

# WEBBER WENTZEL

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## Judicial Service Commission

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Your reference	Our reference	Date
	V Movshovich / P Dela / D Cron / D Rafferty / M Muthwa	21 April 2021

Dear Sirs

## Judge President Hlophe // Judicial Service Commission

1. We address this letter to the Judicial Service Commission ("**the JSC**") on behalf of Freedom Under Law NPC ("**our client**").
2. Our client refers to the findings of the Judicial Conduct Tribunal in the Tribunal Decision of 9 April 2021 ("**the Tribunal Decision**") that the Honourable Judge President Hlophe is guilty of gross misconduct as envisaged in section 177 of the Constitution. The findings are of the most serious character and go to the very heart of the independence of the judiciary in terms of the Constitution. Judge President Hlophe has been found guilty of improperly seeking to interfere with and influence the adjudicative functions of South Africa's highest court. It is difficult to envisage a graver situation in the context of a Judge. This is no longer merely an allegation: it is a final factual and legal finding of an independent statutory tribunal appointed by the JSC itself.
3. Despite these findings, our client has recently been informed by the JSC, by way of letter from the JSC dated 19 April 2021, that the JSC intends to continue with the interviews of the position of Judges in the Western Cape Division of the High Court, Cape Town ("**the WCC**") on 23 April 2021 and that Judge President Hlophe will form part of the JSC during that process.
4. Moreover, it appears that the JSC has to date taken no steps to address the consequences of the Tribunal Decision, including confirming the Tribunal Decision, referring the matter to the National Assembly and recommending to the President of the Republic to suspend Judge President Hlophe with immediate effect. In fact, it is a product of the JSC's failure to

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- fulfil its last-mentioned constitutional obligation to advise the President which has now resulted in Judge President Hlophe's continued participation in the JSC's processes. Under section 237 of the Constitution, all constitutional obligations must be performed diligently and without delay.
5. Our client has, last night, received a copy of a further letter from the JSC, to the Cape Bar Council, ("**the 20 April 2021 letter**") reiterating that Judge President Hlophe will participate in the JSC's hearing on 23 April 2021, stating that it was impracticable to have the interviews scheduled for 23 April 2021 postponed and that this will come at great cost to the public (including access to justice in the sense that Acting Judges will need to be appointed) and indicating that the JSC has scheduled to meet on 4 June 2021 to consider the Tribunal Decision.
  6. The reasons set forth by the JSC for the steps it decided to take are difficult to reconcile with its previous conduct and correspondence.
  7. The serious findings by the Tribunal place this matter in the category of the utmost importance and urgency. The continued failure to deal with this matter properly and expeditiously erodes public confidence in the JSC and the judiciary as a whole; more so given the participation of Judge President Hlophe in the judicial selection process.
  8. Indeed, correspondence received from the JSC by our client five years ago underscores the fact that an adverse Tribunal finding is an obvious game-changer (a copy of the letter of 22 April 2016 is annexed marked "**A**"). As stated by the JSC "*the **absence** of ... a guilty verdict by the Tribunal, in our view, indicates that there is no bar preventing Judge President Hlophe from carrying out his responsibilities as the Judge President of the Western Cape Division of the High Court.*" That is no longer the case and Judge President Hlophe, for the sake of the maintenance of the integrity of the judiciary and the JSC's processes, must be deputised in judicial selection by the Deputy Judge President or another senior judge appointed to act in this capacity.
  9. Moreover, a decision in respect of the referral of the matter to the National Assembly, and recommendation to suspend, must be taken without any further delay.
  10. The 20 April 2021 letter does not mention the suspension recommendation at all. Our client respectfully submits that the JSC has a constitutional power and duty to recommend suspension in terms of section 177(3) of the Constitution. Given the gravity of the findings, a decision on this score must be taken without any further delay. Any suggestion that a JSC decision not to recommend suspension in 2012 is still relevant is without any merit. That decision (the merits of which may be put to one side for the moment) was taken at a different time, in a different context and with different facts. There have been material changes, most important of which is the Tribunal Decision.
  11. Worryingly, too, the 20 April 2021 letter appears to envisage that the JSC may not even make a decision at its 4 June 2021 meeting on whether to confirm the Tribunal Decision. The letter states that "*Bearing in mind that it is impossible to predict how long the current process being undertaken by the JSC may take...*". There is no basis for any delay in this regard. There is a fulsome opportunity in advance of the 4 June 2021 for the JSC to seek representations from all interested parties. There is no reason why a decision on the confirmation of the Tribunal Decision cannot be made on 4 June 2021. A decision to recommend suspension should be made even earlier, for obvious reasons. Judge President Hlophe continues to wield formidable power and authority as the head of the

- Western Cape Division of the High Court. It is not without significance that in that role, in recent years, he has recently been excoriated by the Supreme Court of Appeal.<sup>1</sup>
12. In relation to *audi*, our client respectfully requests that if an opportunity to make representations is afforded to any other person, including Judge President Hlophe, on any of the above issues, our client should likewise be permitted to make brief representations for the purposes of the JSC's decision on the matter. Our client has been integrally involved in challenges to Judge President Hlophe's conduct and the JSC's disciplinary processes throughout this matter, including a review of the JSC's decision to exonerate Judge President Hlophe, with the resultant referral of the matter back to the JSC for proper adjudication. Its role and submissions have been vindicated in a number of courts, and it has pursued litigation successfully in this matter in the public interest.
  13. Our client notes the 20 April 2021 letter's concern with access to justice and the appointment of Acting Judges. Our client is likewise concerned with the failure promptly to fill vacant judicial positions and the proliferation of acting appointments. It is passing strange, however, that the JSC itself raises this as an insuperable issue *requiring* interviews to happen on 23 April 2021. It has been a perennial problem and which is attributable to the JSC itself. The JSC has not in the past suggested that its continued failure to fill dozens of judicial vacancies, for many months and sometimes years, at High Court, Supreme Court of Appeal and Constitutional Court levels, is an intolerable affront to access to justice. Of course, all those courts have functioned with acting Judges for many years, including up to four such judges at the Constitutional Court level. To suggest that now, when the integrity of the judiciary is at stake, the continuation of one or two acting appointments for a few months until the JSC takes a decision on Judge President Hlophe's suspension is "*intolerable*", our client respectfully submits, does not represent a proportionate response to the gravity of the situation and flies in the face of JSC's own long-standing practice.
  14. Should the JSC elect to continue with the hearing of the applications for the Judges of the WCC with Judge President Hlophe's participation or if the JSC fails to take the decisions in relation to Judge Hlophe's suspension and/or removal expeditiously, the integrity of the judicial selection process and adjudication more generally will be impugned. The decisions reached at the meetings on 23 April 2021 will be liable to be set aside. The JSC will be aware that the improper participation of one member of a multi-member body is sufficient to invalidate the proceedings of that body.<sup>2</sup>
  15. Please confirm by no later than 16:00 on Thursday, 22 April 2021:
    - 15.1. when the JSC intends to take a decision on the recommendation to suspend Judge President Hlophe;
    - 15.2. that the JSC intends, at its meeting on 4 June 2021, to take a decision on whether to confirm the Tribunal Decision and refer Judge President Hlophe's impeachment to the National Assembly;
    - 15.3. that, to the extent that any person will have an opportunity to make representations, our client will likewise be afforded an opportunity to make representations before the above decisions are made.

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<sup>1</sup> *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).

<sup>2</sup> *Crouwcamp v Civic Independent and Others* (416/2013) [2014] ZASCA 98 (31 July 2014).

16. Our client also respectfully requests that the JSC reconsider its decision to allow Judge President Hlophe to participate in the judicial selection process and/or to hold the hearings for the Western Cape judicial vacancies at this stage for all the reasons previously stated by it, the Cape Bar Council and the Premier of the Western Cape, and which our client submits are, in any event, too obvious to require recapitulation.

Yours faithfully



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