549 (SCA). Judge Hlope then unsuccessfully applied for leave to appeal to the Constitutional Court in *Hlope v Premier of the Western Cape Province, Hlope v Freedom Under Law and other* 2012 (6) 13 (CC). In the meantime, in June 2010, the *Judicial Service Act* was amended and provided for the establishment of a Judicial Conduct Committee and a Tribunal to deal with complaints against judges. Following the litigation referred to, the JSC then requested the Chief-Justice for the appointment of a Tribunal to investigate and report on the complaint against judge Hlope.
27 Tribunal decision:par. 55.
28 Tribunal decision:par. 58.

out that Hlophe had, in the 12 years of the complaint, never expressed any concerns about the participation of counsel.[29]

3.4 The "charge"[30]

Hlophe's objection in this regard was twofold. First, the 2013 charge against him alleged that there had been an attempt to "improperly influence", while in the 2020 charge sheet, this had changed to "an attempt to improperly interfere or influence". This allegedly created uncertainty as to the status of both charge sheets. At the same time, he submitted that, since the first charge had never been withdrawn, the second was void. Secondly, Hlophe's counsel argued that the fact that the second charge was put to him after a witness' evidence had been led, in other words after proceedings had commenced, constituted an irregularity.

The tribunal made a few observations in rejecting this objection. First, it pointed out that an objection to a charge sheet is normally made when the charge sheet is introduced, and not in closing arguments. Such objection was not raised at the commencement of the proceedings. As there was no material difference between the phrasing of the two charges, Hlophe's right to a fair hearing could not possibly have been affected.[31] The facts of the complaint and the summary of evidence substantiating the complaint remained the same, namely that Hlophe "sought to improperly influence the outcome in Zuma/Thint matters after the matters had been heard and judgment [by the Constitutional Court] reserved".[32]

Another, in Judge Labuschagne's words, "truly frivolous and regrettable submission" under this objection was that a charge sheet circulated by the evidence leader before the hearing contained details of junior counsel for the Constitutional Court justices, while those details had previously been omitted. In this instance, the tribunal maintained that Hlophe had suffered no prejudice.

4. THE MORE SUBSTANTIVE ISSUES IN THE TRIBUNAL'S DECISION

4.1 The principle of legality, and the "charge"

Further pursuing the line of argument of prejudice suffered through the process, Hlophe submitted that there was "no valid charge" against him.[33]

29 Tribunal decision:paras. 59-61.

30 Bear in mind that the tribunal's proceedings do not require a charge sheet, only a notice containing the facts that allegedly constitute gross incompetence or gross misconduct, a summary of the evidence and any other substantiating information, as well as copies of documentary evidence to be produced. See tribunal decision:par. 68.

31 Tribunal decision:paras. 62-67.

32 Tribunal decision:par. 69.

33 Tribunal decision:par. 73.

He argued that neither sec. 177(1)(a) nor secs. 165(2) and (3) created an offence,[34] and that by lack of an enabling provision, no proper offence could be brought against him. He further submitted that the second charge sheet made no reference to the Code of Judicial Conduct, nor was he "charged" for having contravened the code.

Hlophe's insistence on describing the complaint against him as a criminal charge is disingenuous, if not desperate. No judicial officer or anyone else can be "charged" criminally with, for instance, disrespecting the independence of the judiciary, or failing to respect the rule of law. However, actions that attest to a disregard for these constitutional guarantees may constitute the basis for a complaint against a judge. The tribunal stressed this point, emphasising that its proceedings concerned "issues of judicial probity and ethical standards, rather than rules of law",[35] hence the title of this note. Therefore, none of Hlophe's concerns regarding the validity of the "charge" were found relevant or applicable.

4.2 Unreasonable delay

Hlophe next resorted to the submission that his rights to a fair hearing in terms of sec. 34 of the *Constitution* had been infringed, due to the long delay in finalising the proceedings. The tribunal admitted that the delay was indeed regrettable, particularly also in light of sec. 27 of the *Judicial Service Commission Act*, which provides that a hearing must be concluded without unreasonable delay so as to enhance the dignity and effectiveness of the judiciary and the courts.

Yet the tribunal also pointed out that the delay was, in part, attributable to Hlophe's own conduct, "some of it in no small measure".[36] Upon reading the detailed chronicle of the complaint history,[37] the tribunal was well justified in making this conclusion. Therefore, advancing the delay "as the basis of some prejudice" was, as Judge Labuschagne put it, "opportunistic and untenable".[38]

The delay has tarnished the image of the judiciary in the eyes of the public and exposed the judiciary, and the JSC, to even more criticism.[39]

4.3 The ethical rule at the heart of the controversy

The complaint against Hlophe pivoted on the permissibility of non-panel judges discussing pending matters with panel judges. In essence, Hlophe advanced

34 Tribunal decision:paras. 72-73.
35 Tribunal decision:par. 74.
36 Tribunal decision: par. 77.
37 Succinctly recorded in tribunal decision:paras. 13, 14, 15, 19 and 27.
38 Tribunal decision:par. 77.
39 See De Vos 2021; Radebe 2014:1196 *et seq*.; Sing & Smith 2012:42 *et seq*.; *Judicial Service Commission v Premier Western Cape* [2013] ZASCA 53, in which a JSC decision was set aside.

that nothing prohibited such discussions, as long as only legal principles and jurisprudence, and no facts, were discussed.[40]

According to the tribunal, the prohibition of such discussion was so obvious that it would "ordinarily brook no debate".[41] However, as the submission was advanced with such force by "a senior and respected judge",[42] the tribunal felt compelled to deal with it in detail, *particularly also to prevent aspirant and new judges from being tempted to accept Hlophe's assertions as correct*.[43] In doing so, the tribunal relied on secs. 165(2) and (3) of the *Constitution*. The former stipulates that courts are independent and subject only to the *Constitution* and the law, which must be "applied impartially, without fear, favour or prejudice", while the latter further states that no person "may interfere with the functioning of the courts".

In the supporting statement to the complaint, the late Chief Justice Langa stated: "Elementary principles of judicial ethics precluded a judge of one division from discussion [*sic*] the *merits of a matter*[44] with judges of the highest court where judgment is still pending."[45] Hlophe, however, appeared ignorant of this rule and contended that the chief justice's statement "would have been correct only if the matters before the Constitutional Court were appeals from a decision I [Hlophe] made".[46]

With this submission, Hlophe was, in essence, pleading ignorance of the law. In contrast, both Justices Jafta and Nkabinde were very much aware of the rule. During cross-examination, Jafta stated that he thought Hlophe's approaching him was "not the practice" as he [Jafta] knew it.[47] Nkabinde, in turn, was even more emphatic, testifying that she had "snapped", and told Hlophe that he was not "entitled to do this", and – tellingly – that she "felt that the Judge President was stepping [*sic*] the line of legitimacy" and "at that stage I was of the view that the Judge President was attempting to influence my thinking".[48]

As with the preliminary objections discussed earlier, the tribunal stressed that the ethical rule had not been contested in cross-examination by Hlophe's counsel. Therefore, "in the absence of any countervailing evidence", the tribunal accepted "the assertion by the Chief Justice Langa, supported by the two Justices".[49] This was a principle "instilled through years of practice", and since, in 2008, Hlophe had already been a judge for 13 years, five of which

40 Tribunal decision:par. 78.
41 Tribunal decision:par. 95.
42 Tribunal decision:par. 95.
43 Own italics.
44 Own italics.
45 Tribunal decision:par. 81.
46 Tribunal decision:par. 82.
47 Tribunal decision:par. 84.
48 Tribunal decision:par. 85.
49 Tribunal decision:par. 86.

as judge president, "he is expected to have been aware of it, and on balance, he was".[50]

There was also a strange twist in Hlophe's submission in this regard. During cross-examination, he asserted that "any Judge is free to discuss the legal principles and jurisprudence which is the subject of an appeal in a higher court … *as long as he or she was not part of the judgment being appealed against*".[51] Implicit in this, therefore, was Hlophe's acceptance that, had he himself been involved in the appeal, he would indeed be perceived to have tried to influence the outcome. The tribunal described his distinction between his own judgment on appeal and one where he was not involved as "disingenuous and expedient" and without any sound legal basis.[52]

Lastly, Hlophe was at pains to point out that many legal professionals had discussed the judgment of the Supreme Court of Appeal, as referred to in evidence by Judge Jafta, and yet no complaints were laid against them. The tribunal, however, pointed out that the discussions Jafta had alluded to were following the Supreme Court of Appeal judgment, and not between the Constitutional Court hearing and judgment.

4.4 The submission relying on art. 11(3) of the Code of Judicial Conduct

Hlophe also relied on art. 11(3) of the Code of Judicial Conduct, which allows for formal deliberations, private consultations, and debates among judges, although these must remain confidential. Nothing in art. 11(3) of the code, argued Hlophe, limited such deliberations and discussions to members of a particular court.[53]

The tribunal summarily dismissed this assertion, stating that the article quite obviously envisaged members of the same panel deliberating on a matter before them. Such deliberations and discussions are always permissible yet confidential. However, Hlophe's conversations with the two Constitutional Court judges clearly fell outside the ambit of this stipulation.[54]

5. THE TRIBUNAL'S FACTUAL FINDINGS

The tribunal made the following factual findings on the evidence:

a. Hlophe had initiated the conversations with both Justices Jafta and Nkabinde.

b. The conversations were about the Zuma/Thint matters, which the Constitutional Court by that time had heard, but reserved judgment on.

50 Tribunal decision:par. 87.
51 Tribunal decision:par. 87, own italics.
52 Tribunal decision:par. 89.
53 Tribunal decision:par. 79.
54 Tribunal decision:par. 94.

c. Hlophe had known that both Jafta and Nkabinde sat on the panel of judges in these matters.

d. Hlophe had also known that the issue of privilege (of the documents seized at the office of Mr Zuma's lawyer) was a crucial point, which the Constitutional Court needed to decide.

e. It was no secret that Hlophe disagreed with the Supreme Court of Appeal's majority judgment on the issue of privilege, as he had strongly expressed this view to both Constitutional Court justices.

f. Hlophe had told Jafta that the issue should be decided "properly" and that he (Jafta) was their last hope. The tribunal concluded that this could only have meant that Jafta, as a Constitutional Court judge, was their last hope to "make right which the majority of the Supreme Court of Appeal had got wrong".[55]

g. To Nkabinde, Hlophe had bragged about his political connections, and also levelled a "subtle threat" that people's jobs were on the line once Zuma became president of the country.[56]

In the final part of its decision, the tribunal dealt with the manner in which Hlophe had conducted himself since the lodging of the complaint. This included Hlophe's questioning of the motives and integrity of the Constitutional Court justices, and his allegation that "something sinister was plotted against him".[57] He had also singled out the then Chief and Deputy Chief Justices, accused them of having a political motive to remove him as a judge, and alleged that they had exerted undue pressure on Justices Nkabinde and Jafta, manipulated the facts, and so forth.[58] Dealing with these assertions and allegations by Hlophe, the tribunal aligned itself with remarks made in the matter of *Society of Advocates of South Africa (Witwatersrand Division) v Edeling*.[59] In that case, this type of conduct was described as a "mean and vicious attack" without any factual basis, and an extremely serious example of judicial misconduct.

6. CASE COMMENTARY

The author will now limit himself to an elaboration of the two central issues set out in the introduction.

6.1 The harmful effect of unethical conduct

The evidence before the tribunal, including Hlophe's own evidence to a certain extent, overwhelmingly bears out the allegation that he attempted to influence two judges of the Constitutional Court to find in favour of former President

55 Tribunal decision:par. 107.
56 Tribunal decision:par. 109
57 Tribunal decision:par. 116.
58 Tribunal decision:par. 116.
59 *Society of Advocates of South Africa (Witwatersrand Division) v Edeling* 1998 2 SA 852 (W) 898:paras. F-H; tribunal decision:par. 121.

Zuma. To be clear: that he had disregarded the constitutional guarantees of the rule of law and the independence of the judiciary and, therefore, acted without integrity.

In *Nkabinde v The Judicial Service Commission*,[60] Judge Navsa, then acting Deputy President of the Supreme Court of Appeal, introduced his judgment by stating that "the alleged conduct at the centre of the dispute [with reference to the Hlope investigation process] … touches upon something much more foundational to the judicial institution in a constitutional democracy, namely, integrity".[61] Judge Navsa started off by referring to a Canadian supreme court judgment[62] that related to a Canadian judge, but that was equally applicable to South Africa. The salient points of the Canadian judgment were as follows:[63] (a) The judicial function is "absolutely unique". Apart from the traditional role as arbiters of disputes, "judges are also responsible for preserving the balance of constitutional powers" and have become "one of the foremost defenders of individual freedoms and human rights and guardians of the values [the Canadian Charter] embodies".[64] (b) The judge is a pillar of the entire justice system, and of the rights and freedoms which the system "is designed to promote and protect". (c) Accordingly, the "personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole" and have a significant impact on public confidence in an effective judicial system, and in "democracy founded on the rule of law".

Against this backdrop, it is my view that, if clear and decisive action does not follow in the Hlophe matter, the image of the judiciary and the statutory body, which protects the judiciary, the JSE, is tarnished. In the process, our constitutional democracy stands to suffer the most damage. This is so because above all else, the matter goes to the heart of South Africa's commitment to its *Constitution* and the rule of law. It falls outside the scope of this note to revisit the meaning, reasons, and significance of the importance of the independence of the judiciary.[65]

There is no denying the perception that not all individuals are equal before the law in South Africa.[66] In the Hlophe matter, instead of waiting that the law takes its course in the Zuma/Thint appeal process, the judge president resorted to an extra-curial route to try to predetermine the outcome. It is this effect of allowing an obvious disregard for the *Constitution* and the rule of law

60 *Nkabinde v The Judicial Service Commission* 2016 4 SA 1 (SCA).

61 *Nkabinde v The Judicial Service Commission*:par. 1.

62 *Judge Therrien v Minister of Justice and Attorney General of Quebec; Attorney General for Ontario, Attorney General for New Brunswick* 2001 SCC 35; 84 CRR(2d)1.

63 *Nkabinde v The Judicial Service Commission*:par. 5, citing paras. 108-110 of the Canadian judgment.

64 See Marshall 2006:1: "Today there is widespread agreement that the most effective way to secure an open, democratic state is through the enactment of a written charter of government that apportions public power, guarantees fundamental human rights, and entrusts protection of those rights to an independent judiciary."

65 See, for example, Carpenter 2005:499 *et seq*.

66 See, for example, Corder & Hoexter 2017:111-112; Mailovich 2021.

that fuels the dangerous public perception, including among law students and young lawyers, that the state's commitment to these values is hollow. Judge Labuschagne was certainly alive to this possibility in dealing with Hlophe's submission regarding the permissibility of non-panel judges discussing pending matters with panel judges. It is appropriate to cite part of the tribunal's observation in this regard with reference to Hlope:[67]

> 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.

Clearly, the tribunal was concerned about the impact that the incorrect statements and improper conduct of judges may have.

6.2 Misuse/abuse of process in defiance of an obligation to the court: Delays and frivolous litigation

In his closing remarks in *Nkabinde v The Judicial Service Commission*, Judge Navsa stated:

> Against all of these assertions it was unsettling when counsel on behalf of the appellants, with emphatic certainty, stated during submissions before us that this matter would never end, speculating without specificity that there would be on-going challenges to proceedings related to the complaint. The judicial image in South Africa cannot afford to be further tarnished in this manner. As can be seen from the extensive litigation referred to above, each of the protagonists, including the JSC, has contributed to the delay.[68]

It is highly concerning for the South African legal culture that counsel on behalf of a Constitutional Court judge would threaten with protracted and never-ending litigation.

The "protagonists" (as Judge Navsa called them) in the Hlophe saga were, in many instances, sitting judges or JSC members, serving on that body if not as judges, as legal professionals. As such, they ought to be aware of not only the ethical, but also procedural rules against the misuse or abuse of court process, including processes before quasi-judicial bodies such as the JSC. The inordinate delay in finalising the Hlophe matter and the preliminary objections and submissions made by Hlophe before the tribunal suggest the misuse of the court process for reasons completely unrelated to accepting accountability and allowing the rule of law to take its course. Sadly, this unethical practice, commonly referred to as "Stalingrad tactics", is something to which the South African public have become but all too accustomed in recent times, not least because of the conduct of former President Zuma. Employing these tactics involves

67 Tribunal decision:par. 95.
68 *Nkabinde v The Judicial Service Commission*:par. 104, own italics.

> wearing down the plaintiff by tenaciously fighting anything the plaintiff presents by whatever means possible and appealing every ruling favourable to the plaintiff. Here, the defendant does not present a meritorious case. This tactic or strategy is named for the Russian city besieged by the Germans in World War II.[69]

Also bear in mind that the judges concerned were represented by counsel – in many instances, senior counsel – who were, therefore, as much part of the "protagonists" as the litigants on whose behalf they acted. There is no special judicial code of conduct or canon, neither locally nor internationally, that deals with judges' obligation as litigants to the court or tribunal in which they litigate. Therefore, they (and their counsel) have the same ethical obligation to a court as an ordinary litigant would have. According to Lewis,[70]

> if the client's conduct or proposed conduct is of a kind which the general mores of society would reprobate as being contrary to decency or honour or as being oppressive then the attorney must have no part in the counselling or assisting its initiation or continuance, but on the contrary must seek to restrain it.

The South African Legal Council's Code of Conduct for all Legal Practitioners[71] clearly restates[72] the settled common law rule of treating a client's interest paramount, though always subject to a legal practitioner's duty towards the court, the interests of justice, the observation of the rule of law, and the maintenance of ethical standards.

From its meticulous account of the Hlophe complaint history,[73] the tribunal pointed out instances where the JSC had postponed the hearing of the complaint against the judge president by what appears to be unreasonably lengthy periods.[74] As stated earlier, the tribunal also found that many of the delays could be attributed to Hlophe himself.[75] As Judge Navsa pointed out in *Nkabinde*, the delay has certainly "tarnished" the judicial image in South Africa.[76]

None of Hlophe's multiple objections and submissions were found to have any merit and sometimes referred to as frivolous. In addition, ignorance of the law is no excuse or defence in our law. Moreover, the use of ignorance as a justification for a settled ethical rule by someone of Hlophe's stature is an embarrassment to the judiciary and the entire legal profession.

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69 Judges Matter 2018.
70 Lewis 1982:115.
71 South African Legal Council's Code of Conduct for all Legal Practitioners https://lpc.org.za/wp-content/uploads/2020/10/CODE-OF-CONDUCT.pdf.
72 South African Legal Council's Code of Conduct for all Legal Practitioners:sec. 3.
73 Tribunal decision:paras. 1-34.
74 See, for instance, tribunal decision:paras. 13, 27, 28.
75 Tribunal decision:par. 77.
76 *Nkabinde v The Judicial Service Commission*:par. 104.

7. CONCLUSION

For a good many years, the judiciary in South Africa largely managed to insulate itself against unfair attacks and criticism. This it did by adhering to the high bar that had been set by proven principles and rules of legal ethics and professional conduct. Of late, however, judges increasingly make headlines for the wrong reasons. The Hlophe saga is a case in point, having not only tarnished the reputation of the judiciary and the legal profession, but ultimately also the constitutional values and guarantees of South Africa.

In a constitutional democracy, the judges' responsibility goes beyond a high standard of judicial and legal professional conduct. They are expected to be individuals with the integrity not only to speak the values contained in the *Constitution*, but also to act in a way that demonstrates integrity with respect for the supremacy of the *Constitution* and the rule of law.

The much-anticipated JSC decision on the Hlophe matter is a good opportunity to help restore the public's faith in those commonly regarded as the guardians of South Africa's constitutional values. "Sesithembele kinina."[77]

77 Tribunal decision: par 97: Hlope JP concluded his conversation with Jafta J with these words which mean "you are our last hope".

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