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Dear Sir/Madam

Freedom Under Law's submissions to the Judicial Service Commission concerning the decision as to whether the Commission will recommend Judge President Hlophe's suspension

INTRODUCTION

1. We represent Freedom Under Law NPC ("**FUL**").
2. On 11 July 2022, the Judicial Service Commission ("**the JSC**") addressed correspondence to the Constitutional Court Justices in which the JSC called on the Constitutional Court Justices to make submissions on why the JSC should or should not advise the President to suspend the Judge President of the Western Cape High Court Division, Judge Hlophe ("**Judge Hlophe**") pending a decision by the National Assembly on the removal of Judge Hlophe from office.
3. The call for submissions is made pursuant to the August 2021 decision by the JSC which found Judge Hlophe guilty of gross misconduct for attempting improperly to influence two Justices of the Constitutional Court - Justices Jafta and Nkabinde - to decide matters that

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were pending before the Constitutional Court concerning the former President, Mr Jacob Zuma.

4. This is a matter of foundational public interest and concern, and it is concerning that the JSC has sought to limit the submissions only to the complainants, being the Constitutional Court Justices, and Judge Hlophe. As the JSC will be aware, FUL has been actively involved from the outset of the matter in 2008.

FUL'S INTEREST AND PARTICIPATION AND REASONS FOR MAKING SUBMISSIONS

5. FUL has over many years addressed the JSC regarding the complaints against Judge Hlophe, made representations in connection therewith and participated in and often initiated litigation to ensure that the JSC properly considers the complaints and that the correct processes are followed. It did so – and was recognised as doing so – in the public interest and in fulfilment of its own mandate to protect the rule of law. FUL was also recently joined as a party to the review proceedings instituted by Judge Hlophe to have the decision of the JSC declared unconstitutional and set aside by way of a court order granted by that Court, alongside a written judgment confirming why its material interest in the proceed warranted its joinder. FUL continues its participation in the pending appeal proceedings.
6. FUL is a non-profit organisation whose objective is to promote democracy under law, and to advance an understanding of, and respect for, the rule of law as well as the principle of legality in Southern Africa, principally by way of instituting or joining in litigation from time to time, in order to combat and correct institutional conduct in conflict with the rule of law.
7. FUL aims to secure and strengthen the independence of the judiciary by promoting the selection, training and advancement of a judiciary that is appropriate to the needs of a constitutional democracy. It further aims to advance the independence and skills of the legal profession in serving the courts and to enhance communication and understanding between the judiciary, the legal profession, academic lawyers, the media and society at large. FUL seeks to promote legal education appropriate to the needs of a constitutional democracy, and to protect, promote and advance freedom of speech and freedom of the media in relation to the administration of justice.
8. The independence and impartiality of the judiciary, as expressly enshrined in section 165(2) of the Constitution, are fundamental to South Africa's constitutional democracy and maintenance of the rule of law.

9. The JSC – as a body established by the Constitution and mandated to advise the state on any matters related to the judiciary and the administration of justice (and specifically with regard to the appointment, removal and discipline of the judges) – is especially tasked with the role of protecting and promoting the independence and impartiality of the judiciary. The JSC's decisions, recommendations and/or submissions regarding the appointment and removal of judges therefore go to the heart of judicial independence, impartiality and accountability.
10. So too do the constitutional safeguards which are then triggered as a result of the JSC's discharge of its mandate.
11. FUL is not only well-versed in the matter and has played – and continues to play – a pivotal role in ensuring that the proper processes are followed, but it has a direct interest in the matter because of its involvement in having the complaint against Judge Hlophe considered, decided and for the JSC to decide on its recommendation for the suspension of Judge Hlophe.
12. In all the circumstances, FUL respectfully submits that it should be permitted, in the public interest, to deliver the submissions set forth below and that such submissions should be taken into account in the JSC's consideration of this matter.

BRIEF BACKGROUND

13. In May 2008, the Justices of the Constitutional Court lodged a complaint against Judge Hlophe for improperly attempting to influence the Constitutional Court's pending judgment in the Zuma/Thint matters ("**the complaint**"). The complaint against Judge Hlophe marked the beginning of a series of legal proceedings and investigations by the JSC and the Judicial Conduct Tribunal ("**the Tribunal**") that had been ongoing for over a decade.
14. In December 2020, the Tribunal was able finally to consider and determine the complaint against Judge Hlophe. On 9 April 2021, the Tribunal ruled that Judge Hlophe was guilty of gross misconduct. The finding was then referred to the JSC for consideration.
15. On 25 August 2021, the JSC found Judge Hlophe guilty of gross misconduct under section 177(1)(a) of the Constitution ("**the Decision**") for attempting improperly to influence Justices Nkabinde and Jafta in their decision of matters that were pending before the Constitutional Court.

16. Section 177(1) of the Constitution provides *inter alia* that a judge may be removed from office if the JSC finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, and the National Assembly calls for that judge to be removed by a resolution adopted by at least two-thirds of its members. Section 177(3) further provides that the President, on the advice of the JSC, may suspend the judge in question pending a decision by the National Assembly on the judge's removal from office. With the above power, there is a correlative obligation on the JSC to make a decision on whether or not to recommend, to the President, Judge Hlophe's suspension. In terms of section 237 of the Constitution, all constitutional obligations must be performed diligently and without delay.
17. In September 2021, Judge Hlophe lodged a two-part review application in which he sought to (i) suspend the impeachment and suspension proceedings envisaged in section 177 of the Constitution pending the finalisation of the main review proceedings ("**Part A**") and (ii) review and set aside the Decision of the JSC which triggers such processes ("**Part B**"). Part A of the application was opposed and later abandoned by Judge Hlophe. In seeking such relief, Judge Hlophe correctly recognised that, in the absence of such an order, the JSC was at liberty to recommend (and the President was at liberty to act on any such recommendation) suspending him pending the removal proceedings, and the reasonable apprehension in the circumstances of the JSC and President doing so.
18. The main review application was heard by the Full Court in February 2022. On 5 May 2022, the Court delivered its judgment dismissing the review application.
19. Initially, when the review application was lodged, the JSC decided that it would pend its decision on the suspension until the High Court delivered its ruling in Part B. That has now occurred and it is imperative that the JSC proceeds to consider and decide on the recommendation in terms of section 177(3) without further delay.
20. The matter is now on appeal to the Supreme Court of Appeal.

FUL'S SUBMISSIONS ON WHETHER TO RECOMMEND SUSPENSION

21. Judging and administration of courts are a public service. They are intended to serve the public interest and the interests of the public. Judges are not appointed so as to vindicate any of their own private interests and their continued service is not linked to any personal entitlements on their part or any "rights" which the judge may assert.

22. The following features, FUL submits, are of central importance in considering whether a judge found guilty of gross misconduct should remain in office pending removal proceedings:
 - 22.1 The nature and gravity of the conduct of which the judge was found guilty;
 - 22.2 The role which the judicial officer in question will likely be playing in the judiciary before the removal proceedings are concluded;
 - 22.3 The public perception, trust and confidence in the judiciary – in both administrative and adjudicative roles;
 - 22.4 The risk of any undue influence on the judicial function or any risk of conduct which might bring the judiciary into disrepute;
 - 22.5 The opportunity for recurrence;
 - 22.6 The ability of the judge to fulfil his or her public functions;
 - 22.7 Any history of misconduct or complaints before or after the complaint which led to the guilty finding in this case;
 - 22.8 The likely duration of the removal proceedings;
 - 22.9 Any other harm which may eventuate to the judiciary, the public and the judge him or herself should the judge remain or be suspended, and the nature and gravity of that prejudice;
 - 22.10 Any relevant background circumstances and the history of the matter.
23. The above factors are not all equally weighted and some are obviously more important than others. One factor, if of sufficient import, may be sufficient to warrant suspension.
24. In FUL's submission, in this case, all the factors point in one direction: a recommendation to suspend with immediate effect.

The nature and gravity of the misconduct

25. It is difficult to imagine misconduct of a more serious nature than the one of which Judge Hlophe was found guilty. Judge Hlophe has sought unduly to influence the exercise of the judicial function at our highest court.
26. Such conduct strikes at the very heart of judicial independence and the administration of justice. It cuts across the prohibition in section 165(3) of the Constitution against interference with the functioning of the courts, and it draws a line across the constitutional obligation imposed on organs of state to assist, protect and support the courts and their independence (section 165(4)). It undermines every value enshrined in chapter 8 of the Constitution. It constitutes a serious breach of the standards of judicial conduct accepted domestically and internationally. It also eviscerates the founding values of our Constitution: the supremacy of the Constitution, the rule of law and the value of equality.
27. In the Decision, the JSC held that in his engagements with Justices Jafta and Nkabinde concerning the ruling of the SCA on the Zuma/Thint matters, Judge Hlophe "*urged them both to decide the case correctly*", which the Tribunal and the JSC found to mean that Judge Hlophe was attempting to influence the Justices to make a finding in favour of Mr Zuma.¹ Moreover, the JSC held that, in his use of the phrase "*sesithembele kinina*", Judge Hlophe held a view that the erroneous finding of the SCA must be "corrected" by the Constitutional Court.
28. The JSC described the conduct of Judge Hlophe as: "*an attempt improperly to influence the two judges concerned; to threaten and interfere with the independence, impartiality, dignity and effectiveness of the Constitutional Court and breached the principle that no outsider - be it government, pressure group, individual or even another judge - should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.*"²
29. Judges are held to high ethical and legal standards, as should be the case for positions of public trust of this nature. Judge Hlophe has not only betrayed that trust and plainly breached several of those standards, but through his conduct, he brought the judiciary into

¹ Majority decision, para [60].

² *Ibid*, para [62].

disrepute and undermined the ability of all courts, including our highest court, to function without interference and with the confidence of court users and the broader public.

30. The gravity of the conduct is accentuated by virtue of the fact that Judge Hlophe was one of the most senior judges in the country at the time of the misconduct. Not only did he know better, but misconduct of this gravity committed by a senior judge casts a pall over the entire judiciary.
31. The nature and seriousness of the misconduct themselves justify suspension.

The role of Judge Hlophe

32. Judge Hlophe remains one of the most senior judicial officers in the country.
33. He does not simply perform adjudicative functions. He is the administrative and judicial head of one of the busiest courts in the country. In the Western Cape Division, he ultimately decides what matter is heard by whom and when. On several occasions, which have been well-reported, he decided to hear especially controversial matters, or matters involving persons with whom he has relationships, himself.
34. The point is that Judge Hlophe possesses enormous powers and responsibilities in this regard. He is the nerve centre of the Division.
35. Moreover, Judge Hlophe sits on the JSC in respect of any judicial appointments involving the Western Cape Division and nominates acting judges to the Minister of Justice, and can thus directly influence the composition of the Western Cape bench on a consistent basis.
36. The importance and remit of Judge Hlophe's role, in FUL's submission, amplifies the other factors and, consequently, the need to suspend.

Trust and confidence in the judiciary

37. Central to the judiciary's mission is to ensure that justice is not only done, but seen to be done.
38. The perception of the judiciary in the eyes of the public is an important element of maintaining the integrity and efficacy of the judicial function. In this regard if trust or

confidence is lost or undermined, this has a severe detrimental impact on the ability of all judges to fulfil their functions and on the independence of the judiciary.³

39. Judge Hlophe's conduct clearly undermined the public's trust and confidence in the judiciary, and their perception of the courts as independent and impartial arbiters.
40. More importantly, his continued and active occupation of the office of Judge President even in the face of the findings of the most serious misconduct (which he has been unable to overturn on review) pursuant to a complaint by the entire panel of Constitutional Court judges will undermine the confidence and trust of every court user and member of the public in the probity and objectivity of Judge Hlophe's adjudicative and administrative decisions. This uncertainty and suspicion should not be allowed to proliferate, as it eats away at the trust of public institutions and their perceived legitimacy.

The risk of undue influence, the opportunity for recurrence and other instances of complaints or misconduct

41. But in this case, we are concerned not only with public perception, but the real risk that Judge Hlophe will again act in a manner contrary to his judicial oath. As the Judge President of the Division, he has every opportunity to do so. He is free to allocate judges and hearings as he sees fit; he can whisper into junior judges' and acting judges' ears and have conversations with them about pending matters; he can allocate himself to any matter in his Division. This gives every opportunity to Judge Hlophe unduly to influence not simply the matters allocated to him independently by another Judge, but the course of every matter in his Division.
42. The risk is substantial and ever-present. It is noteworthy that this type of interference by Judge Hlophe, with prejudicial outcomes for court users and the public, has been the subject of severe criticism by the Supreme Court of Appeal in *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* 2017 (6) SA 90 (SCA). Complaints against Judge Hlophe have also been lodged by Deputy Judge President Goliath, alleging that Judge Hlophe sidelined Goliath DJP within the Division, sought unduly to influence judicial appointments to political

³ See *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC), paras [68] and [75].

cases to ensure a specific outcome, and created a hostile environment at the Western Cape Division of the High Court.

The ability of Judge Hlophe to fulfil his functions effectively

43. In light of the above, the users of court and fellow judges cannot have the requisite confidence in Judge Hlophe fairly and impartially fulfilling the formidable duties of his office. All of the above factors also undermine Judge Hlophe's ethical authority as the head of court and as a judge.
44. While the cloud of gross misconduct hangs over Judge Hlophe's head, he is materially and fatally impaired in exercising his public powers and fulfilling his public duties.
45. On the other hand, there is nothing which requires that the functions of the Judge President in the Western Cape Division must specifically be fulfilled by Judge Hlophe. There are many senior and capable judges in that Division without Judge Hlophe's taint who are more than capable in acting as the Judge President. In fact, arrangements for acting appointments happen all the time, including, for example, when Judge President Leeuw, Judge President Mlambo, Judge President Jappie and Judge President Molemela acted in the Constitutional Court. It is also noteworthy that Judge Hlophe himself stepped aside from his position as Judge President when the complaint against him first emerged in 2008. Deputy Judge President Traverso was the Acting Judge President for a year from 2008 to 2009.

Duration of the removal proceedings, prejudice to the judiciary, the public and Judge Hlophe and other factors

46. The duration of the parliamentary removal proceedings is uncertain. Parliament has not published any timetable in this regard. It is also uncertain what impact the continuation of Busisiwe Mkhwebane's removal proceedings and Judge Hlophe's appeal to the Supreme Court of Appeal will have on parliamentary processes.
47. This makes it all the more imperative that the image and work of the judiciary are not jeopardised or tarnished further by Judge Hlophe remaining in office (as though nothing has happened and there was no finding of gross misconduct against him) while the uncertain parliamentary process and Judge Hlophe's legal challenges run their course. A substantial amount of damage, both actual and in terms of the trust and confidence of the judiciary can occur in the interim period. This should be arrested without delay.

48. Judges who were the subject of proceedings in relation to serious misconduct (and even before any finding of gross misconduct) have all universally taken precautionary leave or have been suspended, including Judge Motata, Judge Parker and Judge Makhubele. This is in the interest of the integrity of the judiciary and public trust. Judge Hlophe himself took leave between 2008 and 2009, but then simply returned to office.
49. A judge is suspended on full pay and benefits, and there is thus no prejudice to Judge Hlophe. There is no specific right on the part of Judge Hlophe to remain in his position while the removal proceedings are ongoing. The key consideration is the public interest and the impact of him continuing to act in his role on the judiciary, the public trust, court users and the administration of justice as a whole. Any reputational harm has already been suffered by Judge Hlophe on account of the complaints against him and the findings by the Judicial Conduct Tribunal and the JSC in relation to the disciplinary process on the merits, and the High Court on review. Those bodies have already made the damning determinations. Suspension will have no further impact on Judge Hlophe and simply serves to protect the public and the judiciary in the interim period.
50. The duration of this matter also counts against Judge Hlophe. The courts have lamented in several judgments the extraordinary delays in the finalisation of this matter. The delays have largely been attributable to the erroneous decision by the JSC, and the litigation launched by Judge Hlophe, and Justices Nkabinde and Jafta. Courts have underscored the gravity of the matter, its impact on the judiciary and the urgent need to finalise the process so as to restore confidence in, or rather mitigate the damage to, the judiciary. The disciplinary proceedings have now been brought to an end. The JSC has spoken, and with clarity. It had done so belatedly. But this in no way detracts from the severity of the findings it has made. The gravity of the matter requires that those findings do not simply gather dust but that while Judge Hlophe exhausts his appeal rights, the functioning of and confidence in the judiciary are not further jeopardised.

CONCLUSION

51. In light of the above, FUL submits that it should be granted leave to make these submissions and that the factors which should animate the decision of the JSC in relation to a suspension all point strongly to the JSC recommending suspension with immediate effect.

Yours faithfully

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Transmitted electronically without a signature