

At the time of going to press, the Kriegler article and the letter from members of the Cape Bar were the immediate newsworthy items that had appeared on this issue that has since then sparked a lively debate. Hopefully we will be able to publish comments (and differing views) in the April issue of the journal. - Editor.

## 'Judge Hlophe betrayed the nation with his greed'

Former Constitutional Court Justice Johann Kriegler wrote as follows in *The Sunday Times*\* of 7 October 2007:

**T**his week a divided Judicial Service Commission decided not to press for the impeachment of Cape Judge President John Hlophe.

Although the judge can consider himself lucky to have gained some kind of not-proven verdict, he was certainly not exonerated. Far from it: the man's reputation is in tatters, his name has become synonymous with scandal in high places, his public utterances and conduct are an ongoing delight to journalists and an embarrassment to his colleagues.

The fall-out of the Hlophe saga is more serious, however. The courts must stand guard over the Constitution and the Bill of

Rights with no weapon other than their moral authority. It is therefore indispensable that the judiciary enjoys public confidence in its competence, impartiality and integrity. Without public trust and confidence the courts cannot fulfil their constitutional role.

Judges are fallible and people do not expect perfection. But what they do expect – and are entitled to demand – is, at least, honesty and impartiality. When judges are no longer seen to be administering justice to all alike, without fear, favour or prejudice, the immediate casualty is the administration of justice. Then the rule of law suffers and, ultimately, individual rights and freedoms.

Sadly, Judge Hlophe no longer enjoys this confidence. Some of the members of the JSC must have found his version of the sordid

Oasis saga plausible. But no clear and consistent account emerges from the convoluted and confused flurry of reported explanations put out as reports of these surreptitious payments were emerging – variously styled 'expenses,' 'reimbursement for expenses' or 'expense payments for my expertise' by the judge but 'consulting fees' and 'an advisory fee FORUM e' by Oasis.

Vague and variable allegations hint that at some unspecified time the judge had some kind of discussion about some kind of possible involvement with Oasis with Minister Dullah Omar, who had (unfortunately or conveniently?) died by the time the Oasis payments were uncovered. This is odd. Omar had relinquished the Justice portfolio more than a year before the creation of the

*(continued overleaf)*

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fund concerned, long before Judge Hlophe was appointed to its board and even longer before the payments (eventually totalling R467 500) commenced. Despite the judge never having explicitly claimed ministerial consent for these payments, this excuse seems, curiously, to have found favour with some members of the JSC.

That, however, is beside the point. Believe if you wish (or must) that Minister Omar somehow consented years in advance to payments of unspecified sums of money to be made at some time by an embryonic entity for as yet unknown services (and/or expenses). The ugly fact remains that on his own showing Judge Hlophe was guilty of grossly improper conduct.

We are not here concerned with the statutory requirement of ministerial consent for outside work by a judge. Here we have a matter of elementary judicial ethics. The point is that whatever a minister may say, no judge dare receive any surreptitious payment of money from a financial institution carrying on business within that judge's area of jurisdiction. It is inherently improper and no consent

from anybody can make it otherwise.

In the case of a judge president this is even more compellingly obvious. The incumbent of this office not only personally presides over cases in court but also has extensive administrative functions, powers and duties – organising court rolls, allocating judges and exercising general control in a myriad discretionary ways. A judge president is the judicial and ethical head of the division and exercises enormous moral influence, setting norms of professional ethics, competence and collegiality for the judges and the whole of the legal profession within the division.

The unseemly squabble that erupted when Oasis, Judge Hlophe's secret paymaster, asked him for leave to sue Judge Desai was entirely predictable – and of the Judge President's own making. It was improper for him ever to have accepted these payments from Oasis; for him then to have dealt with the application to sue compounded the original impropriety. Judge Hlophe could not have been unaware that a judge may not seek to exercise power in a cause in which he or she has an interest. Being on the Oasis payroll,

whether as consultant, board member or expert adviser, was self-evidently such an interest and he should not have thought of dealing with the matter, initially or later. He thus not only compounded the original impropriety but manifested a lamentable lack of judgment throughout.

As we all know only too well, numerous other features of the learned Judge President's tempestuous career at the head of the Cape judiciary have elicited adverse public comment. It is not necessary to refer to them here, save to observe that they reinforce the damning conclusion from the Oasis affair: Judge Hlophe is not a fit and proper person to be a judge. His retention of office constitutes a threat to the dignity and public acceptance of the integrity of the courts. This is indeed tragic, for this highly talented man carried the hopes of all who are passionate about transformation of the judiciary. By his greed he has betrayed us. 

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## Public statement by senior counsel: Cape Bar

We are all senior counsel in practice at the Cape Bar. Some of us are former chairs of the Bar, and of the General Council of the Bar of South Africa and from time to time have served, too, as acting High Court judges.

For a period of nearly two years we have viewed with deep concern the lodging with the Judicial Services Commission (JSC) of a series of complaints against the conduct of Cape Judge President JM Hlophe. We have thought it only right that the JSC should have the fullest opportunity to deal with these matters, and Judge President Hlophe to exonerate himself. Although the process was protracted, we have withheld public comment throughout.

The JSC has now determined that its process is at an end. By majority, it has decided not to proceed further with its inquiry. That would have entailed summoning the Judge President to be orally examined on such responses as he has chosen to give to the JSC's investigation. Unanimously, however, it has found Judge Hlophe's explanations for receiving money from Oasis Management Group 'unsatisfactory in certain respects'. It also considered his failure to disclose his relationship with Oasis at the time he gave it permission to sue another Cape judge 'inappropriate'. And it has (again unanimously) directed its chair, the Chief Justice, together with the President of the SCA and the Judge President of Gauteng to meet him to convey the JSC's concerns and its expectations regarding his future conduct.

In an important public statement on the issue, Johann Kriegler, former Johannesburg High Court, Supreme Court of Appeal and Constitutional Court judge, has observed that while judges are fallible, what the public are entitled to demand is at least honesty and impartiality. He has pointed to improbabilities, inconsistencies and vagaries in Judge Hlophe's account to the JSC. Judge Kriegler writes: '[t]he ugly fact remains that on his own showing Judge Hlophe was guilty of grossly improper conduct...no judge dare receive any surreptitious payment of money from any financial institution carrying on business within that judge's area of jurisdiction. It is inherently improper'.

Pointing to Judge Hlophe's position as head of the Cape judiciary, controlling its rolls, allocating judges to cases and setting the whole ethical tone for the division, he concludes: 'Judge Hlophe is not a fit and proper person to be a judge. His retention of office constitutes a threat to the dignity and public acceptance of the integrity of the courts.'

We find ourselves bound to support Justice Kriegler's analysis and conclusions. We do so with heavy hearts. As Justice Kriegler himself notes, this state of affairs is indeed tragic, 'for this highly talented man carried the hopes of all who are passionate about transformation of the judiciary'. Our Bar supported his nomination as a judge, when - recruited from the University of Transkei - in 1994 he became (at the age of 35) one of the youngest judges in South Africa since Union. And we supported him again in due course as a Bar for the judge presidency of the Cape. We record these things, lest by reflex we be accused of personal antipathy or racism.

We believe that there cannot be public confidence in the continuation in office now of Judge Hlophe. Even the conduct he has admitted, and the JSC's characterisation of it, oblige this conclusion.

In all the circumstances, we believe the right thing for Judge Hlophe to do is to resign as judge president and as a judge.

As regards the JSC, we find it puzzling that despite its (unanimous) characterisation of Judge Hlophe's responses as 'unsatisfactory', it (by majority vote) decided to desist from requiring him to be examined in relation to these answers. Public confidence in the JSC as a principled upholder of judicial independence and integrity may not have been served by these events.

**Schalk Burger SC, Michael Fitzgerald SC, Jeremy Gauntlett SC, Peter Hodes SC, Rob Petersen SC, Les Rose-Innes SC, Nic Treurnicht SC, Henri Viljoen SC, Renata Williams SC.**

*This statement was widely published in South African media, including Business Day, The Cape Times and Beeld*