

**Complaints of Constitutional Court Judges against Hlophe JP and the
counter-complaint by Judge President Hlophe against the
Constitutional Court Judges**

1. In this matter, the Judicial Service Commission has been asked to rule on two complaints that were lodged with it in May and June 2008. First, a complaint by the Judges of the Constitutional Court that the Judge President of the Western Cape High Court, Judge Hlophe, in the course of separate conversations with Judges Jafta and Nkabinde in March and April 2008, had sought improperly to persuade them to decide the Zuma/Thint cases in a manner favourable to Mr Zuma. Second, a counter-complaint by Hlophe JP that the Constitutional Court Judges had violated a number of his constitutional rights by making known to the media and many others the fact of the complaint within minutes of lodging their complaint with the Commission.

2. The following matters must be stressed at the outset. The Commission is the constitutionally appointed body to deal with complaints of judicial misconduct. It is, as the law reads at present, not empowered to deal with and rule on complaints where the act or acts complained

of do not constitute gross misconduct, incapacity or gross incompetence.

3. After the parties had filed their statements and responses in support of and disputing the respective complaints, oral hearings were held on 7 and 8 April 2009. Hlophe JP was not present, saying, through his counsel, that he was ill. At the hearings, six Judges, including the Chief Justice and Deputy Chief Justice of South Africa, gave evidence. On 30 July 2009, a three-person sub-committee of the Commission took evidence from Hlophe JP and four of the Constitutional Court Judges, including the Chief Justice and his Deputy, who had given evidence in April 2009.
4. On 15 August 2009, the Commission, by a majority, decided that none of the Judges against whom complaints had been lodged is guilty of gross misconduct. It regarded the complaint and the counter-complaint as finalised. It has notified the Judges of the Constitutional Court and Hlophe JP of its decision and forwarded to them the reasons for its decision. In arriving at its decision, the Commission took careful account of all the evidence that had been given in support of the complaint and the counter-complaint and the written submissions that were filed on 14 August 2009 by counsel.

5. In respect of the counter-complaint, the evidence revealed that Hlophe JP's complaint was based almost entirely on inferences that he had drawn from what the Constitutional Court Judges had said and done in releasing, only a few minutes after they had lodged their complaint with the Commission, a media statement announcing the fact that the complaint had been lodged. He also made some unfortunate allegations against the Constitutional Court Judges and especially the Chief Justice and Deputy Chief Justice imputing improper motives to them. These allegations were also not supported by evidence: they, too, were based on inferences. We can understand that Hlophe JP felt aggrieved that he had not been told of the media release before he was made aware of it by journalists. However, in their evidence the Constitutional Court Judges explained why they believed that speed was of the essence. Having regard to all the evidence, the Commission concluded that none of the Constitutional Court Judges was guilty of gross misconduct. Full reasons have been furnished for the decision.
6. In respect of the complaint, the Commission accepts that the evidence reveals that Hlophe JP did in fact talk to Judges Nkabinde and Jafta about the Zuma/Thint cases, which had been heard by the Constitutional Court, but in respect of which its decisions were still pending. It further accepts that in the course of those conversations, among other things, Hlophe JP said that the cases and some of the

- legal issues that they raised were important and urged that they be decided properly.
7. However, the first question that the Commission had to consider was whether the evidence tendered supports the charge that Judge President Hlophe had sought improperly to persuade the Judges to decide the cases in Mr Zuma's favour. Neither of the Judges expressly says that Hlophe JP asked that the cases be decided in Mr Zuma's favour. Both say that they inferred that Hlophe JP desired that result on the basis of other things that Hlophe JP had said, for example, that the cases must be decided properly and that Mr Zuma was being persecuted like he (Hlophe JP) had been and that the Constitutional Court was their "*last hope*".
 8. The Commission accepted that it might have been unwise and imprudent for Hlophe JP to talk to the Judges about the cases and make the comments that he did. But it is not persuaded that Hlophe JP's actions make him guilty of gross misconduct.
 9. It was submitted by counsel that a full enquiry should be held in terms of Rule 5 of the Commission's Rules. Such a step, so the argument went, would clear up many of the matters about which there were sharp disputes between the Constitutional Court Judges

and Hlophe JP. If a full enquiry were held, it was contended, the resultant cross-examination would assist in establishing what Hlophe JP's intention in approaching Judges Jafta and Nkabinde was.

10. We are not persuaded that a full enquiry will take the matter much further, if at all. Significantly, it was not suggested that new evidence may become available. The contention was that cross-examination would assist in determining whose version of disputed facts to accept. However, in our view the matters on which it was suggested that cross-examination would assist are not material or necessarily relevant to the essential question that we would have to consider, even if a formal enquiry were to be held. That question is: Did Hlophe JP attempt to improperly interfere with the decision of the Constitutional Court by attempting to persuade Judges Jafta and Nkabinde to decide the cases in Mr Zuma's favour? In addition, we are not persuaded that cross-examination would necessarily lead to more clarity on the disputed issues.
11. In the result, the Commission does not accept that a referral to a formal enquiry is warranted. It accordingly did not invoke the provisions of Rule 5.

12. For these reasons, it is our considered decision that a formal hearing in respect of the complaint and counter-complaint is not warranted. Accordingly, both the complaint and the counter-complaint are hereby finalised.

13. This Executive Summary is furnished in order to assist the public and the media to understand the basis of the reasoning of the Commission in reaching its decision. It is not intended to deal fully with the evidence and the comprehensive reasons for the decision. The full text of the Decision and the Reasons therefor may be obtained from the Secretariat of the Judicial Service Commission.